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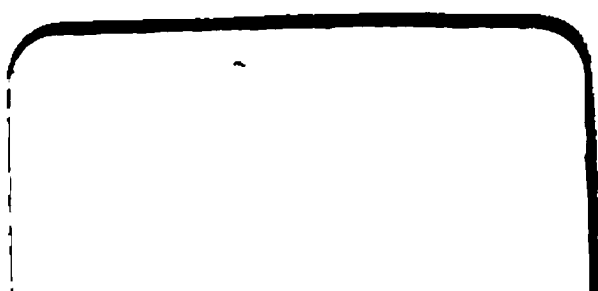
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THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

STREETS AND SIDEWALKS—(See also BRIDGES, vol. 2, p. 540; CROSSINGS, vol. 4, p. 906; DEDICATION, vol. 5, p. 395; DRAINS AND SEWERS, vol. 6, p. 2; EMINENT DOMAIN, vol. 6, p. 509; HIGHWAYS, vol. 9, p. 362; IMPROVEMENTS, vol. 10, p. 242; LAW OF THE ROAD, vol. 12, p. 957; MUNICIPAL CORPORATIONS, vol. 15, p. 949; PRIVATE WAYS, vol. 19, p. 95; TURNPIKES.)

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I. DEFINITION.—A street is a public road or way in a city, town, or village.¹ All streets are highways, but all highways are not necessarily streets.² Being a highway, a street is *prima facie* a public place.³ It need not be a thoroughfare, for a *cul-de-sac* may be a highway.⁴

1. "Strictly, a street is a paved way or road, but the term is used for any way or road in a city or village." *Brace v. New York Cent. R. Co.*, 27 N. Y. 271. It is "a road or public way in a city, town, or village." *Elliott on Roads and Streets* 12. "A road in a village or city." 2 *Bouv. L. Dict.* For similar definitions and descriptions of streets, see *State v. Moriarty*, 74 Ind. 104; *Heisle v. East Portland*, 13 Oregon 97; *Com. v. Boston*, etc., R. Co., 135 Mass. 551; *Denver v. Clements*, 3 Colo. 486.

Streets and roads are public highways, under the control of cities and towns, subject to the paramount authority of the commonwealth. *Southwark R. Co. v. Philadelphia*, 47 Pa. St. 314; *Branson v. Philadelphia*, 47 Pa. St. 329.

In *England* it seems that a private way may be a street. *St. Mary, Islington v. Barrett*, 43 L. J. M. C. 85; L. R., 9 Q. B. 287; *Midland R. Co. v. Walton*, 55 L. J. M. C. 99; 17 Q. B. Div. 30. And it seems to be essential that there should be houses on either one or both sides of the way. *Robinson v. Barton*, 53 L. J. Ch. 231; L. R., 8 App. Cas. 798; *Rex v. Platts*, 49 L. J. Q. B. 848; *McIntosh v. Romford*, 5 L. R. 643. See also, the other English authorities above cited.

A street is "a public way or road,

whether paved or unpaved, in a village, town or city, ordinarily including a sidewalk or sidewalks and a roadway, and having houses or town lots on one or both sides. . . . In law, street sometimes includes as much of the surface and as much of the space above and of the soil or depth beneath, as may be needed for the ordinary works which the local authorities may decide to execute on or in a street, including sidewalks." *Century Dict.*, vol. 5. See also *Coverdale v. Charlton*, L. R., 4 Q. B. Div. 121.

2. *Common Council v. Croas*, 7 Ind. 9; *State v. Moriarty*, 74 Ind. 104; *State v. Berdetta*, 73 Ind. 185; 38 Am. Rep. 117; *Benedict v. Goit*, 3 Barb. (N. Y.) 459; *Penny Pot Landing*, 16 Pa. St. 79; *Tucker v. Conrad*, 103 Ind. 355.

3. *State v. Moriarty*, 74 Ind. 103; *State v. Waggoner*, 52 Ind. 481; *State v. Baker*, 83 N. Car. 649; *Carwile v. State*, 35 Ala. 392; *McCauley v. State*, 26 Ala. 135; *Wilson v. Allegheny*, 79 Pa. St. 272; *Quinn v. Paterson*, 27 N. J. L. 35; *Moffit v. State*, 43 Tex. 346; *Carter v. Abshire*, 48 Mo. 300; *Quincy v. Jones*, 76 Ill. 231; 20 Am. Rep. 251; *Denver v. Clements*, 3 Colo. 472; *Hamlin v. Norwich*, 40 Conn. 25; *Horne v. State*, 49 Md. 286.

4. *Bateman v. Bluck*, 14 Eng. L. & Eq. 69; *People v. Kingman*, 24 N. Y. 559; *People v. Van Alstyne*, 3

The term "street" generally includes the roadway, the gutters, and the sidewalks;¹ but there are many cases, especially where the term is used in ordinances and contracts for the improvement of streets, in which it is held to mean the roadway and gutters, or space between the sidewalks.²

Keyes (N. Y.) 35; Saunders v. Townsend, 26 Hun (N. Y.) 308; Bartlett v. Bangor, 67 Me. 460; Sheaff v. People, 87 Ill. 189; 29 Am. Rep. 49; Adams v. Harrington, 114 Ind. 66; Moore v. Ange, 125 Ind. 562. Compare State v. Frazer, 28 Ind. 196; Schatz v. Pfeil, 56 Wis. 429.

1. *In re* Burmeister, 76 N. Y. 174; Pomfrey v. Saratoga Springs, 104 N. Y. 459; 20 Am. & Eng. Corp. Cas. 346; Bloomington v. Bay, 42 Ill. 503; Hall v. Manchester, 40 N. H. 410; Himmelman v. Satterlee, 50 Cal. 69; Clark v. Com., 14 Bush (Ky.) 166; Manchester v. Hartford, 30 Conn. 118; State v. Berdetta, 73 Ind. 185; 38 Am. Rep. 117; Debolt v. Carter, 31 Ind. 355; Taber v. Grafmiller, 109 Ind. 206; Kokomo v. Mahan, 100 Ind. 242; Dooley v. Sullivan, 112 Ind. 451; Wiles v. Hoss, 114 Ind. 371; 22 Am. & Eng. Corp. Cas. 460; Warner v. Knott, 50 Wis. 429.

2. Himmelman v. Satterlee, 50 Cal. 68; Dyer v. Chase, 52 Cal. 440; Philadelphia v. Lea, 9 Phila. (Pa.) 106; Dickinson v. Worcester, 138 Mass. 555. See also Wilson v. Allegheny, 79 Pa. St. 272; Reed v. Erie, 79 Pa. St. 346.

In a statute requiring compensation for damages caused by changing the grade of streets, the word "streets" includes sidewalks. Kokomo v. Mahan, 100 Ind. 242. So, in a statute authorizing the improvement of "streets" upon petition of property owners. Wiles v. Hoss, 114 Ind. 371; 22 Am. & Eng. Corp. Cas. 460.

When Included Under Term "Highways."—Streets are generally included in the term "highways." Case of road from Fitzwater Street, 4 S. & R. (Pa.) 106; Kelsey v. King, 33 How. Pr. (N. Y.) 43. But it frequently happens that the purpose of a statute is such that the term "highways" will be construed as referring only to county roads or public ways not within the limits of a city. Cleaver v. Jordan, 34 Me. 9; Waterford v. Oxford Co., 59 Me. 450.

Thus, where a statute conferred authority on the commissioners of highways to construct and maintain high-

ways it was held that they had no authority over streets in incorporated cities and villages. People v. Chicago, etc., R. Co., 118 Ill. 520; Ottawa v. Walker, 21 Ill. 605; 71 Am. Dec. 121; Com'rs of Highways v. Baumgarten, 41 Ill. 254; People v. La Salle Co., 111 Ill. 527. See also Cowan's Case, 1 Overt (Tenn.) 311; State v. Jones, 18 Tex. 874; Common Council v. Croas, 7 Ind. 9.

So, it seems that a statute in relation to highways by user is not applicable to the street of a city. Tucker v. Conrad, 103 Ind. 349.

And it may be stated as a general rule that, unless there is something in the statute to indicate a contrary intention, powers granted to one class of officers, as road supervisors or county commissioners, will not be so construed as to give them authority over streets, which are ordinarily under the jurisdiction of city officials. O'Kane v. Treat, 25 Ill. 458; Fox v. Rockford, 38 Ill. 451; People v. Chicago, etc., R. Co., 118 Ill. 520; *Ex parte* Roberts, 28 Tex. App. 43; 27 Am. & Eng. Corp. Cas. 11; Cross v. Mayor of Morristown, 18 N. J. Eq. 305; Clark v. Com., 14 Bush (Ky.) 166. But see Wells v. McLaughlin, 17 Ohio 99; Baldwin v. Green, 10 Mo. 410; Norwich v. Story, 25 Conn. 41; Bennington v. Smith, 29 Vt. 254.

The following English cases will serve to show the varied meanings given to the term "streets" in different statutes: Section 157, P. H. Act, 1875, whilst manifestly comprising the roadways of "streets," also includes the power of making by-laws for regulating "the buildings erected or to be erected on each side of them—the whole construction—every part of those buildings, external and internal" (per Selborne, L. C., Robinson v. Barton, 53 L. J. Ch. 231; Baker v. Portsmouth, 47 L. J. Ex. 223; 3 Ex. D. 157). So where the city of London was empowered to take land for the purpose of forming a new "street" to the Metropolitan Meat Market, it was held that the statute meant not merely the land for the roadway, but enough for houses on both its sides. Galloway v. London, 35 L. J. Ch. 477:

II. HOW ESTABLISHED.—Streets may be established by dedication, by prescription, or by proceedings under legislative authority.

1. Dedication¹—a. DEFINITION AND KINDS.—Dedication of a street is the setting aside or appropriation of land by the owner for use as a public street.² It may be either statutory or as at common law, and common-law dedications may be either express

L. R., 1 H. L. 34; London, etc., R. Co. v. London, 19 L. T. 250.

The word "street" may, by an interpretation clause, be made to mean almost anything, whether in association with houses or not; and, for the purposes of the P. H. Act, 1875, "includes any highway (not being a turnpike road) and any public bridge (not being a county bridge) and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not." *Nutter v. Accrington*, 48 L. J., Q. B. 487; 4 Q. B. Div. 375. And a similar definition, though a little larger, as embracing "any mews and a part thereof," is provided for the purposes of the Metropolitan Local Management Acts (18 & 19 Vict., ch. 120, § 250; 25 & 26 Vict., ch. 102, § 112); "street," in § 53 of the latter act, includes new as well as old streets. *St. John, Hampstead v. Cotton*, 55 L. J., Q. B. 213; 56 L. J., Q. B. 225; 12 App. Cas. 1; *following Sheffield v. Fulham*, 1 Ex. Div. 395, and dissenting from *Sawyer v. Paddington*, 40 L. J., M. C. 8.

The object of the interpretation clauses being to enlarge the meaning, a turnpike road, or any part of it, notwithstanding the exception in the interpretation, will be a "street," if in fact it is a street within the ordinary meaning of that word. *Thomas v. Roberts*, 43 J. P. 574.

Section 3 of the Town Police Clauses Act, 1847 (10 & 11 Vict., ch. 89) (the provisions of which act, so far as they relate to "obstructions and nuisances in the streets," have been incorporated into the P. H. Act, 1875), declares that "street" "shall extend to and include any road, square, court, alley and thoroughfare, or public passage within the limits of the Special Act;" but to be within those words the road, etc., must be of a public, or *quasi* public character. Therefore an approach to a railway station which is the private property of the company but only separated from the public highway by a gutter, is not such a "street." *Curtis*

v. Embrey, 42 L. J., M. C. 39; L. R., 7 Ex. 369; but an open square (in front of, and let with, an hotel), over which for many years the public had freely passed except when the hotel keeper's carriages stood there, was held to be part of the street. *Marks v. Ford*, 45 J. P. 157; *Foinett v. Clark*, 41 J. P. 359.

So where a private act used the phrase "street or road," "street" was held to be deprived of its larger interpretation by being so associated with "road." *Bristol Water Works Co. v. Bristol*, 5 T. R. 203.

Land on the sea shore between two villages, over which the inhabitants of those villages passed at high-tide but by no defined track, was held not to be a "street," "highway" or "public place." within § 3, Gasworks Cl. Act, 1847, 10 Vict. ch. 15. *Maddock v. Wallasey*, 55 L. J., Q. B. 267.

It has been held that whether any given roadway is a "street" is a question of fact for the jury or the justices. *Rex v. Fullford*, 33 L. J., M. C. 122; 10 L. T. 346; 10 Jur. N. S. 522; *Rex v. Dayman*, 26 L. J., M. C. 128; *Maude v. Baildon*, 10 Q. B. Div. 394. But in *Portsmouth v. Smith*, 53 L. J., Q. B. 95; 13 Q. B. Div. 196, *Brett, M. R.*, said: "I am unable to agree with the judgment in *Maude v. Baildon*, and think that the court there was under a misapprehension as to what was decided in *Rex v. Dayman*." The justices, when called on to make an order under § 150, P. H. Act, 1875, have jurisdiction to inquire whether the place is a "street." *Eccles v. Wirral*, 55 L. J., M. C. 106; 17 Q. B. D. 107.

1. See, also, DEDICATION, vol. 5, p. 395.

2. *Barteau v. West*, 23 Wis. 420; *Hunter v. Sandy Hill*, 6 Hill (N. Y.) 407; *Mayor, etc., of Macon v. Franklin*, 12 Ga. 239; *Grogan v. Hayward*, 4 Fed. Rep. 161; *Dovaston v. Payne*, 2 Smith Lead. Cas. 90 and note; *Bushnell v. Scott*, 21 Wis. 451; 94 Am. Dec. 955; *Hemphill v. Boston*, 8 Cush. (Mass.) 196; 54 Am. Dec. 749.

or implied. A statutory dedication must be made in the manner prescribed by the statute.¹ But a dedication not good as a statutory dedication may be valid as a common-law dedication.² In many of the States a valid statutory dedication vests the fee in the city, and acceptance on the part of the public is unnecessary.³

An express common-law dedication may be made in various ways. Any language or any instrument setting apart land for public use as a street may bind the donor from the time of acceptance by the public.⁴ One of the commonest forms of express dedication is where a plat is recorded which has not been so executed as to make it a statutory dedication.⁵ In case of an

1. *Noyes v. Ward*, 19 Conn. 250; *Winona v. Huff*, 11 Minn. 119; *Des Moines v. Hall*, 24 Iowa 234; *Grand Rapids v. Hastings*, 36 Mich. 122; *Fulton v. Mehrenfeld*, 8 Ohio St. 440; *Gould v. Howe*, 131 Ill. 490; *Grandville v. Jenison* (Mich. 1890), 47 N. W. Rep. 600. In the cases cited dedications were held invalid as statutory dedications because not acknowledged as required by statute.

Where the statute required the plat to be certified by the county surveyor, a certificate signed by the deputy surveyor was held insufficient. *Auburn v. Goodwin*, 128 Ill. 57.

But a substantial compliance with the statute may be sufficient. *Derby v. Alling*, 40 Conn. 310; *Police Jury v. Foulhouze*, 30 La. Ann. 64; *M. E. Church v. Mayor, etc., of Hoboken*, 33 N. J. L. 22; 97 Am. Dec. 696; *Gebhardt v. Reeve*, 75 Ill. 301.

Under the *Illinois* statute providing for the recording of plats acknowledged by the owners of the platted land, it is held that the recording of a plat acknowledged by the attorney in fact of the owner, does not operate as a statutory dedication. *Earll v. Chicago* (Ill. 1891), 26 N. E. Rep. 370; *Gosselin v. Chicago*, 103 Ill. 623; *Thomsen v. McCormick* (Ill. 1891), 26 N. E. Rep. 373.

A statutory dedication may be made to take effect *in futuro* unless the statute otherwise provides. *M. E. Church v. Mayor, etc., of Hoboken*, 33 N. J. L. 22; 97 Am. Dec. 696; *Derby v. Alling*, 40 Conn. 410; *Denver v. Clements*, 3 Colo. 472.

2. *Gould v. Howe*, 131 Ill. 490; *Maywood Co. v. Maywood*, 118 Ill. 61; 13 Am. & Eng. Corp. Cas. 505; *Earll v. Chicago* (Ill. 1891), 26 N. E. Rep. 370; *Fulton v. Mehrenfeld*, 8 Ohio St.

440; *Baker v. Johnston*, 21 Mich. 319; *Banks v. Ogden*, 2 Wall. (U. S.) 57; *Denver v. Clements*, 3 Colo. 472; *Thurston v. St. Joseph*, 51 Mo. 510; 11 Am. Rep. 463.

It is not necessary, in order to constitute a street or alley in a municipal corporation, that the statutory course should be pursued. Any act by the owner of property setting apart to the public a portion of his property, clearly showing that such was his intention, vests the use of such property in the public for the purposes indicated; and if actually thrown open, the public may take possession. *Rose v. Charles*, 49 Mo. 509.

3. *Wisby v. Bonte*, 19 Ohio St. 238; *Ragan v. McCoy*, 29 Mo. 356; *Carter v. Portland*, 4 Oregon 339; *Brooklyn v. Smith*, 104 Ill. 429; 44 Am. Rep. 90; *Weeping Water v. Reed*, 21 Neb. 261; *Rowan v. Portland*, 8 B. Mon. (Ky.) 232; *Osage City v. Larkin*, 40 Kan. 206; 10 Am. St. Rep. 186; *Reid v. Edina Board of Education*, 73 Mo. 295.

But unless the statute or the instrument of dedication provides for a fee, the public will take only an easement. *Hamilton v. Chicago, etc., R. Co.*, 124 Ill. 235; 19 Am. & Eng. R. Cas. 610; *Little v. Lincoln*, 106 Ill. 353; *Irving v. Ford*, 65 Mich. 241; *Cox v. Louisville, etc., R. Co.*, 48 Ind. 178; *Smith v. City Council*, 19 Ga. 89; 63 Am. Dec. 298; *Banks v. Ogden*, 2 Wall. (U. S.) 57; *Mankato v. Willard*, 13 Minn. 1; 97 Am. Dec. 208; *Dubuque v. Benson*, 23 Iowa 248; *Peck v. Providence Steam Engine Co.*, 8 R. I. 353.

4. *Elliott on Roads and Streets* 91. See, also, *Yolo Co. v. Barney*, 79 Cal. 375; 12 Am. St. Rep. 152; *Waugh v. Leech*, 28 Ill. 488.

5. *Maps and Plats*.—Platting land

into lots, blocks and streets, and selling lots with reference to the map or plat, constitutes a valid dedication upon the part of the owner. *Miller v. Indianapolis*, 123 Ind. 196; *Hicklin v. McClear*, 18 Oregon 126; *Campbell v. Kansas*, 102 Mo. 326; 31 Am. & Eng. Corp. Cas. 278; *Irwin v. Dixon*, 9 How. (U. S.) 10; *Gormley v. Clark*, 134 U. S. 338; *Moose v. Carson*, 104 N. Car. 431; 17 Am. St. Rep. 681; *Schneider v. Jacob*, 86 Ky. 101; 19 Am. & Eng. Corp. Cas. 597; *Giffen v. Olathe* (Kan. 1890), 24 Pac. Rep. 471; *Port Huron v. Chadwick*, 52 Mich. 320; *Harrison v. Augusta Factory*, 73 Ga. 447; *Borer v. Lange*, 44 Minn. 281; *In re Pearl Street*, 111 Pa. St. 565; *Grogan v. Hayward*, 4 Fed. Rep. 161; *Clark v. Elizabeth*, 40 N. J. L. 172; *Lockland v. Smiley*, 26 Ohio St. 94; *Diedrich v. Northwestern Union Co.*, 42 Wis. 248; 24 Am. Rep. 399; *Pierce v. Roberts*, 57 Conn. 31; 27 Am. & Eng. Corp. Cas. 41; *San Leandro v. Le Breton*, 72 Cal. 171; *Griffiths v. Galindo*, 86 Cal. 192; *Rowan v. Portland*, 8 B. Mon. (Ky.) 232; *Gregory v. Lincoln*, 13 Neb. 352; *Story v. New York El. R. Co.*, 90 N. Y. 122; 7 Am. & Eng. Corp. Cas. 596; 43 Am. Rep. 146; *In re Brooklyn*, 73 N. Y. 179; *Preston v. Navasota*, 34 Tex. 684. So, by adoption of an existing plat and reference thereto. *Campbell v. Kansas*, 102 Mo. 326; 31 Am. & Eng. Corp. Cas. 278; *Moale v. Mayor, etc., of Baltimore*, 5 Md. 314; 61 Am. Dec. 276; *M. E. Church v. Mayor, etc., of Hoboken*, 33 N. J. L. 13; 97 Am. Dec. 696; *In re Furman Street*, 17 Wend. (N. Y.) 649; *Brooks v. Topeka*, 34 Kan. 277.

Where the owner of land sells lots with reference to a city map showing the land as laid off into streets and blocks, he dedicates the streets as designated thereon to the public, to be opened whenever the public authorities may deem necessary, and when they are opened he cannot recover damages. *Sherer v. Jasper* (Ala. 1891), 9 So. Rep. 584.

So, where several deeds of land in a village, the first conveying it as an entire tract, and the subsequent deeds in distinct parcels to successive grantees, described the premises by bounding them on a street by name according to a certain map previously made, it was held that the intention was not merely to give the grantees and their successors a private right of

way, but to permit the opening of the street whenever the authorities of the village should see fit. *In re Trustees of Olean* (Supreme Ct.), 14 N. Y. Supp. 54.

Where the owner of land lays it off into lots and streets as an addition to a city, and causes the plat, although it is not properly acknowledged, to be recorded, and sells lots, describing them with reference to the plat, he thereby irrevocably dedicates to the public the streets shown upon such plat; and where the limits of the city are subsequently extended so as to include such addition, the corporate authorities have the right, when the public necessities require it, to use the streets as public thoroughfares. It is not essential to the validity of the dedication in such a case that the city authorities should formally accept it or proceed at once to open and improve the streets. The dedication only requires that the streets shall be used as such when the public exigencies demand it. *Meyer v. Portland, etc., Co.*, 16 Oregon 500. See also, *Shea v. Ottumwa*, 67 Iowa 39; *Hardy v. Memphis*, 10 Heisk. (Tenn.) 127. Compare *People v. Reed*, 81 Cal. 70; *Abstracted* 27 Am. & Eng. Corp. Cas. 24; *Hamilton v. Chicago, etc., R. Co.*, 124 Ill. 235; 19 Am. & Eng. Corp. Cas. 610.

In a *New Jersey* case, it appeared that lands were taken for a street extension, an award therefor made and confirmed, and the extension declared to be a street. Possession was taken by the city, the street opened, and used as such, and a sewer built therein; but the award was never paid. Long afterwards the owners of the lands made an assignment, for the benefit of their creditors, to the complainants, who applied to the city for the award, and were refused. They then advertised the lands, including other lands also, for public sale, using for that purpose a map designating the street in question by its name and location. Held, that there was no dedication on their part. *Gardner v. Jersey City*, 32 N. J. Eq. 586.

Where land is surveyed and platted, and the width, location, and course of the streets fully shown, one who purchases with reference to the plat is estopped from disputing the existence and width of the streets as surveyed and shown on the plat. *Reed v. Mayor, etc., of Birmingham* (Ala.), 33 Am. & Eng. Corp. Cas. 469.

express dedication evidenced by a writing the extent of the dedication is measured by the writing, and the intent as therein expressed cannot be contradicted by parol evidence.¹ If the instrument adds terms and conditions, the public will generally be bound by them after acceptance.²

An implied dedication is one arising by operation of law from the acts of the landowner, and is founded upon the equitable doctrine of estoppel.³

b. WHO MAY DEDICATE.—A dedication can only be made by the owner or proprietor of the land, or of an estate therein.⁴ A

Deed Referring to Street as Boundary.—Where lots are sold by the owner and described in the deed as bounded by certain streets, this amounts to a dedication of such streets on the part of the owner. *Fossion v. Landry*, 123 Ind. 136; *State v. Bayrne*, 52 N. J. L. 503; *White v. Flannigain*, 1 Md. 525; 54 Am. Dec. 668; *People v. Lambier*, 5 Den. (N. Y.) 9; 47 Am. Dec. 273; *West Covington v. Freking*, 8 Bush (Ky.) 121; *Vannatta v. Jones*, 42 N. J. L. 561; *In re Brooklyn*, 73 N. Y. 179; *Rathgaber v. Tonawanda* (Supreme Ct.), 13 N. Y. Supp. 937; *Demopolis v. Webb*, 87 Ala. 659; 25 Am. & Eng. Corp. Cas. 268.

But when a street has been laid out by municipal action, although not yet opened to public use, a description in a deed subsequently made referring to the street as a boundary, is not such a dedication thereof as will deprive the grantor of his right to compensation when the street is actually opened. *In re Wayne Ave.*, 124 Pa. St. 135; *In re Brooklyn Street*, 118 Pa. St. 640; 19 Am. & Eng. Corp. Cas. 584. See, also, *Sandford v. Covington* (Ky. 1890), 14 S. W. Rep. 497; *Lippincott v. Harvey*, 72 Md. 572.

1. *Miller v. Indianapolis*, 123 Ind. 196; *Indianapolis v. Kingsbury*, 101 Ind. 200; 51 Am. Rep. 749.

It is for the court to determine as matter of law whether a plat contains an express dedication of a strip of ground to the public as a street. *Hanson v. Eastman*, 21 Minn. 509; *Yates v. Judd*, 18 Wis. 126; *Sanborn v. Chicago, etc., R. Co.*, 16 Wis. 20; *Miller v. Indianapolis*, 123 Ind. 196.

The use may, however, be of such a nature and so long continued as to change the extent of the easement. *Getchell v. Benedict*, 57 Iowa 121; *Bell v. Burlington*, 68 Iowa 296.

2. *Long v. Mayor, etc., of Battle Creek*, 39 Mich. 323; *Boughluer v.*

Clarksburg, 15 W. Va. 394; *Fisher v. Prowse*, 2 B. & S. 770; 110 E. C. L. 770; 31 L. J., Q. B. 213; *Field v. Manchester*, 32 Mich. 279.

But it has been held that the dedication of a street with the proviso that a certain space in the middle shall be used for market-houses, does not prevent the city from adding that space to the street, and charging the cost of its improvement against the land fronting thereon. *Philadelphia v. Slocum*, 14 Phila. (Pa.) 141.

So, it has been held that the *habendum* clause of a deed, conveying land to be used as a street, does not limit the power of the authorities; their control over such a street, in reference to grades and the laying of railroad tracks, is the same as over streets dedicated generally. They may do anything with such a street which is not incompatible with the purposes for which streets are established. *Murphy v. Chicago*, 29 Ill. 279; 81 Am. Dec. 307.

3. *Morgan v. Chicago, etc., R. Co.*, 96 U. S. 716; *Cincinnati v. White*, 6 Pet. (U. S.) 582; *Faust v. Huntington*, 91 Ind. 493; *Noyes v. Ward*, 19 Conn. 250; *Denver v. Clements*, 3 Colo. 472; *Holdane v. Cold Spring*, 21 N. Y. 474; *Rowan v. Portland*, 8 B. Mon. (Ky.) 232; *Godfrey v. Alton*, 12 Ill. 29; 52 Am. Dec. 476; *Leonard v. Baton Rouge*, 39 La. Ann. 75; *Marion v. Skillman*, 127 Ind. 130.

4. 2 Dillon Munic. Corp. (4th ed.), § 635; *Irwin v. Dixon*, 9 How. (U. S.) 10; *Moberly v. McShane*, 79 Mo. 41; 7 Am. & Eng. Corp. Cas. 405; *Hoole v. Attorney Genl.*, 22 Ala. 190; *Lawe v. Kankanna*, 70 Wis. 306; *Armstrong v. Topeka*, 36 Kan. 432; *Lee v. Lake*, 14 Mich. 12; 90 Am. Dec. 220; *Leland v. Portland*, 2 Oregon 46; *Warren v. Brown* (Neb. 1890), 47 N. W. Rep. 633.

But one who has entered land may

corporation,¹ the nation or State,² the owner of the equitable estate,³ and, in some cases, a trustee,⁴ may make a valid dedication. So, there may be cases in which a dedication will be presumed as against an infant⁵ or a married woman.⁶ But a stranger or person in possession without title cannot make an express dedication.⁷ Neither can a mortgagor make a dedica-

dedicate it although he has not yet obtained his patent. *Rube v. Sullivan*, 23 Neb. 779. See also *Nelson v. Madison*, 3 Biss. (U. S.) 244. So, the owner of an undivided interest may, it has been held, make a valid dedication. *Forney v. Calhoun Co.*, 84 Ala. 215; 20 Am. & Eng. Corp. Cas. 453. Compare *St. Louis v. Laclede Gas Light Co.*, 96 Mo. 197; 9 Am. St. Rep. 334; *Scott v. State*, 1 Sneed (Tenn.) 629. The fact that part of the land dedicated does not belong to the owner will not avoid the dedication of that which does belong to him. *Earll v. Chicago* (Ill. 1891), 26 N. E. Rep. 370.

In *California*, one who holds a certificate for school lands may make a valid dedication. *Watkins v. Lynch*, 71 Cal. 21.

One who has no valid title at the time he makes a dedication may be estopped from denying the dedication when he afterwards acquires title. *Napa v. Howland*, 87 Cal. 84; *Nelson v. Madison*, 3 Biss. (U. S.) 244. But compare *Lee v. Lake*, 14 Mich. 12; 90 Am. Dec. 220.

1. *Grand Surrey Canal Co. v. Hall*, 1 M. & G. 392; 39 E. C. L. 497; *Williams v. New York*, etc., R. Co., 39 Conn. 509; *Niagara Falls Suspension Bridge Co. v. Bachman*, 66 N. Y. 261.

A city or county may dedicate its lands to public use. *Story v. New York El. R. Co.*, 90 N. Y. 122; 7 Am. & Eng. R. Cas. 596; 43 Am. Rep. 146; *Boston v. Lecraw*, 17 How. (U. S.) 426; *Greene Co. v. Huff*, 91 Ind. 333; *Mayor, etc., of Macon v. Franklin*, 12 Ga. 239; *State v. Woodward*, 23 Vt. 92.

2. *Illinois v. Illinois Cent. R. Co.*, 33 Fed. Rep. 730; *Terre Haute, etc., R. Co. v. Scott*, 74 Ind. 29; 3 Am. & Eng. R. Cas. 208; *Reilly v. Racine*, 51 Wis. 526; *Matthiessen, etc., Co. v. La Salle*, 117 Ill. 411; 33 Am. & Eng. Corp. Cas. 465; *Boston v. Lecraw*, 17 How. (U. S.) 426; *Harper v. Charlesworth*, 4 B. & C. 574; 10 E. C. L. 412.

But one who occupies government

land cannot dedicate a way across it. *Smith v. Smith*, 34 Kan. 293.

3. *Cincinnati v. White*, 6 Pet. (U. S.) 431; *Williams v. First Presbyterian Soc.*, 1 Ohio St. 478; *Ragan v. McCoy*, 29 Mo. 356; *Johnstone v. Scott*, 11 Mich. 232; *Doe v. Attica*, 7 Ind. 641; *Dover v. Fox*, 9 B. Mon. (Ky.) 200; *Wright v. Tukey*, 3 Cush. (Mass.) 290; *Sargeant v. State Bank*, 4 McLean (U. S.) 339.

4. *Prudden v. Lindsley*, 29 N. J. Eq. 615; *Pitts v. Mayor, etc., of Baltimore*, 73 Md. 326.

An executor or administrator authorized to sell land to pay debts may make a valid dedication. *Earle v. Mayor, etc., of New Brunswick*, 38 N. J. L. 47; *Logansport v. Dunn*, 8 Ind. 378.

A guardian, acting under the order of court, may make a valid dedication of his ward's land. *Earle v. Mayor, etc., of New Brunswick*, 38 N. J. L. 47; *Indianapolis v. Kingsbury*, 101 Ind. 207; 51 Am. Rep. 749; *Tyler on Infancy to Coverture* 175.

A commissioner in partition may make a valid dedication. *Indianapolis v. Kingsbury*, 101 Ind. 200; *Clark v. Parker*, 106 Mass. 554. See, also, *Miller v. Indianapolis*, 123 Ind. 196. Compare *New Albany v. Williams*, 126 Ind. 1.

So an agent may dedicate his principal's land where he has the requisite authority. *U. S. v. Chicago*, 7 How. (U. S.) 185; *Barclay v. Howell*, 6 Pet. (U. S.) 498; *Barteau v. West*, 23 Wis. 416; *Brown v. Manning*, 6 Ohio 298; 27 Am. Dec. 255. See *Wirt v. McEnery*, 21 Fed. Rep. 233; 6 Am. & Eng. Corp. Cas. 105.

5. *Elliott on Roads and Streets* 104. But, as a general rule, an infant cannot make an express dedication. *Elliott on Roads and Streets* 104.

6. *Schenley v. Com.*, 36 Pa. St. 29; 78 Am. Dec. 359; *Ward v. Davis*, 3 Sandf. (N. Y.) 502; *Indianapolis v. Kingsbury*, 101 Ind. 200; 51 Am. Rep. 749.

7. *Cyr v. Madore*, 73 Me. 53; *Gentleman v. Soule*, 32 Ill. 271; 83 Am. Rep. 264.

tion so as to cut out the mortgagee,¹ nor a tenant as against his landlord.² And, as a general rule, the remainderman is not bound by the acts of the owner of the particular estate.³

c. INTENT.—There can be no valid dedication without an intention on the part of the donor to set aside the land to public use,⁴ but this intention may be implied from circumstances as well as proved by direct evidence.⁵ The intent which the law means is that which is expressed in the acts and conduct of the landowner rather than any hidden or secret purpose he may have.⁶

d. EVIDENCE.—A party may sometimes testify as to his original intention in regard to the dedication of a street;⁷ but a dedication is generally proved by evidence of the owner's acts, together with the surrounding circumstances.⁸

1. *Moberley v. McShane*, 79 Mo. 41; 7 Am. & Eng. Corp. Cas. 405; *Detroit v. Detroit, etc.*, R. Co., 23 Mich. 173; *Hoole v. Attorney Gen.*, 22 Ala. 190. But see *Vreeland v. Torrey*, 34 N. J. Eq. 312; *Bushnell v. Scott*, 21 Wis. 457; 94 Am. Dec. 955, where the mortgagee was held to be estopped.

The owner of land which he had already mortgaged, dedicated part of it as a street. The mortgagee knew of the dedication but made no dissent, his mortgage being duly recorded. Two years later the land was sold under the mortgage. *Held*, that the attempted dedication did not bind the purchaser, as the mortgagee was not estopped. *Moberley v. McShane*, 79 Mo. 41; 7 Am. & Eng. Corp. Cas. 405.

2. *Gentleman v. Soule*, 32 Ill. 271; 83 Am. Dec. 264; *Wood v. Veal*, 5 B. & A. 454; 7 E. C. L. 158; *Harper v. Charlesworth*, 4 B. & C. 574; 10 E. C. L. 412. But where there is long-continued user with the knowledge of the landlord a dedication may be presumed against him as well as against the tenant. *Rex v. Barr*, 4 Campb. 16; *Davis v. Stephens*, 7 C. & P. 570; 32 E. C. L. 634; *Woodyer v. Hadden*, 5 Taunt. 126. Nor can one tenant in common ordinarily make a valid dedication as against the others. *St. Louis v. Laclede Gas Light Co.*, 96 Mo. 197; 9 Am. St. Rep. 334; *McBeth v. Trabue*, 69 Mo. 642; *Scott v. State*, 1 Sneed (Tenn.) 629. Compare *Forney v. Calhoun Co.*, 84 Ala. 215; 20 Am. & Eng. Corp. Cas. 453; *Lake View v. Le Bahn*, 120 Ill. 92.

3. 2 Smith's Lead. Cas. 95; *Rives v. Dudley*, 3 Jones Eq. (N. Car.) 126; 67 Am. Dec. 231; *Detroit v. Detroit, etc.*,

R. Co., 23 Mich. 173. Nor can one who has a mere equitable right of reversion make a valid dedication. *Tapert v. Detroit etc. R. Co.*, 50 Mich. 267; 11 Am. & Eng. R. Cas. 413.

4. *White Bear v. Stewart*, 40 Minn. 284; *Flack v. Green Island*, 122 N. Y. 107; *Miller v. Aracoma*, 30 W. Va. 606; 19 Am. & Eng. Corp. Cas. 571; *Chicago v. Hill*, 124 Ill. 646; 20 Am. & Eng. Corp. Cas. 466; *Hogue v. Albina*, 20 Oregon 182; 32 Am. & Eng. Corp. Cas. 49; *Tinges v. Baltimore*, 51 Md. 606; *Mayor, etc., of Baltimore v. White*, 62 Md. 362; *Rozell v. Andrews*, 103 N. Y. 150; *Shellhouse v. State*, 110 Ind. 509; *Marion v. Skillman*, 127 Ind. 130; *Weiss v. South Bethlehem*, 136 Pa. St. 294.

5. *Marion v. Skillman*, 127 Ind. 130; *Indianapolis v. Kingsbury*, 101 Ind. 200; 51 Am. Rep. 749; *Smith v. State*, 23 N. J. L. 712; *Quinn v. Anderson*, 70 Cal. 454; 2 Dillon's Munic. Corp. (4th ed.), § 636; 2 Greenleaf on Ev., § 662; *Elliott on Roads and Streets*, 91-93.

See *infra*, this title, *Evidence*.

6. *Bartlett v. Beardmore*, 77 Wis. 356; *Fossion v. Landry*, 123 Ind. 136; *Indianapolis v. Kingsbury*, 101 Ind. 200; 51 Am. Rep. 749; *Columbus v. Dahn*, 36 Ind. 330; *Morgan v. Chicago, etc., R. Co.*, 96 U. S. 716. See, also, *Lamar Co. v. Clements*, 49 Tex. 347; *Denver v. Clements*, 3 Colo. 484.

7. *Bidinger v. Bishop*, 76 Ind. 244; *McKee v. Perchment*, 69 Pa. St. 342. *Contra*, *Brown v. Stark*, 83 Cal. 636.

8. Evidence to Prove Dedication.—Plaintiff owned land lying between two platted additions of a town, in each of which was laid out a street

which intersected plaintiff's lot. For more than twenty years the public had passed over plaintiff's land in the line of this street. During that time plaintiff built an hotel which encroached from six to thirty inches on the line of the street extended across his land. *Held*, there was a dedication of a strip across plaintiff's land of the width of the street in the two additions, except at the place where the hotel encroached, making it that much narrower at that point. *Marion v. Skillman*, 127 Ind. 130.

A corporation platted an addition to a city. The plat showed on the north side a strip 85 feet wide, marked "North." An agent of the company, who was also a director, sold lots fronting on the strip and told the purchasers that it was a street. Houses were built on both sides, and it was used as a street, the city constructing bridges and sluices thereon. *Held*, that the evidence was sufficient to sustain a finding that there was a dedication, and that statements to that effect made by a director of the corporation, while selling lots as its agent, were competent, but not while selling lots of his own. *Hitchcock v. Oberlin* (Kan. 1891), 26 Pac. Rep. 466.

A turnpike entered a town at an avenue, and, by an arrangement between the turnpike company and the town, the company kept the street in repair, and was allowed to claim that its road extended some distance into the town, in order to increase its tolls. It had been used as a street for twenty-five years. *Held*, that there was a dedication as a street of that part of the turnpike which was afterwards brought within the town by the extension of its limits. *Hood v. Lebanon* (Ky. 1891), 15 S. W. Rep. 516.

A cemetery company built its fence along land which was afterwards used as a public street for over fifteen years, but, owing to a deep ravine, it was not improved, and was not frequented by conveyances. It was left open to the public, and the city erected along it telephone and fire-alarm poles. *Held*, that there was a dedication of the strip by the company as a public street. *Eastern Cemetery Co. v. Louisville* (Ky. 1891), 15 S. W. Rep. 1117.

See, also, *Ellsworth v. Lord*, 40 Minn. 337; *Wilson v. Hull* (Utah, 1890), 24 Pac. Rep. 799; *Richardson v. Dallas* (Tex.), 16 S. W. Rep. 622; *St. Paul*,

etc., *R. Co. v. Minneapolis*, 44 Minn. 149; *Wicks v. Thompson*, 59 Hun (N. Y.) 618; *Allen v. Reinhardt* (Ky. 1890), 14 S. W. Rep. 420.

Declarations made by the owner, tending to prove an intent to dedicate, at the time the dedication is claimed to have taken place, are competent evidence. *Fossion v. Landry*, 123 Ind. 136; *Cook v. Harris*, 61 N. Y. 448.

It has also been held that direct evidence of the intention of the landowner is admissible to defeat a dedication where it does not necessarily contradict his acts. *Bidinger v. Bishop*, 76 Ind. 244. But such evidence is generally inadmissible, and it is certainly not competent to overthrow a dedication as against those who have acquired rights upon the faith of the acts and conduct of the owner clearly manifesting an intent to dedicate. *Brown v. Stark*, 83 Cal. 636; *Columbus v. Dahn*, 36 Ind. 330; *Miller v. Indianapolis*, 123 Ind. 196; *Denver v. Clements*, 3 Colo. 484; *Barracough v. Johnson*, 8 A. & E. 105; 35 E. C. L. 337. See also *Downer v. St. Paul*, etc., *R. Co.*, 23 Minn. 271; and compare *Buchanan v. Curtis*, 25 Wis. 99.

Insufficient Evidence.—For statements of facts and circumstances held insufficient to prove dedication, see *Hogue v. Albina*, 20 Oregon 182; 32 Am. & Eng. Corp. Cas. 49; *Pitts v. Baltimore*, 73 Md. 326; *Scranton v. Thomas*, 141 Pa. St. 1; *West Covington v. Ludlow* (Ky. 1891), 15 S. W. Rep. 353.

Where one leaves open a strip of land for his own convenience, and there is no evidence of an intent to dedicate other than occasional use by the public with his permission, there is no valid dedication. *Rozell v. Andrews*, 103 N. Y. 150; *Pennsylvania Co. v. Plotz*, 125 Ind. 26; *Weiss v. South Bethlehem*, 136 Pa. St. 294. See, also, *New Albany v. Williams* (Ind. 1890), 25 N. E. Rep. 187.

Evidence to Rebut Dedication.—The presumption of dedication arising from public use may be rebutted by acts of the owner inconsistent with the rights of the public in the way as a street or public road. *McCormick v. Mayor*, etc., of *Baltimore*, 45 Md. 512; *Irwin v. Dixon*, 9 How. (U. S.) 10; *Bowers v. Suffolk Mfg. Co.*, 4 Cush. (Mass.) 332; *Stone v. Jackson*, 32 Law & Eq. 349; *Bowman v. Wickliffe*, 15 B. Mon. (Ky.) 84; *Green v. Bethea*, 30 Ga. 897; *Brinck v. Collier*, 56 Mo. 160; *White v. Bradley*, 66 Me. 254; *Chicago v. Stinson*,

c. ACCEPTANCE.—A common-law dedication must be accepted in order to render it complete as against the public and to charge the municipality with the duty to repair;¹ but acceptance upon

124 Ill. 510; Mayor, etc., of Baltimore v. Glenn, 67 Md. 390; 19 Am. & Eng. Corp. Cas. 564; Smith v. Inge, 80 Ala. 283. Thus the owner may defeat a presumption of dedication by placing gates or bars across the way. British Museum v. Finnis, 5 C. & P. 460; Roberts v. Karr, 1 Campb. 262; Herhold v. Chicago, 108 Ill. 467; 6 Am. & Eng. Corp. Cas. 110; Hall v. Mayor, etc., of Baltimore, 56 Md. 187; Quinn v. Anderson, 70 Cal. 454; Jones v. Davis, 35 Wis. 376; Carpenter v. Gwynn, 35 Barb. (N. Y.) 395; State v. Strong, 25 Me. 297; State v. Green, 41 Iowa 693; Cook v. Hillsdale, 7 Mich. 115; Com. v. Newbury, 2 Pick. (Mass.) 57. But this must be done before the private rights have been acquired on the faith of the dedication. Indianapolis v. Kingsbury, 101 Ind. 200; 51 Am. Rep. 749. And it is not always conclusive. Bartlett v. Beardmore, 77 Wis. 356; Davis v. Stephens, 7 C. & P. 570; 32 L. C. L. 634.

Where the landowner makes all repairs, that fact will strongly tend to rebut the presumption of an intent to dedicate. Brinck v. Collier, 56 Mo. 160; Irwin v. Dixon, 9 How. (U. S.) 10.

So, the payment of taxes by the owner upon the land claimed as a street will tend to rebut a presumption of dedication, but it will not overcome the presumption of an intent to dedicate where other acts and circumstances clearly show such an intention. Getchell v. Benedict, 57 Iowa 121; Lemon v. Hayden, 13 Wis. 159; Wyman v. State, 13 Wis. 663; Ellsworth v. Grand Rapids, 27 Mich. 250; Lake View v. Le Bahn, 120 Ill. 92.

The situation of the land may also be such as to rebut the presumption of a dedication. Gowen v. Philadelphia Exchange Co., 5 W. & S. (Pa.) 141; 40 Am. Dec. 489; Tallmadge v. East River Bank, 26 N. Y. 108; Attorney Genl. v. Whitney, 137 Mass. 450. See, also, Pennsylvania Co. v. Plotz, 125 Ind. 26.

The owner of land situated in a township on a public highway, who, for his own convenience, constructs a board sidewalk in front of his premises, does not thereby dedicate it to the public. Com. v. Barker, 140 Pa. St. 189.

Question of Fact.—Whether the evidence is sufficient to show a dedication or not is generally a question of fact to be determined by the jury under proper instructions. Flack v. Green Island, 122 N. Y. 107; Nixon v. Biloxi (Miss. 1880), 5 So. Rep. 621; Eastland v. Fogo, 58 Wis. 274; Elgin v. Beckwith, 119 Ill. 367; Wood v. Hurd, 34 N. J. L. 88; Cowles v. Gray, 14 Iowa 1; Harding v. Jasper, 14 Cal. 642; Gould v. Glass, 19 Barb. (N. Y.) 195; Daniels v. People, 21 Ill. 439; Alrord v. Ashley, 17 Ill. 363; Gardiner v. Tisdale, 2 Wis. 153; 60 Am. Dec. 407; Hartford v. New York, etc., R. Co., 59 Conn. 250.

But there are cases, where the facts are undisputed, and there is but one reasonable inference that can be drawn therefrom, or where the construction of a map or written instrument is the only question involved, in which the question is one of law for the court to determine. Miller v. Indianapolis, 123 Ind. 196; State v. Schwin, 65 Wis. 207; Hanson v. Eastman, 21 Minn. 509; Yates v. Judd, 18 Wis. 126; Sanborn v. Chicago, etc., R. Co., 16 Wis. 20.

1. Harrison Co. v. Seal, 66 Miss. 129; 14 Am. St. Rep. 545; Moore v. Johnston, 87 Ala. 220; Com. v. Moorehead, 118 Pa. St. 344; 19 Am. & Eng. Corp. Cas. 621; 4 Am. St. Rep. 599; Waterloo v. Union Mill. Co., 72 Iowa 437; 19 Am. & Eng. Corp. Cas. 595; Dorman v. Bates Mfg. Co., 82 Me. 438; Moore v. Cape Girardeau (Mo.), 15 S. W. Rep. 755; Landis v. Hamilton, 77 Mo. 554; 4 Am. & Eng. Corp. Cas. 491; Warren v. Brown (Neb. 1890), 47 N. W. Rep. 633; Kennedy v. Mayor, etc., of Cumberland, 65 Md. 514; 57 Am. Rep. 346.

Before the dedication of a street can impose on the municipality the duty of improving or repairing it, and the consequent liability, there must be an acceptance by the proper authorities, or an uninterrupted user by the public for at least twenty years. Kennedy v. Mayor, etc., of Cumberland, 65 Md. 514; 57 Am. Rep. 346.

But after a city has taken possession of a certain piece of ground, and used it and claimed it as a street, and after the city has entered into a contract to have the supposed street graded, and after the grading has all been done and accepted by the city, the city will then be

the part of the municipality or general public is usually unnecessary as between the landowner and those who have bought property or expended money upon the faith of the dedication.¹

The acceptance must be within a reasonable time,² otherwise the dedication may be revoked, unless individual rights have been acquired preventing a revocation.³ It need not, ordinarily, be evidenced by any formal act upon the part of the public authorities,⁴ for it may be implied where the municipality takes control of the street and makes repairs,⁵ or where there has been long-

estopped from denying that the supposed street was ever legally laid out or dedicated as a street. *Leavenworth v. Laing*, 6 Kan. 274.

Under the *California* Statute, providing that a board of supervisors may, on certain conditions, accept a "street," but shall not accept any portion of it less than the entire width of the "roadway," it was held that the acceptance of a street included the sidewalks, making the city liable for their repair. *Bonnet v. San Francisco*, 65 Cal. 230.

1. *Hamilton v. Chicago, etc., R. Co.*, 124 Ill. 235; 19 Am. & Eng. Corp. Cas. 610; *Zearing v. Raber*, 74 Ill. 409; *Earll v. Chicago* (Ill. 1891), 26 N. E. Rep. 372; *Harrison Co. v. Seal*, 66 Miss. 129; 14 Am. St. Rep. 545; *State v. Catlin*, 3 Vt. 530; 23 Am. Dec. 230; *Common Council v. Croas*, 7 Ind. 9; *Bartlett v. Bangor*, 67 Me. 460; *Carter v. Portland*, 4 Oregon 339; *Bissell v. New York Cent. R. Co.*, 23 N. Y. 61; *Wiggins v. McCleary*, N. Y. 346.

The doctrine of these cases is that, "if the owner of land exhibits a map or plan of a town, or addition platted thereon, on which a street is defined, and sells lots abutting on such street, with clear reference to the plat exhibited, then the purchasers of such lots have a right to have that street remain open forever; and such right is not a mere right that the purchasers may use that street, but is a right vested in the purchasers that all persons may use it; that the sale and conveyance of lots according to the plat imply a grant or covenant to the purchasers of lots and their grantees that the public street indicated upon the plat shall be forever open to the use of the public as a public highway, free from all claim or interference of the proprietor, or those claiming under him, inconsistent with such use; and that the owner and all claiming under him will be perpetually estopped from denying the existence of the street."

Earll v. Chicago (Ill. 1891), 26 N. E. Rep. 372. See, also, to same effect, *Rives v. Dudley*, 3 Jones Eq. (N. Car.) 126; 67 Am. Dec. 237; *Parrish v. Stephens*, 1 Oregon 59; *Moose v. Carson*, 104 N. Car. 431; 17 Am. St. Rep. 681.

2. *Galveston v. Williams*, 69 Tex. 449; *Briel v. Natchez*, 48 Miss. 423; *Simmons v. Cornell*, 1 R. I. 519; *Cass Co. v. Banks*, 44 Mich. 467; *Grandville v. Jenison* (Mich. 1890), 47 N. W. Rep. 600.

As to what is a reasonable time, see *M. E. Church v. Mayor, etc., of Hoboken*, 33 N. J. L. 13; 97 Am. Dec. 696; *Derby v. Alling*, 40 Conn. 410; *Hawley v. Baltimore*, 33 Md. 270; *Oswald v. Grenet*, 22 Tex. 94; *Crockett v. Boston*, 5 Cush. (Mass.) 182; *Baker v. Johnston*, 21 Mich. 319.

3. *Eureka v. Crogan*, 81 Cal. 524; 27 Am. & Eng. Corp. Cas. 17, and note; *People v. Reed*, 81 Cal. 70; *Abstracted* 27 Am. & Eng. Corp. Cas. 24; *Field v. Manchester*, 32 Mich. 279; *Wayne Co. v. Miller*, 31 Mich. 447.

4. *Green v. Elliott*, 86 Ind. 53; *Lake View v. Le Bahn*, 120 Ill. 92; *Requa v. Rochester*, 45 N. Y. 129; 6 Am. Rep. 52.

5. *Brakken v. Minnesota, etc., R. Co.*, 29 Minn. 41; 7 Am. & Eng. R. Cas. 593; *Harrison Co. v. Seal*, 66 Miss. 129; 14 Am. St. Rep. 545; *Ross v. Thompson*, 78 Ind. 90; *State v. Wilson*, 42 Me. 9; *Illinois Ins. Co. v. Littlefield*, 67 Ill. 368; *Dayton v. Rutland*, 84 Ill. 279; 25 Am. Rep. 457; *Lake View v. Le Bahn*, 120 Ill. 92.

If an express acceptance is relied upon it must be shown to have been made by some one having authority. *Remington v. Millerd*, 1 R. I. 93; *State v. Bradbury*, 40 Me. 154; *White v. Bradley*, 66 Me. 254. It should be proved by the record, where one exists. *Parsons v. Atlanta University*, 44 Ga. 529. See, also, *People v. Reed* (Cal. 1888), 20 Pac. Rep. 708.

But in a Michigan case it was held

continued user by the public.¹ So, acceptance will generally be presumed where the dedication is beneficial to the public.²

f. EFFECT.—The effect of a complete dedication is to conclude the owner,³ and vest an easement in the public for all street purposes,⁴ unless the dedication is made and accepted upon some condition limiting the rights of the public.⁵ Subject to this easement, the owner retains the fee and all the rights of the

that ordering sidewalks to be laid down on a portion of the way was not sufficient evidence of acceptance. *Irving v. Ford*, 65 Mich. 241. See also *State v. Bradbury*, 40 Me. 154.

The acceptance by a city of a charter providing that all streets opened or used as such for a certain time, shall thereby become streets for all purposes, is a sufficient acceptance of streets dedicated and opened for that length of time before the adoption of the charter. *Requa v. Rochester*, 45 N. Y. 129; 6 Am. Rep. 52; *Des Moines v. Hall*, 24 Iowa 234. But compare *St. Louis v. St. Louis University*, 88 Mo. 155.

1. *Adams v. Iron Cliffs Co.*, 78 Mich. 271; 18 Am. St. Rep. 441; *Peninsula Iron, etc., Co. v. Crystal Falls*, 60 Mich. 510; *Kruger v. Le Blanc*, 70 Mich. 76; *Wolf v. Brass*, 72 Tex. 133; *Spaulding v. Bradley*, 79 Cal. 449; *Cook v. Harris*, 61 N. Y. 448; *People v. Loebfelm*, 102 N. Y. 1; *Ross v. Thompson*, 78 Ind. 90; *Green v. Elliott*, 86 Ind. 53; *Price v. Breckenridge*, 92 Mo. 378; 19 Am. & Eng. Corp. Cas. 593; *Steele v. Sullivan*, 70 Ala. 589; *Eureka v. Croghan* (Cal. 1888), 19 Pac. Rep. 485; *Carter v. Portland*, 4 Oregon 339; *Com. v. Moorhead*, 118 Pa. St. 344; 4 Am. St. Rep. 599; 19 Am. & Eng. Corp. Cas. 621; *Eastland v. Fogo*, 66 Wis. 133; *Lake View v. Le Bahn*, 120 Ill. 92; *Fairfield v. Morey*, 44 Vt. 239; *David v. New Orleans*, 16 La. Ann. 404; 79 Am. Dec. 586; *Waterloo v. Union Mill Co.*, 72 Iowa 437; 19 Am. & Eng. R. Cas. 595; *Maus v. Springfield*, 101 Mo. 613; 20 Am. St. Rep. 634.

This is also the *English* rule. *Rex v. Leake*, 2 N. & M. 595; *Rex v. Lyon*, 5 D. & R. 497.

2. *Abbott v. Cottage City*, 143 Mass. 521; 58 Am. Rep. 143; *Guthrie v. New Haven*, 31 Conn. 321; *Hall v. Meriden*, 48 Conn. 416; *San Francisco v. Canavan*, 42 Cal. 541; *Cemetery Assoc. v. Meninger*, 14 Kan. 312.

3. *Plumb v. Grand Rapids*, 81 Mich.

381; *Logan v. Rose*, 88 Cal. 263; *Mankato v. Willard*, 13 Minn. 23; *Harding v. Jasper*, 14 Cal. 642.

Dower is barred by a valid dedication. *Gwynne v. Cincinnati*, 3 Ohio 25; *Moore v. New York*, 8 N. Y. 110; 59 Am. Dec. 473; *Mankato v. Meagher*, 17 Minn. 265; 97 Am. Dec. 208. See also *Duncan v. Terre Haute*, 85 Ind. 104.

4. *Schurmeir v. St. Paul, etc., R. Co.*, 10 Minn. 104; 88 Am. Dec. 67; 7 Wall. (U. S.) 272; *Peck v. Providence Steam Engine Co.*, 8 R. I. 353; *Peck v. Smith*, 1 Conn. 103; 6 Am. Dec. 216; *Goodtitle v. Alker*, 1 Burr. 133; *Dubuque v. Benson*, 23 Iowa 248; *Schneider v. Jacob*, 86 Ky. 101; 19 Am. & Eng. Corp. Cas. 597.

Where land is platted by the owner and lots are sold with reference thereto the purchasers acquire a right to have the dedication enforced as to all the streets shown thereon. *In re Pearl Street*, 111 Pa. St. 565; *Bartlett v. Bangor*, 67 Me. 460; *Rowan v. Portland*, 8 B. Mon. (Ky.) 232; *Fox v. Union Sugar Refinery*, 109 Mass. 292; 2 Smith's Lead. Cas. (8th Am. ed.) 161; *De Witt v. Ithaca*, 15 Hun (N. Y.) 568; *Huber v. Gazez*, 18 Ohio 18; *Derby v. Alling*, 40 Conn. 410.

5. An owner may grant whatever estate he sees fit to grant, and may annex conditions and limitations thereto, provided they are not inconsistent with the dedication. *Elliott on Roads and Streets* 109; *M. E. Church v. Mayor, etc., of Hoboken*, 33 N. J. L. 13; 97 Am. Dec. 696; *Antones v. Elslava*, 9 Port. (Ala.) 527; *Mowry v. Providence*, 10 R. I. 52; *Rex v. Northampton*, 2 M. & S. 262; *Rex v. Hudson*, 2 Stra. 209; *Mercer v. Woodgate*, L. R., 5 Q. B. 26; *Arnold v. Blaker*, L. R., 6 Q. B. 433; *Hemphill v. Boston*, 8 Cush. (Mass.) 195; 54 Am. Dec. 749; *Valentine v. Boston*, 22 Pick. (Mass.) 75; 33 Am. Dec. 711; *Pettibone v. Hamilton*, 40 Wis. 402; *Church v. Portland*, 18 Oregon 73; 27 Am. & Eng. Corp. Cas. 29. But he cannot

owner of a fee,¹ except in cases where the dedication is a statutory one and the statute provides that the fee shall vest in the public.² The landowner neither warrants nor represents that the land is fit for the purposes of a street,³ and the public take *secundum formam doni*.⁴

2. Prescription.⁵—Where land is used by the public as a street, under claim of right and with the knowledge of the owner, for a time corresponding to the statutory period of limitation of real actions, it may be said to have become a street by prescription, and the owner cannot afterwards deprive the public of its use as such.⁶ “But where there is no other evidence against the

impose such conditions as would prevent the use of the street and destroy its character as a public way. *Fitzpatrick v. Robinson*, 1 H. & B. 565; *Blundell v. Cotterall*, 5 B. & A. 268; 7 E. C. L. 91; *Rex v. Leake*, 2 N. & M. 595; *Dawes v. Hawkins*, 8 C. B., N. S. 848; 98 E. C. L. 848. Nor can he limit the use to only a part of the public. *Poole v. Huskisson*, 11 M. & W. 827; *Tupper v. Huson*, 46 Wis. 646; *Trerice v. Barteau*, 54 Wis. 99; *Tallmadge v. East River Bank*, 26 N. Y. 105; *Illinois Ins. Co. v. Littlefield*, 67 Ill. 368; *M. E. Church v. Mayor, etc., of Hoboken*, 33 N. J. L. 13; 97 Am. Dec. 696; *Richards v. Cincinnati*, 31 Ohio St. 506; *Des Moines v. Hall*, 24 Iowa 234; *Jackson v. Hartwell*, 8 Johns. (N. Y.) 422; *South Newmarket Meth. Seminary v. Peaslee*, 15 N. H. 317.

Where the owner of unimproved land, within the limits of an incorporated city, lays out and dedicates a portion of it as a street, then lays off lots on said street, and with a view of enhancing their value, sells them with the express stipulation that the street on which they so abut “shall be kept open to its full dimensions for all time,” if the city government accept the street, they take it incumbered with a trust in favor of the purchasers of said lots, and their successors in title; and equity will enforce that trust. *Savannah, etc., R. Co. v. Shiels*, 33 Ga. 601.

1. *O’Neal v. Sherman*, 77 Tex. 182; 19 Am. St. Rep. 743; *Ellsworth v. Lord*, 40 Minn. 337; *Western Union Tel. Co. v. Williams*, 86 Va. 696; 19 Am. St. Rep. 908; 30 Am. & Eng. Corp. Cas. 564; *Stevenson v. Mayor, etc., of Chattanooga*, 20 Fed. Rep. 586; 4 Am. & Eng. Corp. Cas. 503, and note.

2. The statute of *Michigan*, in operation in 1839, and *Wisconsin Rev. Stat.*, ch. 41, § 2, relating to the recording of town plots, both had the effect to vest the fee of the land, designated as streets, in the corporate authorities, in trust for corporate uses, and for no other. *Kimball v. Kenosha*, 4 Wis. 321. See also *Mattheisen, etc., Zinc Co. v. La Salle*, 117 Ill. 411; 14 Am. & Eng. Corp. Cas. 376.

3. He is not chargeable, therefore, with the cost of filling excavations or removing obstructions, nor is he liable for injuries caused thereby after the way has passed under the control of the public authorities. *State v. Society*, 44 N. J. L. 502; *Fisher v. Prowse*, 2 B. & S. 770; 31 L. J., Q. B. 219; 110 E. C. L. 770; *Cornwall v. Metropolitan Comrs. of Sewers*, 10 Exch. 771; *Robbins v. Jones*, 15 C. B., N. S. 221; 109 E. C. L. 221.

4. Per *Abbott. C. J.*, in *Barraclough v. Johnson*, 3 N. & P. 233; *Rex v. Leake*, 2 N. & M. 595; *Roberts v. Karr*, 1 Camp. 262; *Boughner v. Clarksburg*, 15 W. Va. 394; *Baker v. Johnston*, 21 Mich. 319. Compare *State v. Trask*, 6 Vt. 355. See also *St. Louis v. Meier*, 77 Mo. 13; 4 Am. & Eng. Corp. Cas. 488; *Stevenson v. Mayor, etc., of Chattanooga*, 20 Fed. Rep. 58; 4 Am. & Eng. Corp. Cas. 503.

Dedication is treated under that title in vol. 5, p. 395, and in this article an attempt has been made to state the general rules as concisely as possible and to cite only the leading cases and later authorities.

5. See also *HIGHWAYS*, vol. 9, p. 366; *PRESCRIPTION*, vol. 19, p. 6.

6. *Veale v. Boston*, 135 Mass. 187; *Weld v. Brooks*, 152 Mass. 297; *Gould v. Boston*, 120 Mass. 300; *McKenna v. Boston*, 131 Mass. 143; *Reed v. North-*

owner to support the dedication but the mere fact of such user, so that the right claimed by the public is purely prescriptive, it is essential to maintain it, that the user or enjoyment should be adverse, that it is with claim of right, and uninterrupted and exclusive for the requisite length of time; but when it is said that it must be uninterrupted, this refers to the right, and not simply to an interruption of the use."¹

A certain and well-defined line of travel must be shown,² although a slight deviation on account of some obstacle will not

field, 13 Pick. (Mass.) 94; 23 Am. Dec. 662; *Odiorne v. Wade*, 5 Pick. (Mass.) 421; *Onstott v. Murray*, 22 Iowa 457; *State v. Mitchell*, 58 Iowa 567; *State v. Green*, 41 Iowa 693; *Com. v. Cole*, 26 Pa. St. 187; *Garrett v. Jackson*, 20 Pa. St. 331; *State v. Walters*, 69 Mo. 463; *State v. Wells*, 70 Mo. 635; *Wilkes Barre's Appeal*, 108 Pa. St. 313; *Blanchard v. Moulton*, 63 Me. 434; *Detroit v. Detroit, etc., R. Co.*, 23 Mich. 173; *Brownell v. Palmer*, 22 Conn. 107; *Ely v. Parsons*, 55 Conn. 83; *Stevens v. Nashua*, 46 N. H. 192; *Wallace v. Fletcher*, 30 N. H. 434; *Campton's Petition*, 41 N. H. 197; *Summers v. State*, 51 Ind. 201; *Devenpeck v. Lambert*, 44 Barb. (N. Y.) 596; *Hicks v. Fish*, 4 Mason (U. S.) 310; *State v. Hunter*, 5 Ired. (N. Car.) 369; 44 Am. Dec. 41; *Compton v. Waco Bridge Co.*, 62 Tex. 715; 8 Am. & Eng. Corp. Cas. 388; *Graham v. Hartnett*, 10 Neb. 517; *Shafer v. Stull* (Neb. 1891), 48 N. W. Rep. 882; *Marion v. Skillman*, 127 Ind. 130; *Wayne Co. Sav. Bank v. Stockwell*, 84 Mich. 586.

It is sometimes said that a highway cannot exist by prescription because prescription presupposes a grant. *Angell on Highways*, § 131. But the law relating to dedication is based largely upon the theory that "the public is an ever-existing grantee," and prescription may be supported by the additional presumption stated by Chief Justice Shaw—namely, that the way was "at some anterior period laid out and established by competent authority." *Reed v. Northfield*, 13 Pick. (Mass.) 94; 23 Am. Dec. 662; *Krier's Private Road*, 73 Pa. St. 109; "Highways by Limitation," 7 Cent. L. Jour. 123; *Wallace v. Fletcher*, 30 N. H. 434; *Veale v. Boston*, 135 Mass. 187.

1. *Dillon Munic. Corp.*, § 637, citing *Remington v. Millerd*, 1 R. I. 93; *Thayer v. Boston*, 19 Pick. (Mass.) 511;

31 Am. Dec. 157; *Talbott v. Grace*, 30 Ind. 389; *Keyes v. Tait*, 19 Iowa 123; *Detroit v. Detroit, etc., R. Co.*, 23 Mich. 173; *Green v. Oakes*, 17 Ill. 249; *Smith v. State*, 23 N. J. L. 130; *Onstott v. Murray*, 22 Iowa 457; *Com. v. Cole*, 26 Pa. St. 187; *Bush v. Johnston*, 23 Pa. St. 209; *Perry v. New Orleans, etc., R. Co.*, 55 Ala. 413; 28 Am. Rep. 740; *San Francisco v. Canavan*, 42 Cal. 541. See also, to the effect that it must be continuous and uninterrupted, *Bodfish v. Bodfish*, 105 Mass. 317; *Webster v. Lowell*, 142 Mass. 325; 14 Am. & Eng. Corp. Cas. 385; *Jones v. Davis*, 35 Wis. 376; *State v. Green*, 41 Iowa 693; *Kennedy v. Mayor, etc., of Cumberland*, 65 Md. 514; 57 Am. Rep. 346; *Shellhouse v. State*, 110 Ind. 509; *State v. Bishop*, 22 Mo. App. 435. A slight or occasional use by the owner, however, may not be sufficient to interrupt the public use. *Toof v. Decatur*, 19 Ill. App. 204; *Hart v. Red Cedar*, 63 Wis. 634; *Kelsey v. Furman*, 36 Iowa 614. Thus the mere fact that the owner put a fence or barrier across the way without evidence of the occasion, length of time it remained, or circumstances, does not necessarily, as matter of law, constitute such an interruption of the use as will defeat the rights of the public. *Weld v. Brooks*, 152 Mass. 297. See also *Bartlett v. Beardmore*, 77 Wis. 356.

The use must be under claim of right and not merely under the license or permission of the owner. *Shellhouse v. State*, 110 Ind. 109; *State v. Green*, 41 Iowa 693; *Pentland v. Keep*, 41 Wis. 490; *White v. Wiley*, 59 Hun (N. Y.) 618; *Johnson v. Lewis*, 47 Ark. 66; *Chestnut Hill, etc., Turnpike Co. v. Piper*, 77 Pa. St. 432; *Blanchard v. Moulton*, 63 Me. 434; *Green v. Bethea*, 30 Ga. 896; *Stewart v. Frink*, 94 N. Car. 487; 55 Am. Rep. 619. For instruction held good, see *White v. Foxborough*, 151 Mass. 28; 32 Am. & Eng. Corp. Cas. 97.

2. *Bryan v. East St. Louis*, 12 Ill. App.

affect the right.¹ The width of the way and the extent of the servitude is measured by the user,² unless it is based upon a claim and color of right supplied by defective proceedings to establish the way, in which case the extent of the easement may be measured by such proceedings.³

The existence of a street by prescription is generally proved by evidence that it has been known and used as such by the public for the necessary period of prescription.⁴

It has been held that, as prescription presupposes a grant, the public cannot acquire a way by prescription as against married women,⁵ minors,⁶ or insane persons,⁷ incapable of making a grant;⁸ but this doctrine has not passed unchallenged.⁹ If the existence of a highway by prescription can be based upon the presumption that the way "was at some anterior period laid out

390; *Owens v. Crossett*, 105 Ill. 354; *South Branch R. Co. v. Parker*, 41 N. J. Eq. 489.

1. *Howard v. State*, 47 Ark. 431; *Gentleman v. Soule*, 32 Ill. 271; 83 Am. Dec. 264; *Ross v. Thompson*, 78 Ind. 90. Compare *Kelsey v. Furman*, 36 Iowa 614; *State v. McGee*, 40 Iowa 595.

2. *Bartlett v. Beardmore*, 77 Wis. 356; *Ehret v. Kansas City, etc., Co.*, 20 Mo. App. 251; *Harlow v. Humiston*, 6 Cow. (N. Y.) 189; *Davis v. Clinton*, 58 Iowa 389; *State v. Trask*, 6 Vt. 355; 27 Am. Dec. 554; *Epler v. Niman*, 5 Ind. 459; *Waltman v. Rund*, 109 Ind. 366; *Hart v. Bloomfield Tp.*, 15 Ind. 226; *Kirk v. Smith*, 9 Wheat. (U. S.) 288; *Hinks v. Hinks*, 46 Me. 423; *Mt. Olive Tp. v. Hunt*, 51 N. J. L. 274. But see *State v. Morse*, 50 N. H. 9; *Bumpres v. Miller*, 4 Mich. 159.

If a street has been used and built up along a particular line, and the adjoining owners have acquiesced in the line so built upon, and treated it as the true line of the street for forty or fifty years, they cannot be permitted to change or correct the course of the street, by showing that the surveys laying it out give it a different direction. *Smith v. State*, 23 N. J. L. 130.

3. *Manrose v. Parker*, 90 Ill. 581; "Highways by Limitation," 7 Cent. L. Jour. 123, 125. Compare *Com. v. Old Colony, etc., R. Co.*, 14 Gray (Mass.) 93; *Waltman v. Rund*, 109 Ind. 366. And see *Bolton v. McShane*, 79 Iowa 26.

Thus, where a highway three rods wide was commenced by an actual recorded location, but the proceedings were irregular, it was held that, after

twenty years' adverse user by the public, the way existed of the full width of three rods as originally located, although the part traveled during the twenty years was not so wide. *Pillsbury v. Brown*, 82 Me. 450. Compare *Wayne Co. Sav. Bank v. Stockwell*, 79 Iowa 26.

4. *Com. v. Coupe*, 128 Mass. 63; *Woburn v. Henshaw*, 101 Mass. 193; 3 Am. Rep. 333; *Mosier v. Vincent*, 34 Iowa 478; *Eyman v. People*, 6 Ill. 4; *Hampson v. Taylor*, 15 R. I. 83. See also *Barker v. Clark*, 4 N. H. 380; 17 Am. Dec. 428; *Jones v. Percival*, 5 Pick. (Mass.) 485; 16 Am. Dec. 415; *Lawton v. Rivers*, 4 McCord. (S. Car.) 445; 13 Am. Dec. 741; *Rosser v. Bunn*, 66 Ala. 89. Compare *Speir v. New Utrecht*, 121 N. Y. 420.

5. *State v. Bishop*, 22 Mo. App. 435; *McGregor v. Wait*, 10 Gray (Mass.) 74; 69 Am. Dec. 305; *Reimer v. Stuber*, 20 Pa. St. 458; 59 Am. Dec. 744. But see *Schenley v. Com.*, 36 Pa. St. 29; 78 Am. Dec. 359.

6. *Watkins v. Peck*, 13 N. H. 360; 40 Am. Dec. 156; *Melvin v. Whiting*, 13 Pick. (Mass.) 184.

7. *Edson v. Munsell*, 10 Allen (Mass.) 557.

8. **Intervening Disability.**—But an intervening disability not existing at the beginning of the period of prescription, will not affect the prescriptive right. *Wallace v. Fletcher*, 30 N. H. 434; *Reimer v. Stuber*, 20 Pa. St. 458; 59 Am. Dec. 744; *Edson v. Munsell*, 10 Allen (Mass.) 566; *Peck v. Randall*, 1 Johns. (N. Y.) 176; *Tracy v. Atherton*, 36 Vt. 503.

9. See Elliott on Roads and Streets 139, 140.

and established by competent authority," as stated in some of the cases, it would seem that the legal disability of the owner, preventing the presumption of a grant, can make no difference.¹

3. Proceedings Under Legislative Authority²—a. JURISDICTION.—Proceedings to establish and lay out highways under legislative authority are so far governed by statutory provisions that it is difficult to lay down general rules of universal application in all the States. The original proceedings are generally instituted before local tribunals of limited jurisdiction, such as boards of supervisors, county commissioners, county judges, street commissioners, or common councils, and, no matter what the title of the tribunal may be, its authority over such matters is of a judicial nature.³ It is essential to the validity of the proceedings that

1. Even if prescription must be based upon the presumption of a grant, it might, as against a married woman, be presumed that her husband had joined her in granting the way, thus rendering the grant effective. See remarks to this effect in the opinion of Strong, J., in *Schenley v. Com.*, 36 Pa. St. 29; 78 Am. Dec. 366.

2. See, also, *EMINENT DOMAIN*, vol. 6, p. 509; *HIGHWAYS*, vol. 9, p. 366.

3. Elliott on Roads and Streets, 218; citing *State v. Richmond*, 26 N. H. 235; *State v. Macdonald*, 26 Minn. 449; *In re Canal Street*, 11 Wend. (N. Y.) 154.

They are courts of limited statutory jurisdiction. *Doctor v. Hartman*, 74 Ind. 221; *White v. Conover*, 5 Blackf. (Ind.) 462; *Stone v. Augusta*, 46 Me. 127; *Chicago, etc., R. Co. v. Chamberlain*, 84 Ill. 333; *Northern Pac. Terminal Co. v. Portland*, 14 Oregon 24.

The common council of a city, in laying out highways, act, not as agents or officers of the city, but as public officers, vested with *quasi* judicial functions, and deriving their power from the sovereign authority. The laying out and establishing the way is the act of the State, in the exercise of the power of eminent domain, and this power cannot be destroyed or abridged by the acts of any individual or corporation. The fact, therefore, that persons whose property is so taken, hold it under a covenant of quiet enjoyment, entered into by the city in its capacity as a municipal corporation, cannot create in their favor an exemption from this common liability. *Brimmer v. Boston*, 102 Mass. 19.

Authority to Establish and Open Streets.—The power to open new streets conferred by a city charter in-

cludes the power to lay out and establish streets, and is not limited to the opening of streets already shown on the plat of the city and its additions. *Hannibal v. Hannibal, etc., R. Co.*, 49 Mo. 480. See, also, *Hannibal v. Winchell*, 54 Mo. 172. And power to "open and extend," includes power to construct. *Matthiesen, etc., Sugar Refining Co. v. Mayor, etc., of Jersey City*, 26 N. J. Eq. 247. But power to "regulate and improve" does not include power to condemn and open. *Knowles v. Muscatine*, 20 Iowa 248.

The legislature has no power to invest the common council of a municipal corporation with authority to assess the amount of compensation due an owner whose land is taken for a street. *Lumsden v. Milwaukee*, 8 Wis. 485.

Where a municipality has complete authority to lay out and open streets, that authority is generally exclusive. *Cherry v. Keyport*, 52 N. J. L. 544. See *Norwood v. Gonzales Co.*, 79 Tex. 218.

In *Illinois*, a village street may be opened by sections. *People v. Hyde Park*, 117 Ill. 462. See also *Ripka's Appeal*, 21 Pa. St. 55.

A municipal corporation has not the power or authority to take the property of the State, purchased by the latter for a specific object, for the purpose of appropriating the same for a public street; and such contemplated action will be enjoined. *Mayor, etc., of Atlanta v. Central R. Co.*, 53 Ga. 120.

Nor has it power, unless expressly authorized, to lay a street longitudinally over a railroad track constructed under an express legislative grant. *New Jersey, etc., R. Co. v. Long Branch Com'rs.*, 39 N. J. L. 28. See, also, *Milwaukee, etc., R. Co. v. Faribault*, 23

the tribunal should have jurisdiction of the subject-matter and of the persons whose lands are affected, but jurisdiction of the person may be waived or given by consent.¹

It is in the discretion of the legislature to declare directly the necessity for the taking, or to delegate the power to determine that matter to the appropriate instrumentalities of government;² but some tribunal must be designated to assess benefits and damages; if none is provided, there can be no valid appropriation of land.³ Provision need not, however, be made for a jury, unless the constitution so requires.⁴ Where the constitution gives the right to a jury, there must be an ordinary jury of twelve men, in the absence of anything in the constitution to the contrary.⁵ It is generally held sufficient, however, if a jury is provided for upon appeal.⁶ There must be a meeting at the time and place appointed,⁷ and the hearing must be at a general and not a special term;⁸ but where the hearing has been entered upon, an adjourn-

Minn. 167; Prospect Park, etc., R. Co. v. Williamson, 91 N. Y. 552; 14 Am. & Eng. R. Cas. 34.

See generally as to the power of cities to open streets, Shaaber v. Reading, 133 Pa. St. 643; Bull v. Southfield, 14 Blatchf. (U. S.) 216; Simmons v. Camden, 26 Ark. 276; 7 Am. Rep. 620; Shaffner v. St. Louis, 31 Mo. 264; Edgerton v. Huff, 26 Ind. 35; *In re* Claiborne St., 4 La. Ann. 7.

1. JURISDICTION, vol. 12, p. 299; McCormick v. Pennsylvania Cent. R. Co., 49 N. Y. 303; Hervey v. Edmunds, 68 N. Car. 243; Greer v. Cagle, 84 N. Car. 385; Wilson v. Zeigler, 44 Tex. 657; Iowa, etc., R. Co. v. Retter, 36 Iowa 568; Stoughton v. Mott, 13 Vt. 175; Thatcher v. Powell, 6 Wheat. (U. S.) 119; Folger v. Columbian, etc., Ins. Co., 99 Mass. 267; Davis v. Davis, 36 Ind. 160; *In re* College Street, 11 R. I. 472.

The adoption of the city charter, after proceedings for the establishment of a town-way have been commenced before county commissioners, does not oust them of jurisdiction to pass an order, before the city government is organized, for the construction of the way. Durant v. Lawrence, 1 Allen (Mass.) 125.

2. Backus v. Lebanon, 11 N. H. 25; 35 Am. Dec. 466; Pratt v. Brown, 3 Wis. 603; Anderson v. Turbeville, 6 Coldw. (Tenn.) 150; Smeaton v. Martin, 57 Wis. 364; State v. Shawnee Co., 28 Kan. 431; People v. Smith, 21 N. Y. 595; Chicago v. Wright, 69 Ill. 327; Scudder v. Trenton, etc., R. Co., 1 N. J.

Eq. 694; 23 Am. Dec. 756; Fairchild v. St. Paul, 46 Minn. 540.

"Whether a city will open a street or not is discretionary with it; and the exercise of its discretion either way gives no right to any one who may have miscalculated the final action of the city and expended money accordingly." Collins v. Savannah, 77 Ga. 745.

3. Ames v. Lake Superior, etc., R. Co., 21 Minn. 241; Allen v. Jones, 47 Ind. 442; Pennsylvania R. Co. v. Huster, 8 Pa. St. 445; Comrs. of Highways v. Newby, 31 Ill. App. 378.

4. EMINENT DOMAIN, vol. 6, p. 613; Livingstone v. Mayor, etc., of N. Y., 8 Wend. (N. Y.) 85; 22 Am. Dec. 622; Vanhorne v. Dorrance, 2 Dall. (U. S.) 308; Backus v. Lebanon, 11 N. H. 19; 35 Am. Dec. 466, and note; Copp v. Henniker, 55 N. H. 189; 20 Am. Rep. 194; Trigally v. Memphis, 6 Coldw. (Tenn.) 382.

5. Lamb v. Lane, 4 Ohio St. 167; Cooley's Const. Lim. (4th ed.) 394; 2 Dillon's Munic. Corp., § 618.

6. *In re* Wells Co. Road, 7 Ohio St. 16; Reckner v. Warner, 22 Ohio St. 275; Cairo, etc., R. Co. v. Trout, 32 Ark. 17; Bass v. Fort Wayne, 121 Ind. 389; Maxwell v. Fulton Co., 119 Ind. 20; 24 Am. & Eng. Corp. Cas. 584; Hapgood v. Doherty, 8 Gray (Mass.) 373; Flint River Steamboat Co. v. Foster, 5 Ga. 194; 48 Am. Dec. 248; Stuart v. Mayor, etc., of Baltimore, 7 Md. 500.

7. Hobbs v. Tipton Co., 103 Ind. 575.

8. Platter v. Elkhart Co., 103 Ind. 360.

ment may be made before it is completed, unless forbidden by statute.¹

The members of the tribunal appointed to assess benefits and damages must take the proper oath before entering upon the discharge of their duties, and the failure to do so will render their report bad upon motion to quash.² But where a party knows that a member of the tribunal has not been sworn, he must make a seasonable objection or the irregularity will be waived.³

In the absence of a statutory provision authorizing a majority of the commissioners or appraisers to hear and determine the matter, all must be present at the hearing; but it is held that a majority may make the report of the award.⁴

*b. PARTIES.*⁵—All persons whose rights are substantially affected by the proceedings, should be made parties, or in some manner have an opportunity to be heard.⁶ But, as a general rule, only those whose titles or interests appear of record need be made parties.⁷ Where, however, a person is in possession claiming ownership of the property, or an interest therein, he ought also to be made a party.⁸

1. *Wood v. Comrs.*, 62 Ill. 391; *Board of Supervisors v. Magoon*, 109 Ill. 142; *State v. Vanbuskirk*, 21 N. J. L. 86; *Goodwin v. Wethersfield*, 43 Conn. 437; *Polly v. Saratoga, etc., R. Co.*, 9 Barb. (N. Y.) 449; *Ruhland v. Hazel Green*, 55 Wis. 664.

2. *Frith v. Inferior Court*, 30 Ga. 723; *Crossett v. Owens*, 110 Ill. 378; *Low v. Galena, etc., R. Co.*, 18 Ill. 324; *Walters v. Houck*, 7 Iowa 72; *Keenan v. Comrs. Court*, 26 Ala. 568; *Harper v. Lexington, etc., Co.*, 2 Dana (Ky.) 227; *Spring v. Lowell*, 1 Mass. 422; *Bowler v. Drain Comrs.*, 47 Mich. 154; *State v. Laurence*, 5 N. J. L. 981; *State v. Potts*, 4 N. J. L. 396; *State v. Northrop*, 18 N. J. L. 271; *Lyman v. Burlington*, 22 Vt. 131; *Bohlman v. Green, Bay, etc., Co.*, 40 Wis. 157; *Cambria St.*, 75 Pa. St. 357.

3. *Wentworth v. Farmington*, 51 N. H. 128; *Town v. Stoddard*, 30 N. H. 23; *Goodwin v. Milton*, 25 N. H. 458; *Roberts v. Williams*, 13 Ark. 355; *State v. Horn*, 34 Kan. 556; *Hobbs v. Tipton Co.*, 103 Ind. 575; *Barlow v. Highway Comrs.*, 59 Mich. 443; *In re Johnson*, 49 N. J. L. 381; *Henry Co. v. Harper*, 38 Ill. 103; *Wood v. Comrs. of Highways*, 62 Ill. 391.

4. *Elliott on Roads and Streets* 230; *Board of Water Comrs. v. Lansing*, 45 N. Y. 19; *Woolsey v. Tompkins*, 23 Wend. (N. Y.) 324; *In re Fourth Ave.*, 11 Abb. Pr. (N. Y.) 189; *Plymouth v.*

Plymouth Co., 16 Gray (Mass.) 341; *Hall v. People*, 57 Ill. 307; *Young v. Buckingham*, 5 Ohio 485; *McLellan v. Kennebec Co.*, 21 Me. 390; *Van Steenberg v. Bigelow*, 3 Wend. (N. Y.) 42; *Ex parte Rogers*, 7 Cow. (N. Y.) 526; *In re Baltimore Turnpike*, 5 Binn. (Pa.) 481.

5. See, generally, on the subject of parties, *PARTIES TO ACTIONS*, vol. 17, p. 470.

6. A statute which does not provide for notice or give the property-owner some reasonable opportunity to be heard is unconstitutional. *Stuart v. Palmer*, 74 N. Y. 190; 30 Am. Rep. 289; *People v. O'Brien*, 111 N. Y. 1; *East Kingston v. Towle*, 48 N. H. 57; *State v. Lindell Hotel Co.*, 9 Mo. App. 455; *South Platte Land Co. v. Buffalo Co.*, 7 Neb. 256; *Kuntz v. Sumption*, 117 Ind. 1; 23 Am. & Eng. Corp. Cas. 531. See, also, *Bennett v. Buffalo*, 17 N. Y. 383; *Shove v. Manitowoc*, 57 Wis. 5; *Philadelphia v. Miller*, 49 Pa. St. 448; *Harwood v. North Brookfield*, 130 Mass. 561; *Lehman v. Robinson*, 59 Ala. 219.

7. *Elliott on Roads and Streets*, 233.

8. *Anderson v. Pemberton*, 89 Mo. 61; *Lexington, etc., Turnpike Road Co. v. McMurtry*, 3 B. Mon. (Ky.) 516; *Stonechan v. London, etc., R. Co.*, L. R., 7 Q. B. 1. See also *Sherwood v. St. Paul, etc., R. Co.*, 21 Minn. 124; 11 Am. Ry. Rep. 370; *Missouri, etc., R.*

The statutes of the different states generally provide that all "owners" of the property affected should be made parties. This term should be so construed as to include "all who have an estate in the land, and whose interests appear of record."¹ Where there is a vested estate, the owner should be made a party, no matter whether the estate is a present estate or one in remainder or reversion.² A tenant is also generally considered as an owner, and should, therefore, be made a party.³ A trustee, and not his beneficiary, should be made a party,⁴ and the heirs of a deceased owner, and not his administrator, are the proper parties.⁵ Mortgagees are also necessary parties.⁶ A vendor of land, holding the legal title, is the owner, and should be made a party, notwithstanding he may, in equity, hold it for the benefit of his vendee who has not yet obtained the legal title.⁷

Co. v. Owen, 8 Kan. 409. This is the rule wherever the circumstances are such as to impart notice.

Rival Claimants.—The petitioners are not bound to make rival claimants parties. In such cases the money can be paid into court. See *San Francisco etc., R. Co. v. Mahoney*, 29 Cal. 112; *Bell v. Cox*, 122 Ind. 153; *Wooster v. Sugar River Valley R. Co.*, 57 Wis. 311; 10 Am. & Eng. R. Cas. 499; *South Park Comrs. v. Todd*, 112 Ill. 379.

1. Elliott on Roads and Streets, 235.

2. *State v. Easton, etc., R. Co.*, 36 N. J. L. 181; *Columbia, etc., R. Co. v. Geisse*, 35 N. J. L. 558; *Parks v. Boston*, 15 Pick. (Mass.) 198; *Whitman v. Boston, etc., R. Co.*, 3 Allen (Mass.) 133; *Enfield Toll Bridge Co. v. Hartford, etc., R. Co.*, 17 Conn. 454; 44 Am. Dec. 556; *Shelton v. Derby*, 27 Conn. 414; *New Orleans, etc., R. Co. v. Frederic*, 46 Miss. 1; *Boonville v. Ormrod*, 26 Mo. 193; *Passmore v. Philadelphia R. Co.*, 9 Phila. (Pa.) 579; *Harrisburg v. Crangle*, 3 W. & S. (Pa.) 460; *Colcough v. Nashville, etc., R. Co.*, 2 Head (Tenn.) 171; *Burbridge v. New Albany, etc., R. Co.*, 9 Ind. 546; *Gerrard v. Omaha, etc., R. Co.*, 14 Neb. 270; 20 Am. & Eng. R. Cas. 423; *In re Metropolitan El. R. Co.* (Supreme Ct.), 12 N. Y. Supp. 506.

3. *Brown v. Powell*, 25 Pa. St. 229; *Storm Lake v. Iowa Falls, etc., Co.*, 62 Iowa 218; *Turnpike Road v. Brosi*, 22 Pa. St. 29; *Reed v. Hanover Branch R. Co.*, 105 Mass. 303; *Schoff v. Improvement Co.*, 57 N. H. 112; *Baltimore, etc., R. Co. v. Thompson*, 10 Md. 76; *Parks v. Botson*, 15 Pick. (Mass.) 198; *Gilligan v. Alderman*, 11

R. I. 258; *Astor v. Miller*, 2 Paige (N. Y.) 68; *Grand Rapids, etc., Co. v. Alley*, 34 Mich. 18. Compare *Bowman v. Venice, etc., R. Co.*, 102 Ill. 459; 14 Am. & Eng. R. Cas. 338.

4. *State v. Mayor, etc., of Orange*, 32 N. J. L. 49; *State v. Easton, etc., R. Co.*, 36 N. J. L. 181; *Davis v. Charles River Branch R. Co.*, 11 Cush. (Mass.) 506; *Hawkins v. Berkshire Co.*, 2 Allen (Mass.) 254.

5. *Boonville v. Ormrod*, 26 Mo. 193; *Boynton v. Petersborough, etc., R. Co.*, 4 Cush. (Mass.) 467; *Todemier v. Aspinwall*, 43 Ill. 401; *Neal v. Knox, etc., R. Co.*, 61 Me. 298. See, also, where the parties were described as the heirs of a certain person, deceased, *Carr v. State*, 103 Ind. 548. Compare *State v. Blauvelt*, 33 N. J. L. 36; *Lull v. Curry*, 10 Mich. 397.

6. *Sherwood v. Lafayette*, 109 Ind. 411; 58 Am. Rep. 414; *Philadelphia, etc., R. Co. v. Williams*, 54 Pa. St. 103; *Kennedy v. Milwaukee, etc., R. Co.*, 22 Wis. 581; *Severin v. Cole*, 38 Iowa 463; *Wilson v. European, etc., R. Co.*, 67 Me. 358; *Platt v. Bright*, 29 N. J. Eq. 128; *Cool v. Crommet*, 13 Me. 250; *In re John and Cherry Streets*, 19 Wend. (N. Y.) 659. Compare *Warren v. Gibson*, 40 Mo. App. 469.

This is the rule even where the estate mortgaged is but a leasehold estate. *Hagar v. Brainard*, 44 Vt. 294; *Astor v. Hoyt*, 5 Wend. (N. Y.) 603.

7. *Smith v. Ferris*, 6 Hun (N. Y.) 553. See also *Stewart v. White*, 98 Mo. 226; *Bird v. Great Eastern R. Co.*, 34 L. J., C. P. 366; *Curran v. Shattuck*, 24 Cal. 427. *Contra*, *St. Louis, etc. R. Co. v. Wilder*, 17 Kan. 239.

Judgment creditors need not be made parties unless the statute so provides;¹ and married women who have merely an inchoate interest in the lands of their husbands, are not necessary parties.²

c. PETITION.³—Where the statute requires a petition, such a petition is necessary in order to give jurisdiction;⁴ and the statutory requirements in regard to what it should show, must be substantially complied with.⁵ It must contain such averments as will enable the street to be established and laid out as prayed, and as will inform the parties interested of the rights and lands affected.⁶ The route must be described with reasonable certainty;⁷ and

Where, however, the legal title has passed to the vendee, he should be made a party as owner notwithstanding the vendor holds an unrecorded vendor's lien. See *Elizabethtown, etc., R. Co. v. Helm*, 8 Bush (Ky.) 681; *U. S. v. Villalonga*, 23 Wall. (U. S.) 35; *Smith v. Race*, 76 Ill. 490.

1. *Watson v. New York Cent. R. Co.*, 47 N. Y. 157; *Gimbel v. Stolte*, 59 Ind. 446.

2. *Duncan v. Terre Haute*, 85 Ind. 104; *Indianapolis v. Kingsbury*, 101 Ind. 200; 51 Am. Rep. 749; *Gwynne v. Cincinnati*, 3 Ohio 24; 17 Am. Dec. 576; *Moore v. Mayor, etc., of N. Y.*, 4 Sandf. (N. Y.) 456; 8 N. Y. 110; *Jackson v. Edwards*, 7 Paige (N. Y.) 386; *Scribner on Dower* 550, 555.

3. See also HIGHWAY, vol. 9, p. 370.

4. *State v. Morse*, 50 N. H. 9; *People v. Judge*, 40 Mich. 64; *State v. Berry*, 12 Iowa 58; *Oliphant v. Comrs.*, 18 Kan. 386; *State v. Otoe*, 6 Neb. 129.

Even where there is no statutory provision requiring a petition it is an appropriate mode of instituting the proceedings. *Vail v. Morris, etc., R. Co.*, 21 N. J. L. 189; *Com. v. Coombs*, 2 Mass. 489; *Kroop v. Forman*, 31 Mich. 144; *Prichard v. Atchison*, 3 N. H. 335.

5. But technical precision is not required, and if the petition contains more than the statute requires, it is not necessarily invalidated thereby. *Toledo, etc., R. Co. v. East Saginaw, etc., R. Co.*, 72 Mich. 206; 36 Am. & Eng. R. Cas. 553; *Windham v. Comrs.*, 26 Me. 406; *Jackson v. Rankin*, 67 Wis. 285; *Dickinson Co. v. Hogan*, 39 Kan. 606; *Dornan v. Lewiston*, 81 Me. 411; *In re Comrs. of Washington Park*, 52 N. Y. 131; *State v. O'Connor*, 78 Wis. 282.

A California statute provided that, on petition to the mayor by the owners of a majority in frontage of the

property described in such act, "as said owners are or shall be named in the last preceding annual assessment roll for the State, city and county taxes," for the opening of said street, the board constituted by the act should proceed to establish the street. *Held*, that the signatures to the petition of persons other than those to whom the property was assessed on the last preceding assessment roll could not be counted in order to make up the owners of a majority of the frontage. *Kahn v. San Francisco*, 79 Cal. 388. It was also held in the same case that the signatures of executors and agents could not be counted, in the absence of evidence of their authority to sign the petition, and that the certificate of the mayor that the petition was signed by the requisite number of property owners did not estop the city from denying the sufficiency of the petition.

6. *Curtis v. Pocahontas Co.*, 72 Iowa 151; *Elliott on Roads and Streets* 253.

7. *Hyde Park v. Norfolk Co.*, 117 Mass. 416; *Hayford v. Aroostook Co.*, 78 Me. 153; *In re Road in Sterrett Tp.*, 114 Pa. St. 627; *Clift v. Brown*, 95 Ind. 53; *Smith v. Weldon*, 73 Ind. 454; *Jackson v. Rankin*, 67 Wis. 285; *Johns v. Marion Co.*, 4 Oregon 46; *State v. Woodruff*, 36 N. J. L. 204; *Clement v. Burns*, 43 N. H. 609; *State v. Rapp*, 39 Minn. 65; *In re New York Cent., etc., R. Co.*, 70 N. Y. 191; *Toledo, etc., R. Co. v. Munson*, 57 Mich. 42; 20 Am. & Eng. R. Cas. 410. See, also, *Ames v. Union Co.*, 17 Oregon 600; 27 Am. & Eng. Corp. Cas. 60; *Packard v. Androscoggin Co.*, 80 Me. 43; *Adams v. Harrington*, 114 Ind. 66; *Casey v. Kilgore*, 14 Kan. 478; *London v. Sample Lumber Co.*, 91 Ala. 606; *National, etc., Co. v. State* (N. J. 1891), 21 Atl. Rep. 570.

where the width is not fixed by law, the petition should also state the width of the way.¹ The petition need not be verified unless the statute requires a verification.²

Objections to the form of the petition should be specific,³ and should be made promptly; otherwise, if not going to the jurisdiction, they will be regarded as waived.⁴

The courts exercise a broad discretion in allowing amendments, and defects in the petition may often be cured in that way.⁵

*d. NOTICE.*⁶—In the absence of a constitutional provision to the contrary, the legislature may authorize local officers to determine certain preliminary matters, such as the line of the proposed road or street, the necessity for it, and the mode of constructing it, without notice to the landowners;⁷ but if the constitution provides that these questions shall be submitted to a judicial tribunal, notice is necessary.⁸ And, in any case, notice at some stage of the proceedings is always essential.⁹ But where there is jurisdiction of the subject-matter, the failure to give notice to some of the property owners will not, as a general rule, vitiate the proceedings as to those who have been properly notified.¹⁰

1. *State v. Hogue*, 71 Wis. 384; 22 Am. & Eng. Corp. Cas. 375; *Watson v. Crowsore*, 93 Ind. 220.

2. *Gammell v. Potter*, 2 Iowa 562. But see *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100.

No particular form of verification is required except where it is prescribed by statute. *Updegraff v. Palmer*, 107 Ind. 181; *Detroit v. Beecher*, 75 Mich. 454; 27 Am. & Eng. Corp. Cas. 75; *Harvey v. Lloyd*, 3 Pa. St. 331; *Tucker v. Erie, etc., R. Co.*, 27 Pa. St. 281; *In re New York, etc., R. Co.*, 33 Hun (N. Y.) 148; *Skinner v. Lake View Ave. Co.*, 57 Ill. 151.

Where the statute required a verification by the city attorney, it was held sufficient for him to swear that the petition was true to the best of his knowledge and belief. *Detroit v. Beecher*, 75 Mich. 454; 27 Am. & Eng. Corp. Cas. 43.

3. *Anderson v. Baker*, 98 Ind. 587; *Higbee v. Peed*, 98 Ind. 420; *Updegraff v. Palmer*, 107 Ind. 181; *Carr v. State*, 103 Ind. 548; *Meranda v. Spurlin*, 100 Ind. 380; *Worcester v. Keith*, 5 Allen (Mass.) 17; *Howard v. Hutchinson*, 10 Me. 335.

4. *Wells v. Rhodes*, 114 Ind. 467; *Palmer v. Highway Comrs.*, 49 Mich. 45; *Bachelor v. New Hampton*, 60 N. H. 207.

As to the manner in which objections should be made, see *Elliott on Roads and Streets* 257.

5. *Burns v. Simmons*, 101 Ind. 557; *Coolman v. Fleming*, 82 Ind. 117; *Colorado Cent. R. Co. v. Allen*, 13 Colo. 29; 44 Am. & Eng. R. Cas. 193; *Young v. Laconia*, 59 N. H. 534; *Howe v. Jamaica*, 19 Vt. 607; *Webster v. Bridgewater*, 63 N. H. 296; *Russell v. Turner*, 62 Me. 496; *Perry v. Sherborn*, 11 Cush. (Mass.) 388; *Windham v. Litchfield*, 22 Conn. 226; *Pennsylvania R. Co. v. German Lutheran Congregation*, 53 Pa. St. 445.

6. See also *HIGHWAY*, vol. 9, p. 372.

7. *Weaver v. Templin*, 113 Ind. 298; *Zimmermann v. Canfield*, 42 Ohio St. 463; 9 Am. & Eng. Corp. Cas. 382; *Lent v. Tillson*, 72 Cal. 404; 19 Am. & Eng. Corp. Cas. 640; *Preble v. Portland*, 45 Me. 241; *Baltimore, etc., R. Co. v. Pittsburgh, etc., R. Co.*, 17 W. Va. 812; 10 Am. & Eng. R. Cas. 444; *People v. Smith*, 21 N. Y. 595.

8. *Leifert v. Brooks*, 34 Wis. 443; *Baltimore, etc., R. Co. v. Pittsburgh, etc., R. Co.*, 17 W. Va. 812; 10 Am. & Eng. R. Cas. 444.

9. *Elliott on Roads and Streets*, 150, 241; *Tracy v. Elizabethtown, etc., R. Co.*, 80 Ky. 259; 14 Am. & Eng. R. Cas. 407; *Union Pac. R. Co. v. Leavenworth, etc., R. Co.*, 29 Fed. Rep. 728; 2 *Dillon's Munic. Corp.*, § 606.

10. *State v. Richmond*, 26 N. H. 235; *Nichols v. Salem*, 14 Gray (Mass.) 490; *State v. Eastern, etc., R. Co.*, 36

Where the statute provides that notice shall be given in a particular manner, it must be given substantially as the statute prescribes.¹ But it is generally sufficient to give notice to those whose titles or interests appear of record.² The form of the notice is not material, provided it contains all the statutory requisites.³ The service of notice and proof thereof, must be made in the manner prescribed by the statute,⁴ and the courts

N. J. L. 181; *Kidder v. Jennson*, 21 Vt. 108. But compare *Anderson v. Pemberton*, 89 Mo. 61.

1. *Owners of Ground v. Mayor, etc., of Albany*, 15 Wend. (N. Y.) 374; *Cox v. Comrs. of Highways*, 83 Mich. 193; *Conley v. Grove*, 124 Ind. 208.

Even where personal notice is given, it will be insufficient if the statute provides that it shall be given by publication, unless the elements necessary to create an estoppel exist. *Jackson v. Dyar*, 104 Ind. 516; *Adams v. Clarksburg*, 23 W. Va. 203; *Wagner v. Salzburg*, 132 Pa. St. 636.

Notice by Publication.—The legislature may provide for constructive notice by publication. *St. Paul, etc., R. Co. v. Minneapolis*, 35 Minn. 141; 24 Am. & Eng. R. Cas. 309; *Wilson v. Hathaway*, 42 Iowa 173; *State v. Chicago, etc., R. Co.*, 80 Iowa 586; *Davies v. Los Angeles*, 86 Cal. 37.

The *Maryland Code*, which provides that, before any ordinance shall be passed for opening, extending, or widening a street in the city of Baltimore, sixty days' notice of an application for its passage shall be given in two of the daily newspapers of the city, requires in terms but one publication of such notice, leaving it with the city council to determine when sufficient publicity has been given to the application. *Central Sav. Bank v. Mayor, etc., of Baltimore*, 71 Md. 515. See, also, *Philadelphia, etc., R. Co. v. Shipley*, 72 Md. 88, in which it was held discretionary with the examiner for the opening of a street to determine whether more than one publication should be made.

In *New York*, under the city charter of *Amsterdam*, which does not provide for notice to the owners of property to be assessed for the opening of a street, it was held that a published notice that the city proposed to extend a street is not a sufficient notice to them, to validate an assessment of damages on lands beyond those bounded by the extended street. *In re*

Amsterdam, 55 Hun (N. Y.) 270. See, also, as to the requisites of the notice required under other city charters in *New York, In re Orange Street*, 50 How. Pr. (N. Y.) 244. As to the rule in *Pennsylvania*, see *Darlington v. Com.*, 41 Pa. St. 68.

2. *Wilson v. Hathaway*, 42 Iowa 173; *Pickford v. Mayor, etc., of Lynn*, 98 Mass. 491. See, also, *Chicago, etc., R. Co. v. Ellithorpe*, 78 Iowa 415; *State v. Chicago, etc., R. Co.*, 80 Iowa 486.

Notice to a station agent was held good in *Wisconsin* as notice to "the occupant," where the highway was proposed to be laid out through the depot grounds. *State v. O'Connor*, 78 Wis. 282.

3. *Whitcher v. Benton*, 48 N. H. 157; 97 Am. Dec. 597; *Norton v. Walkill R. Co.*, 63 Barb. (N. Y.) 77; *New Orleans, etc., Co. v. Frederic*, 46 Miss. 1.

The notice of a proceeding to levy a special assessment to open an alley is sufficiently certain if it states the location of the alley and the land to be taken, in the language of the ordinance, giving the numbers of lots in the block and the portions to be taken for the alley. *Hemingway v. Chicago*, 60 Ill. 324.

Under the *Wisconsin* statute requiring the notice of the supervisors' meeting, at which they will decide upon the petition to specify the several tracts through which the highway may pass, to be served on the occupants of such tracts, a notice is sufficient which describes the land included in the proposed highway as a portion of the right of way of a railway company, giving the government subdivisions of which it is a part. *State v. O'Connor*, 78 Wis. 282.

In *Iowa*, the notice must be authenticated by the county auditor, according to the statute; but this does not require that it should be under seal. *State v. Chicago, etc., R. Co.*, 80 Iowa 586.

4. *State v. Elizabeth*, 32 N. J. L. 357;

have no power to authorize a different method of service or proof of service.¹

Notice may be waived by a property owner, and the waiver may be either express or implied. If the owner enters a full appearance to the proceedings, without notice, he will generally be deemed to have waived it.²

c. VIEWERS AND COMMISSIONERS.—In most of the states there are statutes providing that the benefits and damage shall be assessed by viewers, commissioners, or appraisers, and in many of the states the question of the public necessity or utility of the road is also submitted to them. It would seem that they ought to hear evidence upon all questions of value;³ but there are some cases which hold that this is a matter entirely within their own discretion.⁴ If evidence is submitted to them they ought to hear it in some legal manner, so that the adverse party may have an opportunity to hear and meet it.⁵

Vizzard v. Taylor, 97 Ind. 90; *Jackson v. Dyar*, 104 Ind. 516; *Babb v. Carver*, 7 Wis. 124; *Adams v. Clarksburg*, 23 W. Va. 203; *People v. Stedman*, 57 Hun (N. Y.) 280; *In re Gardner*, 41 Mo. App. 589.

A certificate of publication of a notice, which failed to state the last day on which publication was made, was held not sufficient evidence that the publication required by law had been completed. *Hemingway v. Chicago*, 60 Ill. 324.

Leaving a copy of the notice at the residence of the landowner, with a member of his family, is a sufficient service. *State v. Trenton* (N. J. 1890), 20 Atl. Rep. 738.

1. *Purdy v. Martin*, 31 Mich. 455; *People v. Nankin*, 14 Mich. 528; *Dupont v. Highway Comrs.*, 28 Mich. 362; *Lancaster v. Pope*, 1 Mass. 86; *Van Wickle v. Camden, etc.*, R. Co., 14 N. J. L. 162; *Skinner v. Lake View Ave. Co.*, 57 Ill. 151; *Jones v. Barclay*, 2 J. J. Marsh. (Ky.) 73.

2. See, as to what acts constitute a waiver, *Seifert v. Brooks*, 34 Wis. 443; *Lumsden v. Milwaukee*, 8 Wis. 485; *Hood v. Finch*, 8 Wis. 381; *Damp v. Dane*, 29 Wis. 419; *Langford v. Ramsey Co.*, 16 Minn. 376; *Milhollin v. Thomas*, 7 Ind. 165; *Parish v. Gilmananton*, 11 N. H. 293; *Onken v. Riley*, 65 Tex. 468; *Windsor v. Field*, 1 Conn. 279; *Polly v. Saratoga, etc.*, R. Co., 9 Barb. (N. Y.) 449; *Tingley v. Providence*, 9 R. I. 388; *Com. v. Westborough*, 3 Mass. 406; *Barre Turnpike Corp. v. Appleton*, 2 Pick. (Mass.) 430.

A city that has taken land and actually constructed a highway over it, cannot object that no notice was given of the purpose to locate the way, or that the names of the owners of the land were not stated in the lay-out. *Haskell v. Bristoe Co.*, 9 Gray (Mass.) 341.

3. *Washington, etc., R. Co. v. Switzer*, 26 Gratt. (Va.) 661. See *Cobb v. Boston*, 109 Mass. 438.

4. *Pennsylvania R. Co. v. Keiffer*, 22 Pa. St. 356; *St. Paul, etc., R. Co. v. Covell*, 2 Dak. 483; *Readington v. Dilley*, 24 N. J. L. 209; *Lyman v. Burlington*, 22 Vt. 131.

5. *Peavey v. Wolfborough*, 37 N. H. 286; *Patten's Petition*, 16 N. H. 277; *Harris v. Woodstock*, 27 Conn. 567; *Lennox v. Knox, etc.*, R. Co., 62 Me. 322; *Lehigh Valley, etc., R. Co. v. Dover, etc.*, R. Co., 43 N. J. L. 528; 14 Am. & Eng. R. Cas. 87.

See, generally, as to appointment and qualifications of viewers and the hearing of evidence, EMINENT DOMAIN, vol. 6, pp. 616-618. As to burden of proof, see EMINENT DOMAIN, vol. 6, p. 622.

In *Maryland*, it is held that the commissioners who are appointed by ordinance to exercise the corporate authority in the matter of opening or widening streets act only in an official capacity, and no change in the *personnel* of such board, pending proceedings therein, can affect the course or validity of the proceedings. *Central Sav. Bank v. Mayor, etc.*, of Baltimore, 71 Md. 515.

So, in *Massachusetts*, it is held that the board of officers authorized by stat-

The report or verdict of the viewers or commissioners should comply substantially with the requirements of the statute in all material matters.¹ It should contain a finding upon all questions properly submitted to them;² but where the report is a mere preliminary one, omissions and irregularities in the report are not, ordinarily, sufficient to cause a dismissal or vaca-

ute to lay out or widen streets and assess taxes therefor, act in a *quasi* judicial capacity, and cannot empower one of their number to make a binding agreement as to betterments, with a person whose estate is liable therefor. *Boylston Market Assoc. v. Boston*, 113 Mass. 528.

Under the *New Jersey* act of March 20, 1857, the commissioners appointed by the common council have the exclusive power in laying out streets, and this power is not discretionary, but must be exercised for the public benefit. *State v. Newark*, 28 N. J. L. 491.

It must appear affirmatively that a commissioner appointed in a particular case to make assessments for opening a street had the requisite qualifications. But where commissioners to make assessments are appointed to serve as officers of the city, for a specified term, their qualifications need not appear. *State v. Mayor, etc., of Jersey City*, 38 N. J. L. 85.

Under the charter of East Saginaw, which provides that when the council order public improvements, they shall "designate and direct three resident freeholders to make an assessment upon all the owners, etc., of the expense in proportion to the advantage which each shall acquire," etc., it is held that the common council has no authority to give directions to the commissioners which shall govern them in making the assessment. *Steckert v. East Saginaw*, 22 Mich. 104.

A city charter provided that after the common council resolved to lay out any street or highway, they should appoint a committee to make such lay-out, and to report, in writing, their doings to said common council, etc. A petition for a lay-out having been presented to the council, it was referred to the standing committee on streets and sidewalks, who recommended that the prayer be granted, and the council thereupon resolved "that Colorado avenue be, and is hereby, ordered extended from Fairfield avenue northerly to North avenue, said extension . . . to be fifty feet in width, and to be in accordance

with red lines on map prepared by" the city engineer; also "that the committee on streets and sidewalks be, and is hereby appointed a special committee to procure and report . . . a survey and particular description of" said street. The committee thereafter made a report laying out the proposed extension, which report was approved by the council. *Held*, that the standing committee was the proper one, acting as a special committee, to lay out the street, and that the lay-out was valid. *Hough v. Bridgeport*, 57 Conn. 290. See further, as to qualifications and powers of commissioners, the note in 32 Am. & Eng. Corp. Cas. 138-140.

1. *State v. Scott*, 9 N. J. L. 17; *Thompson v. Multonomah Co.*, 2 Oregon 34; *State v. Mayor, etc., of Jersey City*, 25 N. J. L. 309; *O'Hara v. Pennsylvania R. Co.*, 25 Pa. St. 445; *Martin v. Rushton*, 42 Ala. 289; *Damrell v. San Joaquin Co.*, 40 Cal. 154; *Windsor v. Field*, 1 Conn. 279; *Gherkey v. Haines*, 4 Blackf. (Ind.) 159; *Pierce v. Franklin Co.*, 63 Me. 252; *Bryant v. Glidden*, 36 Me. 36.

Under the charter of East Portland, the report of the city surveyor must contain the plat of such survey of said street. A statement in such report that the plat of such survey "is shown on the plat on file with the recorder" is insufficient. *Ladd v. East Portland*, 18 Oregon 87.

Where the statute provides for notice and the hearing of objections to the report before final action thereon, all objections to the form of the report not made in the manner prescribed by the statute will be deemed waived. *McKusick v. Stillwater*, 44 Minn. 372.

2. *Butterworth v. Bartlett*, 50 Ind. 537; *Bowers v. Snyder*, 66 Ind. 340; *McClary v. Hartwell*, 25 Mich. 139.

Thus, where the statute requires that they shall pass upon the question of public utility or necessity, there must be a finding upon that question in their report or verdict. *Bass v. Elliott*, 105 Ind. 517; *Arnold v. Decatur*, 29 Mich. 77. See, also,

tion of the entire proceedings; they should be reached by motion to vacate or set aside the report.¹

"In strictness, the report should contain a full and clear statement of the damages sustained by each parcel of property, where several parcels are included in the assessment; but it is not necessary that the items constituting the damages should be stated in detail, unless the statute requires that it should be done."² Where the different parcels are owned by different persons, that belonging to each particular owner should be separately considered, and the damages to each awarded and stated accordingly.³ But where a single tract is owned by several persons jointly, it is proper to state the amount of damages in gross.⁴

Fletcher v. Fugate, 3 J. J. Marsh. (Ky.) 631; *Peck v. Whitney*, 6 B. Mon. (Ky.) 117; *Wood v. Campbell*, 14 B. Mon. (Ky.) 399; *Daveiss v. Co. Court*, 1 Bibb (Ky.) 514.

1. *Brown v. Stewart*, 86 Ind. 377. See, also, *State v. Parker* (N. J. 1891), 20 Atl. Rep. 1074; *Taliaferro v. Roach* (Ky. 1890), 12 S. W. Rep. 1039.

Formal omissions and mere clerical errors may, in such a case, be corrected by resubmitting the matter to the viewers or commissioners. *Missouri Pac. R. Co. v. Hays*, 15 Neb. 224; *New Orleans, etc., R. Co. v. Zeringue*, 23 La. Ann. 521; *People v. White*, 59 Barb. (N. Y.) 666; *Green v. East Had-dam*, 51 Com. 547; *Coleman v. Andrews*, 48 Me. 562; *Pueblo, etc., R. Co. v. Rudd*, 5 Colo. 270; *In re Curtiss Street*, 1 Buff. Super. Ct. (N. Y.) 425.

2. *Elliott on Roads and Streets* 264, citing, *Ohio, etc., R. Co. v. Wallace*, 14 Pa. St. 245; *Ford v. Lincoln Co.*, 64 Me. 408; *Michigan Air Line R. Co. v. Barnes*, 44 Mich. 222. See, also, to same effect, *Oregon R. Co. v. Bridwell*, 11 Oregon 282; 17 Am. & Eng. R. Cas. 130; *Delaware, etc., R. Co. v. Burson*, 61 Pa. St. 369.

3. *Com. v. Coombs*, 2 Mass. 489; *Harris v. Howes*, 75 Me. 436; *Honestine v. Vaughan*, 7 Blackf. (Ind.) 520; *State v. Fischer*, 26 N. J. L. 129; *Rusch v. Milwaukee, etc., R. Co.*, 54 Wis. 136.

4. *Thornton v. North Providence*, 6 R. I. 433; *Snoddy v. Pettes Co.*, 45 Mo. 361; *Pittsburgh, etc., R. Co. v. Hall*, 25 Pa. St. 336. See also *Cox v. Mason, etc., R. Co.*, 77 Iowa 25.

Where a city charter required the damages for street openings to be assessed by three freeholders, and one of

the three viewers appointed was not a freeholder—held, that the appointment was not void. The mistake was in the confirmation of their report, which had the effect of a judgment and could not be inquired into collaterally. *Pittsburgh v. Cluley*, 74 Pa. St. 262.

Though the provisions of a city charter requiring a city assessor to be appointed on each commission of assessment for local improvements is unconstitutional, this objection is not available to avoid the proceedings of a commission, if it does not appear that such appointment was made. *Ganson v. Buffalo*, 2 Abb. App. Dec. (N. Y.) 236.

Where, under the charter of a city, certain commissioners of assessments were required to file their report and a map, within twenty days after an ordinance was referred to them by the council, the neglect to file them within the time specified will render void their proceedings. *State v. Bayonne*, 35 N. J. L. 332.

Where the provisions of a city charter relative to street openings required the common council to appoint a committee to negotiate for the lands required for such improvements, it was held that the omission by the committee so appointed to negotiate for the land, to make application to each landowner whose land was to be taken, was not a fatal defect in the proceedings, where the committee had reported to the common council their inability to agree with some of the landowners to negotiate or sell their land, upon which report the common council proceeded to apply for the appointment of commissioners of estimate and assessment of damages, etc. The application for a commission did not prevent further ne-

f. ORDER.—The order establishing the way must cover substantially the same way described in the petition or application, but an unimportant deviation from the route described in the petition will not affect the validity of the proceedings.¹

It is provided by statute in many of the States that the order must be recorded or filed with the proper officer, and where this is required it is generally held that the statute must be complied with before the way can be opened for travel.² But where the order has been duly made and filed, its loss thereafter will not defeat the rights of the public in the way as laid out.³

g. BENEFITS AND DAMAGES.—Private property cannot be taken for public use as a street without paying or securing to the owner just compensation therefor. The compensation must be

gotiation for the land of those who were willing to sell; and it would not, even after the appointment of commissioners. *Havermans v. Troy*, 50 How. Pr. (N.Y.) 510.

Under a city charter authorizing the common council, when a street is to be laid out, to purchase the right of way of the owners if the parties can agree upon the price, and providing that in case they cannot agree it shall be lawful for a justice to issue a *venire* to summon a jury of freeholders to pass upon the necessity of using the grounds and to assess the value, the power of the justice to issue the *venire* depends upon the failure of the parties to agree upon the price; and the fact of such failure is not one the justice can take judicial notice of, but it is to be proved or shown to him in such form as to be matter of record in his office. *Morseman v. Ionia*, 32 Mich. 283.

1. *McDonald v. Payne*, 114 Ind. 359; *People v. Carman*, 47 Hun (N. Y.) 380.

An order is not invalid because it describes the highway with more definiteness and certainty than did the petition, but describes the same line, except that it extends the line about twenty rods farther than one of the termini designated in the petition, the same being done at the request of the owner of the land over which it was so extended, who released all claim for damages. *State v. O'Connor*, 78 Wis. 282.

An ordinance of the common council declared that a certain street should be laid out and opened as defined on the map filed in the office of the town clerk, and then, under a *videlicet*, purported to state what that definition was, but made a mistake in

the figures. *Held*, that this was not material, and that the rule "*falsa demonstratio, non nocet*" fairly applied, there being enough remaining, after rejecting the false description, from which the exact locality of the street might be ascertained with all legal certainty. *State v. Mayor, etc., of Orange*, 32 N. J. L. 49.

An order of the mayor and aldermen of a city, for the laying out and establishing of a highway, having described the same as "delineated on a plan now before this board"—held, that the laying out was sufficiently certain; that the limits of the highway might be proved by reference to the plan; and that parol evidence was admissible to show that a plan produced from the custody of the city clerk was the plan before the board when the order for laying out was made. *Stone v. Cambridge*, 6 Cush. (Mass.) 270.

2. *Prescott v. Beyer*, 34 Minn. 493; *Dolphin v. Pedley*, 27 Wis. 469; *Comrs. of Highways v. Barry*, 66 Ill. 496; *Cole v. Vankeuren*, 6 Thomp. & C. (N. Y.) 480. *Compare* *Frame v. Boyd*, 35 N. J. L. 457.

It cannot, ordinarily, be shown by parol that the board of town trustees had determined to appropriate the land referred to in the report, where no order has ever been filed and the record shows nothing further than the appointment of commissioners and filing of their report. *Byer v. New Castle*, 124 Ind. 86.

3. *State v. O'Laughlin*, 29 Kan. 20.

In *Maryland*, after an order of confirmation of an award has been made it cannot be revoked. *Philadelphia, etc., R. Co. v. Shipley*, 72 Md. 88.

a pecuniary one, but in many of the states benefits which are special and peculiar to the estate of the land owner may be set off as against the damages. In some states the benefits can be set off as against the incidental injuries or damages to the part of the tract not taken, but not as against the value of the part actually taken; while in others, it is held that they can also be set off against the value of the land.¹ This subject has, however, been so fully treated in other parts of this work that it is now necessary to do no more than refer to the titles under which it is treated and to the later authorities, which are cited in the note below.²

h. ABANDONMENT AND DISMISSAL OF PROCEEDINGS.—The municipality may generally abandon or dismiss the proceedings at any time before confirmation or final judgment;³ but the landowner may have a special action for damages for any wrongful and injurious acts performed by it in the course of the proceedings.⁴

i. APPEAL AND CERTIORARI.—Unless there is some statute giving the right to appeal, the judgment of the tribunal having original jurisdiction is final.⁵ But wherever there is a general statute authorizing an appeal, the courts, unless forbidden by some statutory provision, will extend the right to highway cases.⁶

1. See Elliott on Roads and Streets 188, 189.

2. See EMINENT DOMAIN, vol. 6, pp. 563-597; IMPROVEMENTS, vol. 10, pp. 271-273; CONSTITUTIONAL LAW, vol. 3, p. 718.

See, also, *White v. Foxborough*, 151 Mass. 28; 32 Am. & Eng. Corp. Cas. 97, and note 107; *Omaha v. Howell Lumber Co.* 30 Neb. 633; 32 Am. & Eng. Corp. Cas. 116, and note 117-119; *Doyle v. Austin*, 47 Cal. 353; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641; *De Buol v. Freeport*, etc., R. Co., 111 Ill. 499; *San José*, etc., R. Co. v. *Mayne*, 83 Cal. 566; *Allen v. Boston*, 137 Mass. 319; *St. Louis v. Speck*, 4 Mo. App. 244; *Jamison v. Springfield*, 53 Mo. 224; *Mittel v. Chicago*, 9 Ill. App. 534; *In re Ruan Street*, 132 Pa. St. 257; 32 Am. & Eng. Corp. Cas. 316; *French v. Lowell*, 117 Mass. 363; *McCormick v. Mayor*, etc. of *Baltimore*, 45 Md. 512; *Patch v. Boston*, 146 Mass. 52; *Mayer v. Mayor*, etc., of N. Y., 101 N. Y. 284; 11 Am. & Eng. Corp. Cas. 527; *State v. Bayonne*, 51 N. J. L. 428.

As to whom the damages belong where the owner dies or the land is transferred, see *Oliver v. Pittsburg*, etc., R. Co., 131 Pa. St. 408; *Smith v. Nashville*, etc., R. Co., 88 Tenn. 611; Ap-

peal of *Warrell*, 130 Pa. St. 600; *Evans v. Savannah*, etc., R. Co., 90 Ala. 54; *Porter v. Metropolitan*, etc., R. Co., 120 N. Y. 284; *Walley v. Platte*, etc., R. Co., 15 Colo. 579; *Sherwood v. Lafayette*, 109 Ind. 411; 58 Am. Rep. 414; *Bailey v. Briant*, 117 Ind. 362.

3. *Brokaw v. Terre Haute*, 99 Ind. 451; 7 Am. & Eng. Corp. Cas. 450; *Mayor v. Musgrave*, 48 Md. 272; 30 Am. Rep. 458; *St. Louis v. Thomas* (Mo. 1890), 13 S. W. Rep. 685; *In re Anthony Street*, 20 Wend. (N. Y.) 618; 32 Am. Dec. 608; *Millard v. Lafayette*, 5 La. Ann. 112; *St. Joseph v. Hamilton*, 43 Mo. 282; *Pillsbury v. Springfield*, 16 N. H. 565; *Carson v. Hartford*, 48 Conn. 68; *Higgins v. Chicago*, 18 Ill. 276; *People v. Syracuse*, 78 N. Y. 57.

4. *Van Valkenburgh v. Milwaukee*, 43 Wis. 574; *Feiten v. Milwaukee*, 47 Wis. 494; *State v. Graves*, 19 Md. 351; *Walling v. Mayor*, etc., of *Shreveport*, 5 La. Ann. 660.

5. See *Huntington Co. v. Kauffman*, 126 Pa. St. 305; *Houghton's Appeal*, 42 Cal. 35.

6. *Howard v. Drainage Comrs.* 126 Ill. 53; *Hamilton v. Fort Wayne*, 73 Ind. 1; *Yelton v. Addison*, 101 Ind. 58; *Lawrenceburg*, etc., R. Co. v. *Smith*, 3

The legislature may prescribe what questions shall be tried on appeal.¹ If the statute contains no provisions in regard to the practice on appeal in highway cases, the courts will generally look to analogous statutes or apply the general rules of practice to the particular case.²

In most of the states, the case is tried *de novo* on appeal to the intermediate court;³ but, as a general rule, while evidence is heard and a trial had the same as if the case had originated in that court, objections not made before the tribunal of original jurisdiction, except when they go to the jurisdiction, will be deemed to have been waived.⁴ Where the statute requires notice of the appeal to be given, the failure to give such notice will be fatal to the appeal.⁵ So, where a bond is required or the

Ind. 253; *Pemigewasset Bridge v. New Hampton*, 47 N. H. 151.

1. *Sims v. Hines*, 121 Ind. 534, *In re Comrs. of State Reservation*, 102 N. Y. 734; *Southern R. Co. v. Ely*, 95 N. Car. 77; *Houghton's Appeal*, 42 Cal. 35; *Haswell v. Vermont, etc., R. Co.*, 23 Vt. 228; *Spaulding v. Milwaukee, etc., R. Co.*, 57 Wis. 304; 10 Am. & Eng. R. Cas. 401, 409; *Barr v. Stevens*, 1 Bibb (Ky.) 292; *Canyonville, etc., R. Co. v. Douglas Co.*, 5 Oregon 280.

2. *Warne v. Baker*, 24 Ill. 351; *Peters v. Hastings, etc., R. Co.*, 19 Minn. 260; *Twombly v. Madbury*, 27 N. H. 433; *Dubuque v. Crittenden*, 5 Iowa 514; *West v. McGurn*, 43 Barb. (N. Y.) 198; *Gifford v. Republican, etc., R. Co.*, 20 Neb. 538.

3. *Hardy v. McKinney*, 107 Ind. 364; *Hughes v. Beggs*, 114 Ind. 427; *Kellogg v. Price*, 42 Iowa 360; *Sigafoos v. Talbot*, 25 Iowa 214; *Hord v. Nashville, etc., R. Co.*, 2 Swan (Tenn.) 497; *York Co. v. Fewell*, 21 S. Car. 106; *Dunlap v. Mt. Sterling*, 14 Ill. 251; *Miller v. Prairie Du Chien*, 34 Wis. 533. But see *Rawlings v. Biggs*, 85 Ky. 251.

Under act *Pennsylvania*, June 13, 1874, providing that, in all cases of damages assessed against any municipal or other corporation or individual invested with the privilege of taking private property for public use, an appeal may be taken by either party to the court of common pleas, an appeal from a report of viewers assessing damages by widening a street, to the common pleas, vests that court with exclusive jurisdiction of the question of damages. *In re Chestnut Street* (Pa. 1889), 18 Atl. Rep. 338.

See generally, *Miller v. Mayor, etc., of Newark*, 35 N. J. L. 460; *In re Board of Street Opening, etc.*, 111 N.

Y. 581; *Allegheny v. McCaffrey*, 131 Pa. St. 137; 32 Am. & Eng. Corp. Cas. 274; *In re Kingsbridge Road*, 4 Hun (N. Y.) 599; *State v. Myer*, 20 Oregon 442; *Potter v. McCormack*, 127 Ind. 439.

4. *People v. Chapman*, 127 Ill. 387; *Hunerberg v. Hyde Park*, 130 Ill. 156; 27 Am. & Eng. Corp. Cas. 117; *Green v. Elliott*, 86 Ind. 53; *Norfolk, etc., Co. v. Ely*, 101 N. Car. 8; *Briggs v. Labette Co.*, 39 Kan. 90; *Bachelor v. New Hampton*, 60 N. H. 207; *Palmer v. Highway Comrs.*, 49 Mich. 45; *Sutherland v. Holmes*, 78 Mo. 399; *Whitely v. Mississippi, etc., Boom Co.*, 38 Minn. 523; *Horton v. Norwalk*, 45 Conn. 237; *Field v. Vermont, etc., R. Co.*, 4 Cush. (Mass.) 150; *In re Spuyten Duyvil, etc., Park Way*, 67 How. Pr. (N. Y.) 341; *Harper v. Miller*, 4 Ired. (N. Car.) 34; *Muire v. Falconer*, 10 Gratt. (Va.) 12.

But it is held that on appeal by the objectors to a special assessment, from an order confirming the assessment, the appellee cannot without assigning cross-errors, raise any question as to the objections having been filed in time. *Thorn v. West Chicago Park Comrs.*, 130 Ill. 594.

5. *Maxwell v. La Brune*, 68 Iowa 689; *Brette Co. v. Boydstun*, 68 Cal. 189; *Klein v. St. Paul, etc., R. Co.*, 30 Minn. 451; *Neff v. Chicago, etc., R. Co.*, 14 Wis. 370; *Burns v. Spring Green*, 56 Wis. 239. See also *Hartman v. Belleville, etc., R. Co.*, 64 Ill. 24; *Larson v. Superior, etc., R. Co.*, 64 Wis. 59; 22 Am. & Eng. R. Cas. 165. But notice may be waived by voluntary appearance. *East Saginaw, etc., R. Co. v. Benham*, 28 Mich. 459. Where notice of appeal is given to the mayor as required by statute, the fact that his

time for taking the appeal is limited by the statute, the statutory provisions must be complied with or the appeal will be unavailing.¹

Parties jointly interested may join in the same appeal, but where their interests are separate there should be separate appeals.²

If the landowner does any act inconsistent with the right of appeal in confirmation of the proceedings, upon the faith of which other persons have acted, he will be estopped from prosecuting an appeal, to the injury of such third persons.³

Where no interests are affected except those of the party appealing, he may dismiss the appeal.⁴

Certiorari will not generally be awarded where there is a full and complete remedy by appeal,⁵ but where there is no right of appeal the writ of *certiorari* will be issued, on proper application, to the inferior court to bring its entire record into the superior court from which the writ is issued.⁶ The proper mode of securing a writ of *certiorari* is by written petition setting forth the nature of the proceedings sought to be reviewed, and specifically stating the errors relied upon as invalidating the proceedings.⁷

official character is not stated in the notice is immaterial. *Conklin v. Keokuk*, 73 Iowa 343.

1. Elliott on Roads and Streets 274; *Weir v. St. Paul, etc.*, R. Co., 18 Minn. 155; *McVey v. Heavenridge*, 30 Ind. 100; *Leffel v. Obenchain*, 90 Ind. 50.

2. *Washburn v. Milwaukee, etc.*, R. Co., 59 Wis. 364; 20 Am. & Eng. R. Cas. 225; *Lance v. Chicago, etc.*, R. Co., 57 Iowa 636; 5 Am. & Eng. R. Cas. 617.

If a party is the owner of several distinct parcels of land affected by a single proceeding, he may take one appeal from the proceeding as to all the parcels. *Weyer v. Milwaukee, etc.*, R. Co., 57 Wis. 329; 10 Am. & Eng. R. Cas. 508.

3. *Baltimore, etc.*, R. Co. v. *Johnson*, 84 Ind. 420; 10 Am. & Eng. R. Cas. 408; *Rentz v. Detroit*, 48 Mich. 544; *In re New York, etc.*, R. Co., 98 N. Y. 12. See, also, *McGrath v. Brock*, 13 U. C. Q. B. 620; *Kile v. Yellowhead*, 80 Ill. 208; *Schatz v. Pfeil*, 56 Wis. 429.

Thus, if he accepts the damages awarded and permits the highway officers to expend money in preparing the way for travel, he cannot afterwards appeal. *People v. Mills*, 109 N. Y. 69. See, however, *Langworthy v. Dubuque*, 13 Iowa 86; *Buell v. Ball*, 30 Iowa 282; *Strosser v. Fort Wayne*, 100 Ind. 443.

4. Elliott on Roads and Streets 277.

See, as to costs, *St. Louis, etc.*, R. Co. v. *Martin*, 29 Kan. 750; 10 Am. & Eng. R. Cas. 514. But compare *Brown v. Corey*, 43 Pa. St. 495.

5. *Cedar Rapids, etc.*, R. Co. v. *Whelan*, 64 Iowa 694; *Dunlap v. Toledo, etc.*, R. Co., 46 Mich. 190; *Moore v. Bailey*, 8 Mo. App. 156; *Boston, etc.*, R. Co. v. *Folsom*, 46 N. H. 64; *People v. Wallace*, 4 Thomp. & C. (N. Y.) 438. *Contra*, *Comrs. of Highways v. Harper*, 38 Ill. 104; *Shields v. Justices*, 2 Coldw. (Tenn.) 60; *Roberts v. Williams*, 13 Ark. 355. See also *People v. Brighton*, 20 Mich. 57.

A record of the board of city or town officers of their proceedings in laying out a way and the assessment of betterments therefor, under *Massachusetts Stat.* 1871, ch. 382, defective for not showing the amount of the expense as well as of the assessment, may be amended; and such defect alone is not a ground for a *certiorari*. *Chase v. Board of Aldermen*, 119 Mass. 556.

In *New York* an error by the assessors in determining what property is benefited by a local improvement is reviewable by *certiorari*. *Kennedy v. Troy*, 77 N. Y. 493.

6. *People v. Betts*, 55 N. Y. 600; *Farmington River Water Power Co. v. County Comrs.* 112 Mass. 206; *CERTIORARI*, vol. 3, p. 60.

7. *Chambers v. Lewis*, 9 Iowa 583; *Board of Supervisors v. Magoon*, 109 Ill. 142.

There is a decided conflict among the authorities as to what can be tried on *certiorari*. Some of the courts hold that no questions can be raised except those going to the jurisdiction of the inferior tribunal.¹ Others hold that all errors of law may be reviewed;² and there are others yet which take an intermediate ground.³

The effect of a *certiorari* is to stay proceedings, unless the work of opening the highway has already been commenced.⁴

The final judgment on *certiorari* must, in the absence of some statutory provision, either quash or affirm the proceedings in whole or in part, for the court has no power to determine the merits of the controversy.⁵

j. LOCATING AND OPENING.—The way must be opened and worked on the line described in the petition and order,⁶ although an unimportant deviation therefrom will not, as a general rule, be fatal to the existence of the highway.⁷ A very slight deviation may, however, be important in case of a street.

A clear *prima facie* case must be made by the petitioner. *Lees v. Childs*, 17 Mass. 351; *Willis v. Dunn*, Wright (Ohio) 130; *Parnell v. Dallas Co.*, 34 Ala. 278; *Vanderstolph v. Highway Comrs.*, 50 Mich. 330; *People v. County Judge*, 40 Cal. 479; *Stokes v. Early*, 45 N. J. L. 478; *Richardson v. Smith*, 59 N. H. 517.

1. *Nightingale*, Petitioners, 11 Pick. (Mass.) 168; *Richardson v. Smith*, 59 N. H. 517.

2. *Donahue v. Will Co.*, 100 Ill. 94; *Hyslop v. Finch*, 99 Ill. 171; *McAllilley v. Horton*, 75 Ala. 491; *State v. Dodge Co.*, 56 Wis. 79.

3. *People v. Betts*, 55 N. Y. 600; *People v. East Hampton*, 30 N. Y. 72; *Poe v. Machine Works*, 24 W. Va. 517; *Healy v. Kneeland*, 48 Wis. 497; *Rayner v. State*, 52 Md. 368; *Lapan v. Cumberland Co.*, 65 Me. 160; *Corrie v. Corrie*, 42 Mich. 509; *State v. Davis*, 48 N. J. L. 112.

Some of the courts hold that the question of damages cannot be tried on *certiorari*. *State v. Hulick*, 33 N. J. L. 307; *Johnston v. Rankin*, 70 N. Car. 550.

Other courts hold that the superior court can inquire on *certiorari* whether there was any evidence of a fact. *Jackson v. People*, 9 Mich. 111; 77 Am. Dec. 491; *Camden v. Bloch*, 65 Ala. 236; *People v. Board of Police*, 72 N. Y. 415; *State v. Whitford*, 54 Wis. 150.

4. *State v. Lambertville*, 46 N. J. L. 59; *John v. State*, 1 Ala. 95; *Hyslop v. Finch*, 99 Ill. 171.

5. *Hamilton v. Harwood*, 113 Ill. 154; *Baxter v. Brooks*, 29 Ark. 173; *Wooton v. Manning*, 11 Tex. 327; *Basnet v. Jacksonville*, 18 Fla. 523; *Leonard v. Peacock*, 8 Nev. 157; *Com. v. West Boston Bridge*, 13 Pick. (Mass.) 195; *Thompson v. School Dist. No. 6*, 25 Mich. 483.

The case cannot be reviewed piecemeal, but must be taken up as an entirety. *Western Union Tel. Co. v. Locke*, 107 Ind. 9; *Freshour v. Logansport, etc., Co.*, 104 Ind. 463; *Freeman on Judgments*, §§ 33, 36.

6. *Ackerson v. Van Vleck*, 72 Iowa 57; *Halverson v. Bell*, 39 Minn. 240; *Deere v. Cole*, 118 Ill. 165; *Phipps v. State*, 7 Blackf. (Ind.) 513; *Crossley v. O'Brien*, 24 Ind. 325; 87 Am. Dec. 329.

7. *Carr v. Berkley*, 145 Mass. 539; *Gilkey v. Watertown*, 141 Mass. 317; *State v. Rapp*, 39 Minn. 65; *Packard v. Androscoggin Co.*, 80 Me. 43. But in *People v. Whitney's Point*, 102 N. Y. 81, it is held that the street must be laid out on the precise line designated in the petition.

Under the *Minnesota* statute which requires a petition for the opening of a highway to state the termini and general course of the proposed road, but does not require that the exact route shall be stated, the supervisors may exercise a reasonable discretion in making such variations from the general course stated in the petition as public interests require, and this discretion is not taken away or limited

Where the statute requires that the way shall be located and opened within a certain specified time, the failure to do so may, it has been held, deprive the public of the right to have it opened thereafter.¹ It is not necessary, however, unless the statute prescribes a different rule, that the way should be fully improved within the time limited—it is sufficient if the work is begun within that time.²

In *New York*, under a statute providing that roads may be opened through private property with the owner's consent it is held that a verbal consent is sufficient.³ And in *Illinois*, where the statute provides that the agreement with the owner as to the amount of damages shall be in writing, it is held that it need not be under seal.⁴

In some of the states, it is provided by statute that where the removal of a fence is necessary in order to open the way, notice must be given to the owner before the fence can be removed. The failure to give such notice will not invalidate the order establishing the way, but the officer who undertakes to open the way and remove a fence without giving the requisite notice will become a trespasser *ab initio*.⁵ So, if the officer attempts to lay out a road on a line different from that described in the petition and order, he will be regarded as a trespasser.⁶ But where the statute fixes the width of the way, a line surveyed and described as the center of the way will be sufficient to justify the officer in opening a way of the statutory width along that line as the center.⁷ And the order will generally protect the officer who acts in accordance therewith, if the court had jurisdiction, notwithstanding irregularities in the proceedings.⁸ But he must proceed

by the fact that the petition describes a definite and particular line. *State v. Thompson*, 46 Minn. 302.

1. *Marble v. Whitney*, 28 N. Y. 297; *Walker v. Caywood*, 31 N. Y. 51; *Beckwith v. Whalen*, 65 N. Y. 322. But see *Badgley v. Bender*, 4 Canada K. B., O. S. 221; *Humphreys v. Mayor, etc., of Woodstown*, 48 N. J. L. 588.

2. *Wilcox v. New Bedford*, 140 Mass. 570.

Where the city authorities had passed an order requiring the removal of a building, providing that it need not be done until necessary for the opening of the street, it was held that the owner of the building must take notice of the necessary time, and that such time would be sufficiently indicated to him by the progress in opening the street. *Mussey v. Cahoon*, 34 Me. 74.

3. *People v. Goodwin*, 5 N. Y. 568; *People v. Albright*, 23 How. Pr. (N. Y.) 306.

4. *Brown v. Robertson*, 123 Ill. 631.

5. *Kelly v. Horton*, 2 Cow. (N. Y.) 424; *Rutherford v. Davis*, 95 Ind. 245; *Ruston v. Grimwood*, 30 Ind. 364.

See, also, *Murray v. Norfolk Co.*, 149 Mass. 328; 28 Am. & Eng. Corp. Cas. 210; *White v. Foxborough*, 151 Mass. 28; 32 Am. & Eng. Corp. Cas. 97.

6. *Guptail v. Teft*, 16 Ill. 365; *Beyer v. Tanner*, 29 Ill. 135; *Beckwith v. Beckwith*, 22 Ohio St. 180; *Barnard v. Haworth*, 9 Ind. 103; *Beardslee v. French*, 7 Conn. 125; 18 Am. Dec. 86. But see *Miller v. Silsby*, 8 N. H. 474.

7. *Tucker v. Rankin*, 15 Barb. (N. Y.) 471; *People v. Comrs. of Highways*, 13 Wend. (N. Y.) 310; *Herrick v. Stover*, 5 Wend. (N. Y.) 581; *Lawton v. Comrs. of Highways*, 2 Cal. (N. Y.) 179; *People v. Comrs. of Highways*, 1 Cow. (N. Y.) 23. See, also, *Yeager v. Carpenter*, 8 Leigh (Va.) 454; 31 Am. Dec. 665.

8. *Rutherford v. Davis*, 95 Ind. 245; *Yeager v. Carpenter*, 8 Leigh (Va.) 454; 31 Am. Dec. 665.

in compliance with the law,¹ and the order will not protect him if the court had no jurisdiction.² He must also use ordinary care to prevent injury to private property.³ If he does use such care, there will be no liability for consequential damages resulting from the opening of the street.⁴

III. RIGHTS OF THE PUBLIC.—"Public highways belong, from side to side and end to end, to the public."⁵ Their use is for the public at large and not merely for the municipality within whose limits they may happen to be, notwithstanding the legislature may have given the supervision and control of them to

1. *Suits v. Murdock*, 63 Ind. 73; *Ruston v. Grimwood*, 30 Ind. 364.

2. *Cottingham v. Fortville, etc., Turnpike Co.*, 112 Ind. 522.

3. *Stackpole v. Healy*, 16 Mass. 33; 8 Am. Dec. 121; *Wright v. Phillips*, 36 Me. 551; *Campbell v. Kennedy*, 34 Iowa 494.

4. *Governor, etc., Co. v. Meredith*, 4 T. R. 794; *Sutton v. Clark*, 6 Taunt. 34; *Boulton v. Crowther*, 2 B. & C. 703; 9 E. C. L. 306; *Rex v. Bristol Dock Co.*, 6 B. & C. 181; 13 E. C. L. 139; *Roberts v. Read*, 16 East. 215; *Hall v. Smith*, 2 Bing. 156; 9 E. C. L. 357; *Mersey v. Gibbs*, 11 H. L. Cas. 686; *Callender v. Marsh*, 1 Pick. (Mass.) 417; *Rounds v. Mumford*, 2 R. I. 154; *Green v. Reading*, 9 Watts (Pa.) 382; *O'Connor v. Pittsburgh*, 18 Pa. 187; *Graves v. Otis*, 2 Hill (N. Y.) 466; *Alexander v. Milwaukee*, 16 Wis. 147; *Dorman v. Jacksonville*, 13 Fla. 538; 7 Am. Rep. 253; *Reynolds v. Shreveport*, 13 La. Ann. 426; *Mayor, etc., of Rome v. Omberg*, 28 Ga. 46; 73 Am. Dec. 748; *Macy v. Indianapolis*, 17 Ind. 267; *Delphi v. Evans*, 36 Ind. 90; 10 Am. Rep. 12; *Smith v. Washington*, 20 How. (U. S.) 135; *Humes v. Mayor, etc., of Knoxville*, 1 Humph. (Tenn.) 403; 34 Am. Dec. 657; *Hovey v. Mayo*, 43 Me. 322; *Taylor v. St. Louis*, 14 Mo. 20; 55 Am. Dec. 89; *Skinner v. Hartford Bridge Co.*, 29 Conn. 523; *Simmons v. Camden*, 26 Ark. 276; 7 Am. Rep. 620; *Murphy v. Chicago*, 29 Ill. 279; 81 Am. Dec. 307; *Creal v. Keokuk*, 4 Green (Iowa) 47.

Consequential Damages.—As to what are considered consequential damages see the following cases: *Ham v. Wisconsin, etc., R. Co.*, 61 Iowa 716; 14 Am. & Eng. R. Cas. 204; *In re New York Cent., etc., R. Co.*, 77 N. Y. 248; *Eaton v. Boston, etc., R. Co.*, 51 N. H. 504; 12 Am. Rep. 147; *Whittier v. Portland, etc., R. Co.*, 38 Me. 26; *Menken v.*

Atlanta, 78 Ga. 668; *Dudley v. Minnesota, etc., R. Co.*, 77 Iowa 408; 36 Am. & Eng. R. Cas. 593.

In *New Jersey*, it is held that the constitutional provision requiring compensation to be made for private property taken for public use does not apply to lands taken for streets within municipalities, except to the extent that such compensation is required by their respective charters. The compensation so prescribed is the measure of the landowner's legal right, whether it be just or unjust. *Simmons v. Passaic*, 42 N. J. L. 619.

The remedy by appeal under the Portland charter, from the city council's assessment of damages for the "location" of a street, outfall, or drain, is not available to recover for such injuries as arise from the improper construction thereof. *Jackson v. Portland*, 63 Me. 55.

One whose land has been condemned for a street cannot recover special damages in being deprived of the beneficial use of the land not taken where the street is not opened within a reasonable time. *Webster v. Chicago*, 83 Ill. 458.

But acts of supervisors, in opening and working highways within the general scope of the powers and duties of the town, are the acts of the town, and if they cause damage to adjacent lands for which a private person would be liable, the town is liable. *Peters v. Fergus Falls*, 35 Minn. 549.

5. *State v. Berdetta*, 73 Ind. 193; 38 Am. Rep. 117.

In *Kentucky*, it is held that the exclusive use of a street is in the public, even when the fee to the center of the street is in the abutting lot owners. The owners of abutting lots have and can have no possession, or right to the possession, in fact or in law, of the street or any part of it. *Jefferson, etc., R. Co. v. Esterle*, 13 Bush (Ky.) 667.

the local authorities.¹ "The public are entitled not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler."² While the primary purpose of a street is for public travel, the rights of the public are not confined to the surface of the street,³ and there are many uses, not inconsistent with the right of travel, to which streets may be devoted for the public good. The rights of the public in city streets are much greater than they are in country highways. Thus, gas and water pipes may be laid in a city street;⁴ drains and sewers may be constructed therein;⁵ reservoirs and cisterns dug therein,⁶ and street railways laid along the street.⁷ But these subjects will be more fully treated in other parts of this article.⁸

IV. RIGHTS AND REMEDIES OF ABUTTERS—1. Generally.—Abutters have all the rights to the use of a street that belong to the general public, and, in addition thereto, they have also certain rights not possessed by the general public. The presumption is that

1. 2 Dillon's Munic. Corp., § 656.

In *O'Connor v. Pittsburgh*, 18 Pa. St. 189, the court by Gibson, C. J., said: "To the commonwealth here, as to the king in *England* belongs the franchise of every highway as a trustee for the public; and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals, or public roads."

Municipal authorities have no power to modify or repeal a law declaring certain streets to be public highways, by consenting to the construction of a railroad thereon. The rights of the public will be protected against municipal as well as railroad corporations. *Com. v. Erie, etc., R. Co.*, 27 Pa. St. 339; 67 Am. Dec. 471.

2. 1 Hawk. P. C., ch. 32, § 11; *Johnson v. Whitefield*, 18 Me. 286; 36 Am. Dec. 721; *Hart v. Mayor, etc., of Albany*, 9 Wend. (N. Y.) 571; 24 Am. Dec. 165; *Harrower v. Ritson*, 37 Barb. (N. Y.) 301; *Com. v. King*, 13 Met. (Mass.) 115; *Scott v. New Boston*, 26 Ill. App. 108.

3. *Coverdale v. Charlton, L. R.*, 4 Q. B. Div. 104.

4. *Quincy v. Bull*, 106 Ill. 337; 4 Am. & Eng. Corp. Cas. 554; *Des Moines Gas Co. v. Des Moines*, 44 Iowa 508; 24 Am. Rep. 756; *Smith v. Metropolitan Gas Light Co.*, 12 How. Pr. (N. Y.) 187; *People v. Bowen*, 30 Barb. (N. Y.) 24; *State v. Cincinnati Gas Light, etc., Co.*, 18 Ohio St. 295; *Indianapolis v.*

Indianapolis Gas Light, etc., Co., 66 Ind. 396; *Cooke v. Flatbush Water Works Co.*, 29 Hun (N. Y.) 245. See, also, *Citizens' Gas, etc., Co. v. Elwood*, 114 Ind. 332; 20 Am. & Eng. Corp. Cas. 263.

5. *Cincinnati v. Penny*, 21 Ohio St. 499; 8 Am. Rep. 73; *Cummins v. Seymour*, 79 Ind. 491; 41 Am. Rep. 618; *Elliott on Roads and Streets* 360. See, also, *DRAINS AND SEWERS*, vol. 6, p. 19.

6. *West v. Bancroft*, 32 Vt. 367; *Louisville v. Osborne*, 10 Bush (Ky.) 226.

So, a public drinking fountain or hydrant may be placed therein. *Lostulter v. Aurora*, 126 Ind. 436. Compare *Dubuque v. Maloney*, 9 Iowa 450; 74 Am. Dec. 358.

7. *Eichels v. Evansville St. R. Co.*, 78 Ind. 261; 5 Am. & Eng. R. Cas. 274; 41 Am. Rep. 561; *Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.*, 127 Ind. 369; 43 Am. & Eng. R. Cas. 234; *Elliott v. Fair Haven, etc., R. Co.*, 32 Conn. 579; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75; 86 Am. Dec. 254; *Attorney Genl. v. Metropolitan R. Co.*, 125 Mass. 515; 28 Am. Rep. 264; *Hiss v. Baltimore, etc., R. Co.*, 52 Md. 242; 36 Am. Rep. 371; *Texas, etc., R. Co. v. Rosedale St. R. Co.*, 64 Tex. 80; 22 Am. & Eng. R. Cas. 160; 53 Am. Rep. 739; *Randall v. Jacksonville St. R. Co.*, 19 Fla. 409; 17 Am. & Eng. R. Cas. 184; *Cooley's Const. Lim.* 556.

8. See, *infra*, this title, *Municipal Control; Uses of Streets; Rights and Remedies of Abutters*.

the abutting landowner on each side of a street owns to the center of the street;¹ and, as such owner, he has all the rights and remedies of the owner of an ordinary freehold, subject only to the public easement.²

2. Right to the Soil.—The soil of the street belongs to the owner of the fee, and where, as in most cases, the fee is owned by the abutters and not by the municipality, the latter has no right to remove the earth from a street unless its removal is necessary for the improvement of that street or some other street forming part of the same system of improvement.³ On the other hand, the abutters have no right to remove earth and

1. *Western Union Tel. Co. v. Williams*, 86 Va. 696; 30 Am. & Eng. Corp. Cas. 564; 19 Am. St. Rep. 908; *Willoughby v. Jenks*, 20 Wend. (N. Y.) 96; *Peabody Heights Co. v. Sadtler*, 63 Md. 533; 52 Am. Rep. 519; *Vaughn v. Stuzaker*, 16 Ind. 338; *Terre Haute, etc., R. Co. v. Rodel*, 89 Ind. 128; 10 Am. & Eng. R. Cas. 284; *Rice v. Worcester Co.*, 11 Gray (Mass.) 283; *Boston v. Richardson*, 13 Allen (Mass.) 153; *Florida Southern R. Co. v. Brown*, 23 Fla. 104; *Stephens v. Whistler*, 1 East 51; *Stewart v. Metropolitan El. R. Co.*, 56 N. Y. Super Ct. 377.

2. *Stevenson v. Mayor, etc., of Chattanooga* (Tenn.), 20 Fed. Rep. 586; 4 Am. & Eng. Corp. Cas. 503; *Stackpole v. Healey*, 16 Mass. 33; 8 Am. Dec. 121; *Bliss v. Ball*, 99 Mass. 597; *Overman v. May*, 35 Iowa 89; *Dubuque v. Maloney*, 9 Iowa 450; 74 Am. Dec. 358; *Phifer v. Cox*, 21 Ohio St. 248; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447; 8 Am. Dec. 263; *Cole v. Drew*, 44 Vt. 49; 8 Am. Rep. 363; *Holden v. Shattuck*, 34 Vt. 336; 80 Am. Dec. 684; *Cox v. Louisville, etc., R. Co.*, 48 Ind. 178; *Shawnee Co. v. Beckwith*, 10 Kan. 603; *West Covington v. Freking*, 8 Bush (Ky.) 121; *State v. Laverack*, 34 N. J. L. 201; *Charleston Rice Milling Co. v. Bennett*, 18 S. Car. 254; *Chatham v. Brainard*, 11 Conn. 59; *Kennedy v. Jones*, 11 Ala. 63; *Cooke v. Greene*, 11 Price 736; *Goodtitle v. Alker*, 1 Burr. 133; *Lade v. Shepherd*, 2 Stra. 1004; *St. Mary, Newington v. Jacobs*, L. R., 7 Q. B. 53; *Western Union Tel. Co. v. Williams*, 86 Va. 696; 30 Am. & Eng. Corp. Cas. 564; 19 Am. St. Rep. 908.

3. *Robert v. Sadler*, 104 N. Y. 229; 58 Am. Rep. 498; *Aurora v. Fox*, 78 Ind. 1; *Fisher v. Rochester*, 6 Lans. (N. Y.) 225; *Ladd v. French*, 53 Hun (N. Y.) 635; *Higgins v. Reynolds*, 31 N. Y. 151; *Williams v. Kenney*, 14

Barb. (N. Y.) 629; *Tucker v. Eldred*, 6 R. I. 404; *Mayor, etc., of Macon v. Hill*, 58 Ga. 595; *Smith v. City Council*, 19 Ga. 89; *Leonard v. Cincinnati*, 26 Ohio St. 447; *Cuming v. Prang*, 24 Mich. 514; *Rich v. Minneapolis*, 37 Minn. 423; *Althen v. Kelly*, 32 Minn. 280. Compare *Bissell v. Collins*, 28 Mich. 277; 15 Am. Rep. 217; *Huston v. Fort Atkinson*, 56 Wis. 350; *Griswold v. Bay City*, 35 Mich. 452; *Viliski v. Minneapolis*, 40 Minn. 304; *Hovey v. Mayo*, 43 Me. 322.

Where a city, in proceedings to take land for street purposes, acquires the fee to the land, subject to the right of the owner to remove the buildings thereon, it is liable to the owner for a subsequent conversion of the materials of the latter to its own use. *Schuchardt v. Mayor, etc., of N. Y.*, 53 N. Y. 202.

Shade Trees.—As to when the abutter may remove trees, see *Wellman v. Dickey*, 78 Me. 29; *Clark v. Dasso*, 34 Mich. 86; *Lancaster v. Richardson*, 4 Lans. (N. Y.) 136.

In *Illinois*, a town, having control of its streets, with power to improve them, may allow property-holders to set out shade trees along their premises, and, by so doing, will not lose its control over the trees so planted, and may protect the same as against such parties. *Baker v. Normal*, 81 Ill. 108.

The *Massachusetts* statute protects all shade trees which are standing within the limits of public ways in any city or town from mutilation, destruction, or removal, except by adjudication of the mayor and aldermen, or the selectmen, upon a complaint, on which the owner of the tree is entitled to notice and an opportunity to be heard. *White v. Godfrey*, 97 Mass. 472.

gravel from a street where such removal would interfere with the rights of the public.¹

3. Right to Deposit Merchandise and Building Material.—Abutters have also the right, subject to municipal control, to use the street in front of their premises for the purpose of depositing building material thereon² and for loading and unloading goods or merchandise.³ But the use must be temporary and reasonable.⁴

4. Right of Access.—Another right peculiar to abutters is the right or easement of access.⁵ This is so far of the nature of private property that not even the legislature can take it away and deprive the owner of it without compensation.⁶ In *New York*,

Where the employes of a city, in grading a street, destroy shade trees in removing them, the city is not liable to the abutter where there was neither negligence nor carelessness. *Castleberry v. Atlanta*, 74 Ga. 164.

1. *Palatine v. Kreuger*, 121 Ill. 72.

2. *Wood v. Mears*, 12 Ind. 515; 74 Am. Dec. 222; *Cushing v. Adams*, 18 Pick. (Mass.) 110; *Van O'Linda v. Lothrop*, 21 Pick. (Mass.) 297; 32 Am. Dec. 261; *Clark v. Fry*, 8 Ohio St. 358; 72 Am. Dec. 500; *Rex v. Ward*, 4 A. & E. 384; 31 E. C. L. 92.

3. *Callanan v. Gilman*, 107 N. Y. 360; 23 Am. & Eng. Corp. Cas. 59; 1 Am. St. Rep. 831; *Welsh v. Wilson*, 101 N. Y. 254; 12 Am. & Eng. Corp. Cas. 649; 54 Am. Rep. 698; *People v. Horton*, 64 N. Y. 610; *Haight v. Keokuk*, 4 Iowa 199; *Sikes v. Manchester*, 59 Iowa 65; *Matthews v. Kelsey*, 58 Me. 56; 4 Am. Rep. 248.

4. *People v. Cunningham*, 1 Den. (N. Y.) 524; 43 Am. Dec. 709; *Bennett v. Lovell*, 12 R. I. 166; 34 Am. Rep. 628; *McCloughry v. Finney*, 37 La. Ann. 27; *Fort Wayne v. De Witt*, 47 Ind. 395; *Fritz v. Hobson*, 42 L. T. 225; *Rex v. Jones*, 2 Camp. 230; *North Manheim Tp. v. Arnold*, 119 Pa. St. 380; 4 Am. St. Rep. 653.

Whether it is reasonable or not is generally a question of fact for the jury. *Callanan v. Gilman*, 107 N. Y. 360; 23 Am. & Eng. Corp. Cas. 59; 1 Am. St. Rep. 831; *State v. Edens*, 85 N. Car. 526; *Denby v. Willer*, 59 Wis. 240; 6 Am. & Eng. Corp. Cas. 226; *Jochem v. Robinson*, 66 Wis. 638; 57 Am. Rep. 298.

5. *In re New York El. R. Co.*, 36 Hun (N. Y.) 427; *Fanning v. Osborne*, 34 Hun (N. Y.) 121; *Child v. Chappell*, 9 N. Y. 246; *Hussner v. Brooklyn City R. Co.*, 114 N. Y. 433; 11

Am. St. Rep. 679; *Elizabethtown, etc., R. Co. v. Combs*, 10 Bush (Ky.) 382; 19 Am. Rep. 67; *Rigney v. Chicago*, 102 Ill. 64; *Chicago v. Union Bldg. Assoc.*, 102 Ill. 379; 40 Am. Rep. 598; *Rensselaer v. Leopold*, 106 Ind. 30; *St. Paul, etc., R. Co. v. Schurmeier*, 7 Wall. (U. S.) 272; *Grafton v. Baltimore, etc., R. Co.*, 21 Fed. Rep. 309; 17 Am. & Eng. R. Cas. 200; *Denver v. Bayer*, 7 Colo. 113; 2 Am. & Eng. Corp. Cas. 465; *Everett v. Marquette*, 53 Mich. 450; "An Abutter's Rights in a Street," 24 Cent. L. Jour. 51.

But it has been held in *Maryland* that an abutter cannot prevent a railroad company from maintaining a gate at a crossing, by virtue of a license therefor from the city (the gate being necessary for public safety) because it obstructs an entrance to complainant's premises. *Textor v. Baltimore, etc., R. Co.*, 59 Md. 63; 43 Am. Rep. 540.

6. *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1; 19 Am. St. Rep. 461; *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268; *Theobald v. Louisville, etc., R. Co.*, 66 Miss. 279; 14 Am. St. Rep. 564; *Adams v. Chicago, etc., R. Co.*, 39 Minn. 286; 12 Am. St. Rep. 644; *Moose v. Carson*, 104 N. Car. 431; 17 Am. St. Rep. 681; *Ross v. Thompson*, 78 Ind. 94; *Common Council v. Croas*, 7 Ind. 9; *Le Clercq v. Gallipolis*, 7 Ohio 217; 28 Am. Dec. 641; *Crawford v. Delaware*, 7 Ohio St. 469; *Brakken v. Minneapolis, etc., R. Co.*, 29 Minn. 41; 7 Am. & Eng. R. Cas. 493; *Transsylvania University v. Lexington*, 3 B. Mon. (Ky.) 25; 38 Am. Dec. 173; *State v. Laverack*, 34 N. J. L. 201; *Lackland v. North Missouri R. Co.*, 31 Mo. 180; *Broome v. New York, etc., Tel. Co.*, 42 N. J. Eq. 141.

this right has been so enlarged as to include an easement in the light and air, and it is held that "above the surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner."¹

In some of the states, it has also been held that an abutter may, subject to municipal regulation, construct coal cellars under sidewalks, and basement areas opening within the line of the street, and bay windows and porches within the limits of the street, but the law is not well settled in regard to such matters, and, upon principle, it is questionable if any such right exists.²

Thus, it was held in a recent case by the Supreme Court of *Ohio*, that a coach stand in a public street, materially impairing the right of access of the abutting landowner, was a nuisance, and could not be authorized by the city without compensation to such owner. *Branham v. Hotel Co.*, 39 Ohio St. 333; 2 Am. & Eng. Corp. Cas. 1; 48 Am. Rep. 457.

So in *New York*, where a liveryman left his vehicles in the street in front of the plaintiff's premises, it was held that "the legislature had not the power, neither had the municipal authorities, as against the adjoining owner, to confer upon any person the right to make use of the highway for any other purpose than to pass and repass." *McCaffrey v. Smith*, 41 Hun (N. Y.) 117. See also *Lippincott v. Lasher*, 44 N. J. Eq. 120.

1. *Story v. New York El. R. Co.*, 90 N. Y. 146; 7 Am. & Eng. R. Cas. 596; 43 Am. Rep. 146; *New York El. R. Co. v. Fifth Nat. Bank*, 135 U. S. 440; 43 Am. & Eng. R. Cas. 403.

This is the doctrine of the notable elevated railroad cases in which the court held that the erection of an elevated railroad, intended for permanent use in a street, upon which run cars propelled by steam engines generating gas, steam, and smoke, and interrupting the free passage of light and air to and from the adjoining premises, constitutes a taking of the easement, for which the abutter is entitled to compensation. *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 288; *Story v. New York El. R. Co.*, 90 N. Y. 122; 7 Am. & Eng. R. Cas. 596; 43 Am. Rep. 146; *Mahady v. Bushwick R. Co.*, 91 N. Y. 148; 14 Am. & Eng. R. Cas. 142; 43 Am. Rep. 661; *Drucker v. Manhattan R. Co.*, 106 N. Y. 157; 30 Am. & Eng. R. Cas. 418; 60 Am. Rep. 437; *Pond v. Metropolitan El. R. Co.*, 112 N. Y.

188; 8 Am. St. Rep. 734; *Powers v. Manhattan R. Co.*, 120 N. Y. 178; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1; 19 Am. St. Rep. 461. Compare *Fobes v. Rome, etc., R. Co.*, 121 N. Y. 505.

The *New York* doctrine has been favorably received and followed in other states. *Adams v. Chicago, etc., R. Co.*, 39 Minn. 286; 36 Am. & Eng. R. Cas. 7; 12 Am. St. Rep. 644.

2. **Basement Areas, etc.**—It seems that this may be claimed as a right in *New York*. See *McCarthy v. Syracuse*, 46 N. Y. 194; *Lahr's Case*, 104 N. Y. 268; *Irvine v. Wood*, 51 N. Y. 224; 10 Am. Rep. 603; *In re New York Dist. R. Co.*, 107 N. Y. 42; 32 Am. & Eng. R. Cas. 202.

In *Illinois*, while not prepared to say that a property owner had an absolute right to extend a coal cellar under the sidewalk, the court held that he might do so in the absence of any municipal prohibition. *Nelson v. Godfrey*, 12 Ill. 22. See, also, *Gridley v. Bloomington*, 68 Ill. 50; 30 Am. Rep. 566; *Fisher v. Thirkell*, 21 Mich. 1; 4 Am. Rep. 422; *Augusta City Council v. Hafers*, 59 Ga. 151; *Lafayette v. Blood*, 40 Ind. 62.

In *Kansas*, no city has power to confer upon a private person a right to use a street, or any portion of the same, for the purpose of a cellar-way, or for any other purpose except for passing and repassing. *Smith v. Lavenworth*, 15 Kan. 81.

A city may impose conditions on an abutter's excavating an area under a sidewalk, and forbid the same until they be complied with. *Davies v. Clinton*, 50 Iowa 585.

In *New Jersey*, where a city charter gave authority to the common council to regulate the building of vaults, and the laying of water and gas pipes in and under the streets, and to secure to the public the safe and convenient use

5. Remedies.—Abutters have, in general, all the remedies of the owner of a freehold,¹ subject, however, to the public easement. Thus, an abutter may maintain trespass,² or ejectment³ in a

of the streets and sidewalks for the purposes for which they were originally laid out, it was held that an ordinance directing that applicants should be assessed a certain amount for the privilege of building vaults in front of their dwellings, was not within the authority granted, nor within the usual police powers given to the corporation for the maintenance of peace and good order of the city, and therefore void; and any assessments made under it must be set aside. *State v. Mayor, etc., of Hoboken*, 33 N. J. L. 280.

See, also, *Barry v. Terkildsen*, 72 Cal. 254; 1 Am. St. Rep. 55; *Calder v. Smalley*, 66 Iowa 219; 7 Am. & Eng. Corp. Cas. 20; 55 Am. Rep. 270; *Wolf v. Kilpatrick*, 101 N. Y. 146; 54 Am. Rep. 672.

Bay Windows, Porches, and Steps.—See *Garrett v. Janes*, 65 Md. 266; 13 Am. & Eng. Corp. Cas. 124; *Van O'Linda v. Lothrop*, 21 Pick. (Mass.) 292; 32 Am. Dec. 261; *Underwood v. Carney*, 1 Cush. (Mass.) 285; *Com. v. Blaisdell*, 107 Mass. 234; *Papworth v. Milwaukee*, 64 Wis. 389.

A city authorized an abutter on a street to erect a veranda extending across the sidewalk. *Held*, a mere license, and revocable. *Winter v. Montgomery*, 83 Ala. 589.

"Notwithstanding city authorities have previously given a consent that a houseowner may extend steps for entering his building out upon part of the public street, they may revoke it, and order a removal of such steps. The previous consent works no estoppel, because it is beyond the power of city officers. Streets in a city or town, though generally subjected to the supervision and control of the municipality, are public highways, the use whereof is for the public at large." *Norfolk v. Chamberlaine*, 29 Gratt. (Va.) 534.

A city has no power to authorize the owner of real estate bounded by a public alley, for the convenience or benefit of himself in obtaining access to a building on such realty, to construct a stairway occupying any portion of such alley, to the detriment of the traveling public, or to the permanent injury of the rights of another property owner;

and the latter owner may maintain an action against the former, or his grantee, to have such stairway abated as a nuisance. *Pettis v. Johnson*, 56 Ind. 139. See, also, *State v. Berdetta*, 73 Ind. 185; 38 Am. Rep. 117.

So, a bay window projecting over the line of a street, although sixteen feet above the sidewalk, was held to be a nuisance which could not be authorized by a city ordinance. *Reimer's Appeal*, 100 Pa. St. 182; 45 Am. Rep. 373. See, also, *Bybee v. State*, 94 Ind. 443; 6 Am. & Eng. Corp. Cas. 149; 48 Am. Rep. 175; *Attorney-Gen'l v. Williams*, 140 Mass. 329; 13 Am. & Eng. Corp. Cas. 415; 54 Am. Rep. 468; *Salisbury v. Andrews*, 128 Mass. 336.

A statute empowered a city to regulate porticoes, etc., on certain named streets. *Held*, that a later statute conferring a similar power as to all the streets did not take away the powers conferred by the earlier act. *Garrett v. Janes*, 65 Md. 260; 13 Am. & Eng. Corp. Cas. 124.

1. 2 Dillon's Munic. Corp., § 663; *Elliott on Roads and Streets* 536; *Angell on Highways*, § 319.

2. *Adams v. Rivers*, 11 Barb. (N. Y.) 390; *Adams v. Emerson*, 6 Pick. (Mass.) 57; *Cole v. Drew*, 44 Vt. 49; 8 Am. Rep. 363; *Clark v. Dasso*, 34 Mich. 86; *Baker v. Shephard*, 24 N. H. 208; *Hunt v. Rich*, 38 Me. 195; *Bliss v. Ball*, 99 Mass. 597; *White v. Godfrey*, 97 Mass. 472.

3. *Terre Haute, etc., R. Co. v. Rodel*, 89 Ind. 128; 10 Am. & Eng. R. Cas. 284; 46 Am. Rep. 164; *Peck v. Smith*, 1 Conn. 103; 6 Am. Dec. 216; *Cooper v. Smith*, 9 S. & R. (Pa.) 26; 11 Am. Dec. 658; *Alden v. Murdock*, 13 Mass. 256; *Locks & Canals v. Nashua, etc., R. Co.*, 104 Mass. 1; *Carpenter v. Oswego, etc., R. Co.*, 24 N. Y. 655; *Bissell v. New York Cent. R. Co.*, 23 N. Y. 61; *Jersey City v. Fitzpatrick*, 30 N. J. Eq. 97; *Perry v. New Orleans, etc., R. Co.*, 55 Ala. 413; 28 Am. Rep. 740. Compare *Cincinnati v. White*, 6 Pet. (U. S.) 431.

Where a city fails to pay for land taken for a public street, the owner's remedy is not by petition to enjoin the use until payment. If he claims that he made no valid sale to the city, his remedy is by ejectment; if a valid one, by

proper case ; he may, when specially damaged, maintain an action to abate a nuisance ;¹ and he may even enjoin the unlawful interference with his peculiar rights, upon a proper showing.²

V. MUNICIPAL CONTROL³—1. Generally.—The legislature, representing the public at large, has paramount authority over all public ways, but, instead of exercising this authority directly, usually confers upon the municipalities the power to control and regulate the streets within their jurisdiction.⁴ This power is gener-

suit for the purchase-money. *Hammerslough v. Kansas*, 57 Mo. 219.

1. *Schulte v. Northern P. Transp. Co.*, 50 Cal. 592; *Danville, etc., Co. v. Campbell*, 87 Ind. 57; *Strattan v. Elliott*, 83 Ind. 425; *Herbert v. Benson*, 2 La. Ann. 770; *Fritz v. Hobson*, 19 Am. L. Reg. N. S. 615, and note.

2. *Lippincott v. Lasher*, 44 N. J. Eq. 120; *Branhan v. Hotel Co.*, 39 Ohio St. 333; 2 Am. & Eng. Corp. Cas. 1; 48 Am. Rep. 457; *Ross v. Thompson*, 78 Ind. 90; *Karrer v. Berry*, 44 Mich. 391; *Carter v. Chicago*, 57 Ill. 283; *Williams v. New York Cent. R. Co.*, 16 N. Y. 111; 69 Am. Dec. 651.

He may enjoin the unlawful removal of fences and shade trees. *Taintor v. Mayor, etc., of Morristown*, 19 N. J. Eq. 46; *Winslow v. Nayson*, 113 Mass. 411; *Wilder v. De Con*, 26 Minn. 10; *Price v. Knott*, 8 Oregon 438; *Chicago v. Union Bldg. Assoc.*, 102 Ill. 379; 40 Am. Rep. 598; *Burlington v. Schwarzman*, 52 Com. 181; 9 Am. & Eng. Corp. Cas. 652; 52 Am. Rep. 571. See also *De Witt v. Van Schoyk*, 110 N. Y. 7; *Sullivan v. Phillips*, 110 Ind. 320; *Pettibone v. Hamilton*, 40 Wis. 402.

An injunction will not lie at the instance of an abutter, to restrain a city from causing the bed of a stream to run through one of the public streets. *McMahon v. Council Bluffs*, 12 Iowa 268.

3. See also MUNICIPAL CORPORATIONS, vol. 15, p. 949.

4. 2 Dillon's Munic. Corp., § 656; *Barnes v. District of Columbia*, 91 U. S. 540; *Northern Transp. Co. v. Chicago*, 99 U. S. 635; *Sinton v. Ashbury*, 41 Cal. 525; *Portland, etc., R. Co. v. Portland*, 14 Oregon 188; 58 Am. Dec. 299.

It is now well settled that governmental power may be delegated to local governmental agencies. *State v. Yopp*, 97 N. Car. 477; 18 Am. & Eng. Corp. Cas. 514; 2 Am. St. Rep. 305; *State v. Hoagland*, 51 N. J. L. 62; *Stoutenburgh v. Hennick*, 129 U. S. 141.

A city charter conferring on the inhabitants the special franchise of making their own laws with regard to the opening and laying out of streets, is, so far as it extends, a grant of sovereignty; and such laws, when in accordance with it, must prevail, within the territorial limits of such city, to the exclusion of the general laws of the State, where they are repugnant. *State v. Clarke*, 25 N. J. L. 54.

Where the charter gives the city council full power to keep in repair the streets and provide for keeping them in repair, and to prohibit obstructions therein, the execution of such power can be insisted upon as a duty, and a writ of *mandamus* will issue to compel the same; and where the charter provides that the mayor shall preside at the meetings of the city council, and in case of a tie give the casting vote, such a writ is properly directed to the mayor and city council, in their official capacity, instead of to the city. *People v. Mayor, etc., of Bloomington*, 63 Ill. 207.

The city of New Orleans, by virtue of the authority vested in it by its charter to maintain the public health and to suppress all nuisances, has power to pass an ordinance prohibiting smoking in street cars under penalty of fine and imprisonment. *State v. Heidenhain*, 42 La. Ann. 483.

An ordinance forbidding the obstruction of any water way, so that water shall accumulate in the street, passed under statutes making the violation of a city ordinance a misdemeanor, and giving jurisdiction to the mayor or other chief officer of the city, is not void, as attempting to create an offense already punishable as a public nuisance, under the general laws of the state; for the accumulation of water may be a violation of the ordinance, and yet not sufficient to constitute a nuisance. *State v. Wilson*, 106 N. Car. 718.

In New York City an ordinance prohibiting the hanging of signs

ally very comprehensive, but its extent in any particular case is to be determined from the city charter or legislative enactment by which it is conferred.¹ As the public good, however, requires that a city should have sufficient control over its streets to protect the public in the use thereof, "the authority to open, care

more than one foot in front of any house was held valid and in force, in a recent case. *Mayor, etc., of N. Y. v. Wood*, 15 Daly (N. Y.) 341.

Under the charter of the city of New Orleans, providing that the council shall have power to pass such ordinances as may be necessary to light the streets, etc., the council may make a contract for lighting for more than one year, and their power in this respect is not limited by the sections providing for annual levies to meet current expenses. *New Orleans Gas Light Co. v. New Orleans*, 42 La. Ann. 188; 29 Am. & Eng. Corp. Cas. 246.

1. *North Pac. etc., Co. v. East Portland*, 14 Oregon 3; *Barter v. Com.*, 3 Pa. 253; *Com. v. Erie, etc., R. Co.*, 27 Pa. St. 339; 67 Am. Dec. 471; *Grand Rapids, etc., R. Co. v. Grand Rapids Edison Electric Light, etc., Co.*, 33 Fed. Rep. 659; *Denver Circle R. Co. v. Nestor*, 10 Colo. 403.

In addition to the powers expressly granted, however, a municipal corporation usually has all incidental powers necessary to carry those expressly granted into effect, and its authority to improve and care for its streets in certain ways may sometimes be implied. *White v. McKeesport*, 101 Pa. St. 394; *Keasy v. Louisville*, 4 Dana (Ky.) 154; 29 Am. Dec. 395; *Carthage v. Frederick*, 122 N. Y. 268; 32 Am. & Eng. Corp. Cas. 452; 19 Am. St. Rep. 490. See MUNICIPAL CORPORATIONS, vol. 15, pp. 1039-1041.

Particular Instances. — *Laws New York*, 1885, ch. 454, providing that "the height of all dwelling houses, and of all houses used or intended to be used as dwellings for more than one family," thereafter to be erected in New York City, shall not exceed eighty feet in streets exceeding sixty feet in width, do not apply to hotels. *People v. D'Oench*, 111 N. Y. 859.

In *New York*, a village ordinance declaring it unlawful to go about the streets beating a drum or tambourine, or making any noise with any instrument, for any purpose, without written permission of the village president, under penalty of five dollars, is

authorized by the general village act, giving power to make ordinances for the preservation of the public peace, and to regulate and prevent on the streets any act endangering person or property, and for the apprehension of persons unnecessarily congregating on the sidewalks or corners. *Roderick v. Whitson*, 51 Hun (N. Y.) 620.

The charter of the city of Detroit provides that the city shall have power to clean the streets, alleys, and sidewalks, and prevent the incumbrance or obstruction of them; that it may regulate the manner in which they shall be used; and prevent all amusements and practices having a tendency to frighten horses, or dangerous to life or property. *Held*, that these provisions of the charter contain neither an express nor implied grant of power to the city to pass an ordinance prohibiting the distribution of any hand-bills or advertising cards upon any of the public streets or alleys of said city. *People v. Armstrong*, 73 Mich. 288; 27 Am. & Eng. Corp. Cas. 591; 16 Am. St. Rep. 578.

The charter of Minneapolis vests in the city council power to make such "ordinances for the government and good order of the city, for the suppression of vice and intemperance, and for the prevention of crime, as it shall deem expedient; . . . and for these purposes the said city council shall have authority by such ordinances . . . to prevent open or notorious drunkenness and obscenity in the streets of said city." *Held*, that an ordinance which imposes a penalty upon "any person who commits any act of lewdness or indecency, within the limits of said city," is void, because it is in excess of the power vested in the city council. *State v. Hammond*, 40 Minn. 43.

Neither under its authority to regulate the use of streets, nor section 26, art. 3, of its charter, empowering the mayor and assembly "to license, tax, and regulate" various professions and businesses, nor the general-welfare clause permitting the passage of all such ordinances, not inconsis-

for, regulate and improve streets, taken in connection with the other powers usually granted, gives to municipal corporations all needed authority to keep the streets free from obstructions, and to prevent improper use and to ordain ordinances to this end."¹

ent with the provisions of the charter or the laws of the State, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufacture, can the city of St. Louis regulate by ordinance the tariff of charges of a telephone company. *St. Louis v. Bell Teleph. Co.*, 96 Mo. 623.

The charter of the city of Minneapolis authorizes the city council to restrain the running at large of cattle and other domestic animals within the city limits. *Held*, not to authorize an ordinance providing a penalty for trespasses committed by herdsmen or stock-owners in herding their cattle upon the lands of private owners. *State v. Johnson*, 41 Minn. 111.

In a city one mile square, with a population of nearly 2,000, where cattle run at large, an ordinance prohibiting the use of barb-wire fences on any street or alley is unreasonable as to a landowner who set his fence a year before the passage of the ordinance, a foot back from the street line on a street very little used, there having been no sidewalk in front of the lots till a narrow plank one was laid four months before suit. *Mason City v. Barngrover*, 26 Ill. App. 296.

But in *Alabama*, where a city charter authorized the city "to prevent stock of any kind from running at large in the public streets," in pursuance of which an ordinance provided that animals running at large in the city should be impounded and sold after due notice, on a certain day in each week, unless claimed by the owners, in which event they should be delivered to the owners on payment of certain costs, and that no animal should be sold within 48 hours after it was impounded, this was held a valid exercise of police power. *Folmar v. Curtis*, 86 Ala. 354.

1. 2 *Dillon's Munic. Corp.*, § 680, citing *Philadelphia v. Philadelphia, etc., R. Co.*, 58 Pa. St. 253; *Dudley v. Frankfort*, 12 B. Mon. (Ky.) 617; *Sinton v. Ashbury*, 41 Cal. 525; *Toledo, etc., R. Co. v. Chenoa*, 43 Ill. 209; *Illinois Cent. R. Co. v. Galena*, 40 Ill.

344; *Terre Haute v. Turner*, 36 Ind. 522; *Citizens' Gas, etc., Co. v. Elwood*, 114 Ind. 332; 20 Am. & Eng. Corp. Cas. 263; *Livingston v. Wolf*, 136 Pa. St. 519; 20 Am. St. Rep. 936.

But a city ordinance prohibiting parades accompanied with shouting, singing, music, or any acts calculated to attract an unusual crowd, without written consent of the mayor, has been held void. *Anderson v. Wellington*, 40 Kan. 173; 10 Am. St. Rep. 175; *In re Frazee*, 63 Mich. 396; 15 Am. & Eng. Corp. Cas. 13; 6 Am. St. Rep. 310; *People v. Armstrong*, 73 Mich. 288; 27 Am. & Eng. Corp. Cas. 591; 16 Am. St. Rep. 578. Compare, however, *Com. v. Plaisted*, 148 Mass. 375; 23 Am. & Eng. Corp. Cas. 101; 12 Am. St. Rep. 566.

Authority Over Obstructions.—The municipal authorities of a town have a right to remove, or cause to be removed, any obstruction of the public streets. *Sheen v. Stothart*, 29 La. Ann. 630.

Mere non-usage by the public of the soil forming part of a public street will not prescribe against the right of the municipal corporation and the public to resume its use and clear it of obstructions. *Sheen v. Stothart*, 29 La. Ann. 630.

A charter power to prevent incumbrance of streets is an authority, not only to remove, or cause to be removed, anything actually obstructing a street, but also to take measures to prevent anything from becoming an obstruction. It authorizes the common council, not only to forbid the setting of posts in a street to support an awning, and to remove posts already set for that purpose, but to forbid the erection of wooden awnings, on account of their liability to fall. *Fox v. Winona*, 23 Minn. 10.

But it has been held that where a city corporation was empowered by its charter to impose penalties for "cumbering" streets, such power did not include that of imposing penalties for encroachments on the streets. *Grand Rapids v. Hughes*, 15 Mich. 54.

The corporate authorities of a town

2. Powers Under Particular Charters.—Power to “open and extend streets,” includes the power to construct them,¹ and a general grant of authority to lay out streets includes the power to extend a street across a railroad.² So, a grant of power to regulate streets and sidewalks, gives the city the right to determine their width.³ Sidewalks may be improved under the authority to improve streets,⁴ and authority “to lay out, open, grade and otherwise improve the streets and keep them in repair,” empowers the city to establish the grade of streets, and to require the abutting owners, in constructing sidewalks, to make them conform thereto.⁵

3. Power to Grade and Pave.—“That the use of streets for travel may be made safe and convenient,” says Judge Dillon, “the

have no right to appropriate the public streets to any other uses than that of travel, or right of way, to which they were dedicated, and the convenience of the whole public. They cannot lawfully obstruct them with public or private buildings. Such improper appropriation will be restrained at the suit of any one whose property is especially injured thereby. *Lutterloh v. Mayor, etc., of Cedar Keys*, 15 Fla. 306.

The corporate authorities of a city hold the public streets in trust for the use of the public. Where the municipality possesses the fee in such streets, although in trust for public uses, it may maintain ejectment against any one who wrongfully intrudes upon, or occupies, or detains the property. Where the adjoining proprietor retains the fee, the right to the possession, use, and control of the street by the municipality is regarded as a legal, and not a mere equitable, right. *Chicago v. Wright*, 69 Ill. 318.

The power of the common council of a city to authorize the obstruction of streets or alleys is legislative in its character, and can only be exercised by an ordinance passed under the formalities required by law. Hence a mere order of the common council authorizing an individual to use the streets and alleys adjacent to a building being erected by him, for the purpose of depositing building materials thereon, operates only as a mere license, revocable at the will of the council. *Indianapolis v. Miller*, 27 Ind. 394.

Where the legal title to the soil is in a corporation or the public, it may maintain ejectment to recover the possession of a street. *Mayor v. Steamboat Co., R. M. Charlt. (Ga.)* 342.

In *New York*, a city was sustained

in laying, under a statutory power to remove obstructions in neighboring waters, an assessment to defray expenses of removing an obstruction, although it was created by neglect on the part of the city authorities. *Buffalo Union Iron Works v. Buffalo*, 1 Buff. Super. Ct. (N. Y.) 244.

See generally on this subject, *State v. Mayor, etc., of Jersey City*, 37 N. J. L. 348; *Dawes v. Hightstown*, 45 N. J. L. 501; 4 Am. & Eng. Corp. Cas. 521; *Hawley v. Harrall*, 19 Conn. 142; *Com. v. Curtis*, 9 Allen (Mass.) 266; *Pedrick v. Bailey*, 12 Gray (Mass.) 161; *Emerson v. Babcock*, 66 Iowa 257; 55 Am. Rep. 273; *Laconia v. Gilman*, 55 N. H. 127; *St. Louis, etc., R. Co. v. Belleville*, 122 Ill. 376; 32 Am. & Eng. R. Cas. 278 (may prevent obstruction by trains); *McCarthy v. Chicago*, 53 Ill. 38; *Lowell v. Simpson*, 10 Allen (Mass.) 88 (regulation of use for building); *State v. Summerfield (N. Car.)*, 32 Am. & Eng. Corp. Cas. 441 (forbidding exposure of merchandise in front of stores).

1. *Matthiessen, etc., Sugar Refining Co. v. Mayor, etc., of Jersey City*, 26 N. J. Eq. 247.

2. *St. Paul, etc., R. Co. v. Minneapolis*, 35 Minn. 141; 24 Am. & Eng. R. Cas. 309; *Hannibal v. Hannibal, etc., R. Co.*, 49 Mo. 480; *Hannibal v. Winchell*, 54 Mo. 172.

3. *State v. Mayor, etc., of Morristown*, 33 N. J. L. 57.

4. *Taber v. Grafmiller*, 109 Ind. 206.

And sidewalks may be removed, under a statute giving the city authorities discretionary power to construct sidewalks. *Attorney-Gen'l v. Boston*, 142 Mass. 200; 13 Am. & Eng. Corp. Cas. 513.

5. *Burr v. New Castle*, 49 Ind. 322.

legislature usually confers upon the municipal authorities the power, in express terms, to graduate and improve them, and supplies the means to carry the power into effect by requiring the inhabitants to perform labor upon the streets or to pay specific taxes for that purpose, or taxes that may be so appropriated by the corporation."¹ This power is a continuing one, and is not exhausted by being once exercised.² Its exercise

1. 2 Dillon's Munic. Corp., § 685.

Power to Grade.—In *Pennsylvania*, the authority to grade and pave streets is considered as among the implied powers of a municipal corporation. *White v. McKeesport*, 101 Pa. St. 394.

In *California*, a city has the right to raise the grade of a street. If the contractor performs the work with proper care and skill, he is not responsible for any damage which may result to the contiguous property. *Shaw v. Crocker*, 42 Cal. 435.

But it was held in the same state that the city of Napa, Cal., has no power, under its charter, to declare and adopt "an official system of grades," the charter clearly making the power to establish grades a different thing from the power to provide for grading, and it being apparent that grades must be established in the mode specified before the grading can be provided for. *Napa v. Easterby*, 61 Cal. 509.

Where a city charter provided that property owners might "open, grade, and pave, or lay side or cross walks at their own expense, but in the manner directed by the board of councilmen, provided they do the same within a reasonable time to be fixed by said board, otherwise said improvement shall be done by the city," etc., and certain owners graded only a part of a street, and ceased work thereon—held, that the council should not be restrained from completing the work; the permission to grade did not take away the council's power to regulate the matter. *Morris v. Mayor, etc., of Bayonne*, 25 N. J. Eq. 345.

Where the charter of a city declared that its common council should have full control of the streets, and power to establish the grades thereof, but provided that no street should be graded without a recommendation in writing, signed by a majority of the resident owners of property situate thereon—held, that the city was liable to a lot owner for injury to his lot from the grading of a street ordered without

such recommendation, and that where the grade of a street had been established by vote of the council, a recommendation subsequently presented by a majority of the resident owners of property on such street, that the same be graded, must be presumed to refer to the grade so established. *Crossett v. Janesville*, 28 Wis. 420.

In *New York*, since the passage of *New York Acts* 1873, ch. 335, § 17, subd. 10, the common council of New York City has had charge of providing for and regulating the grade of streets, the power conferred by the act of 1872 upon the department of public works being transferred to the council, with the directions of which the department is bound to comply. *In re Roberts*, 25 Hun (N. Y.) 371.

The power conferred upon the Central Park Commissioners by *New York Laws* 1867, ch. 697, § 1, to change the grade of any of the streets within a certain district, is not subject to, or limited by *New York Laws* 1852, ch. 52, § 2, prohibiting the council from changing the grade of streets without the written consent of a certain proportion of the owners of lands adjoining. *In re Walter*, 83 N. Y. 538.

In *New Jersey*, where, from an agreed statement of facts, it appeared that a portion of a certain turnpike road traversing the city of N. B. was one "of the public recognized streets of said city," it was held that this must be considered an admission that the avenue was recognized as a public street by the municipal authorities on the one hand and the turnpike company on the other; and, that being so, the municipal jurisdiction as to grading, paving, etc., extended thereto. *State v. New Brunswick*, 32 N. J. L. 548.

2. *McCormack v. Patchin*, 53 Mo. 33; 14 Am. Rep. 440; *Morley v. Carpenter*, 22 Mo. App. 640; *Estes v. Owen*, 90 Mo. 113; *Municipality No. Two v. Dunn*, 10 La. Ann. 57; *Coates v. Dubuque*, 68 Iowa 550; *Kokomo v. Mahan*, 100 Ind. 242; *Goszler v. Georgetown*, 6

rests largely in the discretion of the municipal authorities, and they, rather than the courts, are the judges of the necessity or expediency thereof.¹ The power must, however, be exercised in the manner prescribed by statute.²

The power to pave generally includes the power to grade, and, like the latter, it is not exhausted by being once exercised.³ Everything necessary to carry the power into effect is included as incidental thereto,⁴ and a city has the right to pave crosswalks and street intersections under a general grant of power to pave.⁵

4. Power to Repair.—The power to repair is another important power usually possessed by cities. Under this power a municipi-

Wheat. (U. S.) 593; *Adams v. Fisher*, 75 Tex. 657; 22 Am. & Eng. Corp. Cas. 454.

State v. Elizabeth, 30 N. J. L. 365; *Williams v. Detroit*, 2 Mich. 560; *In re Belmont*, 12 Hun (N. Y.) 568.

1. *Murphy v. Peoria*, 119 Ill. 509; *Smith v. Washington*, 20 How. (U. S.) 135; *Delphi v. Evans*, 36 Ind. 90; 10 Am. Rep. 12; *Karst v. St. Paul*, etc., R. Co., 22 Minn. 118; *Markham v. Mayor*, etc., 23 Ga. 402; *Koons v. Lucas*, 52 Iowa 177; *Coates v. Dubuque*, 68 Iowa 550.

2. *Thomson v. Boonville*, 61 Mo. 282; *Hawthorn v. East Portland*, 13 Oregon 271; 12 Am. & Eng. Corp. Cas. 525; *Henderson v. Mayor*, etc., of Baltimore, 8 Md. 352.

The legislature cannot, as a rule, bind itself by contract not to exercise the power when the public good demands its exercise. *Kreigh v. Chicago*, 86 Ill. 407. See, however, *New York Nat. Water Works Co. v. Kansas City*, 20 Mo. App. 237.

3. *Morley v. Carpenter*, 22 Mo. App. 640; *State v. Elizabeth*, 30 N. J. L. 365; *Williams v. Mayor*, etc., of Detroit, 2 Mich. 560; *In re Belmont*, 12 Hun (N. Y.) 558. Compare *Hammet v. Phila.*, 65 Pa. St. 146; 3 Am. Rep. 615. As to when it can be exercised in *New York*, see, *In re Garvey*, 77 N. Y. 523. A city, under this power, is not limited to the laying of any one particular kind of pavement. *Burnham v. Chicago*, 24 Ill. 496; *Gurnee v. Chicago*, 40 Ill. 165; *Warren v. Henly*, 31 Iowa 31; *In re Phillips*, 60 N. Y. 16.

4. Under this rule, gutters, curbstones, trimmings and the like may be put in to complete the pavement. *Schenley v. Com.*, 36 Pa. St. 29; 78 Am. Dec. 359; *Dean v. Borchsenius*, 30 Wis. 236; *McNamara v. Estes*, 22

Iowa 246; *Steckert v. East Saginaw*, 22 Mich. 104; *People v. Brooklyn*, 21 Barb. (N. Y.) 484.

5. *Powell v. St. Joseph*, 31 Mo. 347; *State v. Atlantic City*, 34 N. J. L. 99; *O'Leary v. Sloo*, 7 La. Ann. 25; *Lawrence v. Killam*, 11 Kan. 499; *In re Burke*, 62 N. Y. 224.

Power to Pave.—Corporations which have by law a right to pave the streets may raise or lower particular parts of any street, if such raising or lowering should be necessary for performing the work in a reasonable and proper manner; and the individuals who may be injured by it have no right of action for such injury, unless expressly given by statute. *Smith v. Washington*, 20 How. (U. S.) 135; *Hoe v. Mayor of Alexandria*, 1 Cranch (C. C.) 98.

The grant of power to the common council of a city to make and lay out streets, etc., in said city, and authority conferred upon the municipal corporation to direct the pitching and paving of streets, and to assess the expense upon property benefited gives the common council full discretion, save as curtailed or controlled by legislative action. This discretion and choice will not be deemed revoked by any implication or doubtful inference. *In re Dugro*, 50 N. Y. 513.

Authority to require abutting lot owners to pave, includes the power to require them to make sidewalks. *Warren v. Henly*, 31 Iowa 31.

In *Louisiana*, where one-fourth of the owners of lots fronting on a street do not join in a memorial to have the street paved, the common council have no right to contract for its paving; and such a contract will be invalid against the property holders. *McGuinn v. Peri*, 16 La. Ann. 326.

So, in *New York*, there must be a

pality has the right to keep its streets in good condition and to restore the pavement after injury or partial destruction, but not, as a rule at least, to pave in the first instance.¹

5. Other Powers.—Cities usually have the power, also, to regulate the travel and use of vehicles upon their streets;² to prohibit or regulate auction sales upon the sidewalks;³ to regulate the speed of trains⁴ and prohibit fast driv-

petition to give the city authority to repave at the expense of adjoining owners. *In re Garvey*, 77 N. Y. 523.

1. *Pittsburgh, etc., R. Co. v. Pittsburgh*, 80 Pa. St. 72. See, also, *In re Fulton Street*, 29 How. Pr. (N. Y.) 429; *People v. Brooklyn*, 21 Barb. (N. Y.) 484.

"Under authority to repair there can be no enlargement and improvement, except in so far as the work of repairing necessarily enlarges and improves." *Weaver v. Templin*, 113 Ind. 303.

No by-law is necessary to authorize repairs. *Pratt v. Stratford*, 14 Ont. Rep. 260; 22 Am. & Eng. Corp. Cas. 404.

2. *Com. v. Stodder*, 2 Cush. (Mass.) 562; 48 Am. Dec. 679; *Com. v. Matthews*, 122 Mass. 60; *Brooklyn v. Breslin*, 57 N. Y. 59; *People v. James*, 16 Hun (N. Y.) 426; *Reg. v. Pipe*, 1 Ont. 43; *Gartside v. East St. Louis*, 43 Ill. 47; *Nagle v. City Council of Augusta*, 5 Ga. 546; *City Council v. Pepper*, 1 Rich. (S. Car.) 364; *Memphis v. Battaille*, 8 Heisk. (Tenn.) 524; *St. Paul v. Smith*, 27 Minn. 364; *Com. v. Robertson*, 5 Cush. (Mass.) 438; *Com. v. Brooks*, 99 Mass. 434. See, also, *Garden City v. Abbott*, 34 Kan. 283; *Gass v. Greenville*, 4 Sneed (Tenn.) 62. *Compare Oswego v. Collins*, 38 Hun (N. Y.) 171.

Bicycles and sprinkling carts are vehicles, the use of which may be regulated under this power. *State v. Yopp*, 97 N. Car. 477; 18 Am. & Eng. Corp. Cas. 514; 2 Am. St. Rep. 305; *Mercer v. Corbin*, 177 Ind. 450; 10 Am. St. Rep. 76; *State v. Collins*, 16 R. I. 371; *In re Wright*, 20 Hun (N. Y.) 357; *St. Louis v. Woodruff*, 71 Mo. 92 (Case of sprinkling cart.)

An ordinance, authorizing the depot marshal, or any police officer to prescribe the place where omnibuses, hacks, and other vehicles shall stand at a railroad depot while waiting for passengers, and requiring drivers to obey the directions of the officer, is

valid. *Veneman v. Jones*, 117 Ind. 41; 28 Am. & Eng. Corp. Cas. 147.

The charter of Detroit which gives the council power "to prohibit and prevent incumbering or obstructing of streets, lanes, alleys, cross-walks, sidewalks, and public grounds and spaces, with vehicles, animals," etc., authorizes the enactment of an ordinance forbidding farmers, hucksters, peddlers, etc., from standing with their vehicles and carts on the streets adjacent to the city market, within 500 feet of said market. *People v. Keir* (Mich.), 43 N. W. Rep. 1039.

The violation of a city ordinance forbidding "any vehicle, or the animals attached thereto, to stand waiting for employment within ten feet of any cross-walk," and prescribing "a penalty of not less than one, nor more than ten dollars for every such offense," is a misdemeanor, and the penalty may be recovered by a criminal prosecution. *State v. Keenan*, 57 Conn. 286.

3. *St. Paul v. Traeger*, 25 Minn. 248; *White v. Kent*, 11 Ohio St. 550; *Caldwell v. Alton*, 33 Ill. 416. See also *Graffly v. Rushville*, 107 Ind. 502; 15 Am. & Eng. Corp. Cas. 456; 57 Am. Rep. 123.

4. *Grube v. Missouri Pac. R. Co.*, 98 Mo. 330; 41 Am. & Eng. R. Cas. 357; *Richmond, etc., R. Co. v. Richmond*, 96 U. S. 521; *Knobloch v. Chicago, etc., R. Co.*, 31 Minn. 402; *Chicago, etc., R. Co. v. Haggerty*, 67 Ill. 113; *Whitson v. Franklin*, 34 Ind. 392; *Donnaher v. State*, 8 Smed. & M. (Miss.) 649. See also *Buffalo, etc., R. Co. v. Buffalo*, 5 Hill (N. Y.) 209; *North Chicago City R. Co. v. Lake View*, 105 Ill. 183; 20 Am. & Eng. Corp. Cas. 6; 44 Am. Rep. 788; *Meyers v. Chicago, etc., R. Co.*, 57 Iowa 555; *Cowley v. Burlington, etc., R. Co.*, 65 Iowa 658; 18 Am. & Eng. R. Cas. 56.

The charter of a city providing for the adoption of ordinances to prevent the incumbering of streets with carriages, authorizes an ordinance to prevent the obstruction of streets by

ing;¹ to protect the shade trees along the streets;² to place hydrants, drinking fountains, and cisterns in the streets;³ and to even compel the property owners to remove ice and snow from the sidewalks in front of their premises.⁴

The legislature may also authorize municipal corporations to permit pipe lines for gas or water to be laid in the streets,⁵ railroads to be constructed thereon,⁶ and telegraph or telephone

railroad cars. *Duluth v. Mallet*, 43 Minn. 204.

An ordinance prohibiting the stopping of railroad cars on a street crossing for the switching of cars is not *prima facie* unreasonable and void. *Duluth v. Mallet*, 43 Minn. 204.

The ordinance which limits the rate of speed of railway trains within the limits of the city of St. Paul to four miles an hour is not, on its face, so unreasonable as to justify the court in setting it aside. *Weyl v. Chicago, etc., R. Co.*, 40 Minn. 350.

But where two competing lines of railway pass through different parts of a city, and there is no material difference between the character of such parts, an ordinance limiting the speed of trains in only one part is void. *Lake View v. Tate*, 130 Ill. 247.

In the absence of a legislative grant of power to that end, the police juries of *Louisiana* have no authority to pass an ordinance prohibiting the running of railroad trains through the villages of their parish at a greater speed than six miles an hour. *State v. Miller*, 41 La. Ann. 53.

1. *Nealis v. Hayward*, 48 Ind. 19; *Com. v. Worcester*, 3 Pick. (Mass.) 462. See also *Com. v. Brooks*, 99 Mass. 434. So, it may prohibit stopping a vehicle in a street for over twenty minutes. *Com. v. Fenton*, 139 Mass. 195; 11 Am. & Eng. Corp. Cas. 339.

2. *State v. Merrill*, 37 Me. 329; *Baker v. Normal*, 81 Ill. 108.

3. *West v. Bancroft*, 32 Vt. 367; *Louisville v. Osborne*, 10 Bush (Ky.) 226; *Lostutter v. Aurora*, 126 Ind. 436. Compare *Dubuque v. Maloney*, 9 Iowa 450; 74 Am. Dec. 358; *Morrison v. Hinkson*, 87 Ill. 587.

4. *Carthage v. Frederick*, 122 N. Y. 268; 19 Am. St. Rep. 490; 32 Am. & Eng. Corp. Cas. 452; *Goddard Petitioner*, 16 Pick. (Mass.) 504; 28 Am. Dec. 259; *Kirby v. Boylston Market Assoc.*, 14 Gray (Mass.) 252; 74 Am. Dec. 682. But compare *Gridley v. Bloomington*, 88 Ill. 554; 30 Am. &

Eng. R. Cas. 566; *Chicago v. O'Brien*, 111 Ill. 532; 53 Am. Rep. 640; *Lexington v. McQuillan*, 9 Dana (Ky.) 513; 35 Am. Dec. 159.

By the *New York* statute of 1868, the mayor, comptroller and street commissioner of the city of New York were authorized and directed to employ suitable persons, by contract or otherwise, to remove snow and ice from Broadway, and to perform such additional work as they should consider necessary, beyond that required by existing contracts, to keep the streets, etc., of said city constantly swept. *Held*, 1. That this gave to the persons named a wide discretion as to what work was necessary to be done by the employés, so as to keep the streets and avenues constantly swept; and that if, in order to do so it was necessary to clean the streets, or remove anything therefrom, it was within the authority conferred. 2. That although the title of the act was "An act to make provision for the government of the city of New York," and its purpose was, mainly, to provide means to carry on the government, yet it was not foreign to that purpose to provide for the expenditure of a part of the money so to be raised, in cleaning the streets and making them in a condition fit for public use. *Leverich v. Mayor, etc., of N. Y.*, 66 Barb. (N. Y.) 623.

5. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; 10 Am. & Eng. Corp. Cas. 639; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; 10 Am. & Eng. Corp. Cas. 662; *Kelsey v. King*, 32 Barb. (N. Y.) 410; *Crook v. Flatbush Water Works Co.*, 27 Hun (N. Y.) 72; *Jersey City v. Hudson*, 13 N. J. Eq. 420; *Quincy v. Bull*, 106 Ill. 337; 4 Am. & Eng. Corp. Cas. 554; *Indianapolis v. Indianapolis Gas Light, etc., Co.*, 66 Ind. 396; *Smith v. Metropolitan Gas-Light Co.*, 12 How. Pr. (N. Y.) 187.

6. *Chicago, etc., R. Co. v. People*, 91 Ill. 251; *Tilton v. New Orleans*

poles to be placed therein,¹ although for some of these uses, as will hereinafter be shown, the abutting owners are entitled to compensation.² It is generally held, however, that legislative authority is necessary to justify the use of a street for such purposes,³ but that authority may sometimes be inferred from the charter or act of incorporation.⁴

6. Alienation and Change of Use.—Municipal corporations, notwithstanding their broad and comprehensive powers, have no right, unless authorized by the legislature, to alienate their streets or devote them to uses inconsistent with the rights of the general public and the abutting landowners.⁵

City R. Co., 35 La. Ann. 1062; Atchison St. R. Co. v. Missouri Pac. R. Co., 31 Kan. 660; Barney v. Keokuk, 94 U. S. 324; Railroad Co. v. Brown, 17 B. Mon. (Ky.) 763; Kistner v. Indianapolis, 100 Ind. 210; 8 Am. & Eng. Corp. Cas. 420; Clarke v. Blackmar, 47 N. Y. 150.

1. Com. v. Boston, 97 Mass. 555; Young v. Yarmouth, 9 Gray (Mass.) 386; State v. Newark, 49 N. J. L. 344; Irwin v. Great So. Tel. Co., 37 La. Ann. 63; Mut. Un. Tel. Co. v. Chicago, 16 Fed. Rep. 309; Johnson v. Thompson Houston Electric Co., 54 Hun (N. Y.) 469.

2. See, *infra*, this title, *Uses of Streets*.

3. 2 Dillon's Munic. Corp., §§ 691, 698, 705; Savannah, etc., R. Co. v. Shiels, 33 Ga. 601; Com. v. Boston, 97 Mass. 555; Chamberlin v. Elizabethtown Cordage Co., 41 N. J. Eq. 43; Lawrence R. Co. v. Williams, 53 Ohio St. 168; State v. Cincinnati Gas Light, etc., Co., 18 Ohio St. 262; Ruttle v. Covington (Ky. 1889), 10 S. W. Rep. 644.

Where the lands required for streets have not been acquired in fee, but an easement only has been condemned, the city authorities have not power to appropriate them to the uses of a street railroad company; but a legislative act authorizing this is necessary. Perry v. New Orleans, etc., R. Co., 55 Ala. 413; 28 Am. Rep. 740.

As a city has not corporate power to authorize a railroad to lay tracks in the city streets, its ordinance granting leave is void; and will not operate even to estop the company having accepted and used it until it expired, from claiming or using the streets afterwards. Atlantic, etc., R. Co. v. St. Louis, 66 Mo. 228. Compare Cook v. Burlington, 36 Iowa 357; Stanley v. Davenport, 54 Iowa 463; 37 Am. Rep. 216.

Under the general power to regulate streets, the common council of a city cannot license an individual to lay a railroad track across a public street for his own private use. State v. Trenton, 36 N. J. L. 79; Glaessner v. Anheuser-Busch Brewing Assoc., 100 Mo. 308; 33 Am. & Eng. Corp. Cas. 483; Marine Ins. Co. v. St. Louis, etc., R. Co., 41 Fed. Rep. 643; 43 Am. & Eng. R. Cas. 79; Heath v. Des Moines, etc., R. Co., 61 Iowa 11; 10 Am. & Eng. R. Cas. 313.

The common council of a city, under power to pass ordinances to regulate or prevent the use of streets for any other purposes than public travel, has no power, by ordinance, to confer upon a railroad company a right to occupy exclusively twelve feet of a street by the erection thereon of a freight platform and roof. State v. Mayor, etc., of Jersey City, 52 N. J. L. 55; 28 Am. & Eng. Corp. Cas. 182.

4. St. Paul, etc., R. Co. v. Minneapolis, 35 Minn. 141; 24 Am. & Eng. R. Cas. 309; Denver, etc., R. Co. v. Domke, 11 Colo. 247; Quincy v. Bull, 106 Ill. 337; 4 Am. & Eng. Corp. Cas. 554.

5. Warren v. Lyons, 22 Iowa 351; Glasgow v. St. Louis, 87 Mo. 678; Dubach v. Hannibal, etc., R. Co., 89 Mo. 483; 29 Am. & Eng. R. Cas. 609; Portland, etc., R. Co. v. Portland, 14 Oregon 188; 58 Am. Dec. 299; Pomeroy v. Mills, 3 Vt. 279; 23 Am. Dec. 207; Le Clercq v. Gallipolis, 7 Ohio 217; 28 Am. Dec. 641; Harris v. Elliott, 10 Pet. (U. S.) 25; Coffin v. Portland, 27 Fed. Rep. 412; Moose v. Carson, 104 N. Car. 731; 17 Am. St. Rep. 681; Church v. Mayor, etc., of Hoboken, 33 N. J. L. 13; 97 Am. Dec. 696; Mayor, etc., of N. Y. v. Kerr, 38 Barb. (N. Y.) 369; *In re* Lewis Street, 2 Wend. (N. Y.) 472; *In re* John & Cherry Streets, 19 Wend. (N. Y.) 659;

VI. ALTERING AND WIDENING.—The matter of altering and widening streets is so largely regulated by statute that it is

Varick v. Mayor, etc., of N. Y., 4 Johns. (N. Y.) Ch. 53; *Bartow v. Draper*, 5 Duer (N. Y.) 130; *Mott v. Mayor, etc., of N. Y.*, 2 Hilt. (N. Y.) 358; *Kreigh v. Chicago*, 86 Ill. 407.

Cities have no right to divert to other uses land condemned for a public park, and can confer no such right by lease or other contract, without legislative authority. *Gilman v. Milwaukee*, 55 Wis. 328; *Glasgow v. St. Louis*, 15 Mo. App. 112; *Warren v. Lyons*, 22 Iowa 351; *Cooper v. Alden, Harr.* (Mich.) 72.

A lease by a city council of a portion of a street for a private use is void, though owing to its declivity, and its termination upon a river, it is seldom used, except by footmen. *Marine Ins. Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 643; 43 Am. & Eng. R. Cas. 79.

The council of Troy passed a resolution to reduce the width of a street, and give an institution abutting on the east side permission to inclose the excess. After this had been done with a permanent wall, a resolution was passed revoking the former one, withdrawing the permission, and directing the street to be opened to its original width. *Held*, that the former was *ultra vires*, and the public easement was not extinguished. *St. Vincent Female Orphan Asylum v. Troy*, 76 N. Y. 108; 32 Am. Rep. 286.

In the absence of legislative authority the local corporate authorities have no power to release the public right in a dedicated street. *Hoboken Land, etc., Co. v. Mayor, etc., of Hoboken*, 6 N. J. L. 540. See, also, *Julia Building Assoc. v. Bell Teleph. Co.*, 13 Mo. App. 477.

The erection of a watch-house or market-house in a street is not an ordinary street use, and cannot be authorized without compensation to the owner of the soil. *Winchester v. Capron*, 63 N. H. 605; 56 Am. Rep. 554; 13 Am. & Eng. Corp. Cas. 451; *State v. Laverack*, 34 N. J. L. 201; *State v. Mayor, etc., of Mobile*, 5 Port. (Ala.) 279; 30 Am. Dec. 564; *Mayor, etc., of Savannah v. Wilson*, 49 Ga. 476.

No one can disturb the surface of the street without consent of the municipal authority. Such permission would justify the opening as against the public,

but not against the owners of the soil when done for matters unconnected with the repair or improvement of the highway. *Glasby v. Morris*, 18 N. J. Eq. 72.

But the only restriction upon the appropriation of the streets of a city, by the municipal authority, which has control of them, is, that the use to be made of the streets must not be incompatible with the ends for which they were established. *Chapman v. Albany, etc., R. Co.*, 10 Barb. (N. Y.) 360.

And the legislature, having taken private property for the construction of a park, and vested the title in a municipal corporation in fee, may afterwards authorize a sale by the corporation of any part of the land originally taken. *Brooklyn Park Comrs. v. Armstrong*, 3 Lans. (N. Y.) 429; 45 N. Y. 234; 6 Am. Rep. 76.

A city has no right to so obstruct its streets, or to authorize the same to be done, as to deprive property holders from free access to and from their lots abutting on the same. If it permits the use of a street for an approach to a bridge, it must see that the approach is so constructed as not to produce injury to adjacent property holders. *Stack v. East St. Louis*, 85 Ill. 377; 28 Am. Rep. 619.

A charter power conferred upon a city, in ordinary terms, "to enact ordinances necessary for government," does not extend to a power to grant to individuals a franchise of building a toll-bridge across a river flowing through the city. *Williams v. Davidson*, 43 Tex. 1.

But a city has the right to establish a public market, although, incidentally, the neighboring streets are somewhat obstructed. It may also collect fees for the use of the market privileges and for allowing parties to sell market produce from wagons. No action lies on behalf of a citizen because of annoyance caused by such obstruction. *Henkel v. Detroit*, 49 Mich. 249; 43 Am. Rep. 464.

And it has been held to allow a street in a city to be used for a railroad track, either upon its natural surface, or by tunneling, is not a misapplication of it; provided such use does not interfere with the free and unobstructed use of it by the public, as a highway for passage

difficult to lay down general rules upon the subject. Cities are usually given all needful authority over such matters,¹ but the procedure differs greatly in different States. In many of the States a petition or an application of some kind is required in order to set the machinery in motion.² And due notice of the

and repassage. *Adams v. Saratoga*, etc., R. Co., 11 Barb. (N. Y.) 414; *Plant v. Long Island R. Co.*, 10 Barb. (N. Y.) 26.

1. Jurisdiction and Powers.—The municipal authorities of cities and villages are the exclusive judges of the propriety and necessity of the widening or laying out of a street within their corporate limits; and a court of equity will not interfere with the exercise of this discretion, unless there is manifest injustice, oppression, or gross abuse of power in their action. *Dunham v. Hyde Park*, 75 Ill. 371; *Brush v. Carbondale*, 78 Ill. 74.

An act authorizing the city councils to "widen and straighten" any street "as they may think requisite to improve the approaches to a park," gives them no right to extend a street or alter its course. *In re Thirty-fourth St.*, 10 Phila. (Pa.) 197.

Under an act authorizing the extension of a street, in a certain way and under certain restrictions, and providing that the authorities of a city so empowered may also, at their discretion, extend other streets named in the same section, and similarly situated—held, that it was thereby intended to confer the power to extend such other streets in the same way, and subject to the same restrictions. *Matthiessen, etc., Sugar Refining Co. v. Mayor, etc., of Jersey City*, 26 N. J. Eq. 247.

An Iowa city, under its general control over streets, may reduce the width of a street against the objection of persons whose injuries from the narrowing appear likely to be fanciful and imaginary. *Williams v. Carey*, 73 Iowa 194.

In *Wisconsin*, it is held that power to lay out implies power to alter. *Neis v. Franzen*, 18 Wis. 537.

Where a city charter gives the council power to alter or widen the streets only upon application in writing of three-fourths of the property-owners along the line, they cannot be altered or widened without such application. *Carron v. Martin*, 26 N. J. L. 594; 69 Am. Dec. 584.

2. Petition.—Under the *Pennsyl-*

vania act of 1874, requiring the proceedings for widening a street, on approval of the board of surveyors, to be "as now required by law," the act of 1871 governs, and the court of quarter sessions of the county of Philadelphia has no jurisdiction of a proceeding to widen a street on one side upon petition of the property holders only on the side to be widened. *In re Chestnut St.*, 86 Pa. St. 84.

In *California*, it is held that the legislature did not intend, by the act of January 31, 1870, relative to the opening of streets of Oakland, to authorize the city council to open, extend, straighten or widen any street, except in cases where the council were satisfied that the benefits to lands affected thereby, and to be assessed therefor, would exceed the damages to private property necessarily occasioned, and the expenses of the proceeding and work. *Jacobus v. Oakland*, 42 Cal. 21.

The *Massachusetts* Stat. authorizing the city of Worcester to widen and wall Mill Brook for sewage purposes, gives no right to divert a flow of offensive matter upon a citizen's land to his injury; and he may maintain a bill in equity to restrain the diversion. *Woodward v. Worcester*, 121 Mass. 245.

A city corporation is not authorized to appropriate public streets to a different purpose, or to narrow or widen them, unless this power is given expressly by the charter, except such act be necessary to give effect to a power expressly granted. *State v. Mayor, etc., of Mobile*, 5 Port. (Ala.) 279; 30 Am. Dec. 564; *Lackland v. North Missouri R. Co.*, 31 Mo. 180; *Attorney Genl. v. Heishon*, 18 N. J. Eq. 410.

As to the jurisdiction of the court of quarter sessions in *Pennsylvania*, see *In re Widening of Burnish Street* (Pa.), 21 Atl. Rep. 500.

The authority conferred by the *Pennsylvania* act of 1870, "to widen, straighten, or extend any streets, lanes, or alleys of said city," does not include widening a turnpike toll-road within the city limits, and assessing the cost

application or petition must be given as required by law.¹ The matter must generally be submitted to commissioners or viewers,² as in the case of establishing and opening a street in the first instance, and these commissioners must make such a report as the statute requires.³ Compensation must be made to the land-

on property abutting thereon. *Breed v. Allegheny*, 85 Pa. St. 214. See further as to the power of municipal corporations in widening streets, *State v. Lyle*, 100 N. Car 497; 22 Am. & Eng. Corp. Cas. 395; *State v. Mayor, etc., of Morristown*, 33 N. J. L. 57.

But it was held in *New York* that the widening of a street in Syracuse was not such an improvement as the city was prohibited from making without the application or consent of the property owners along the line of the street. *Granger v. Syracuse*, 38 How. Pr. (N. Y.) 308. See also *Gould v. Glass*, 19 Barb. (N. Y.) 179.

An acceptance by the president of the borough council, of notice of the time of view, etc., under a petition for an order by the court of quarter sessions to widen a street, held, to be no waiver of the privilege of the council, under the *Pennsylvania* act of 1872, regulating such widenings, to approve the petition before its presentation to the court. *Norwegian St.*, 81 Pa. St. 349.

A petition to change a highway, in *Indiana*, need not state that it will be of public utility, nor need it state the length of the proposed change. *Bowers v. Snyders*, 88 Ind. 302.

A new line cannot be laid out and opened under a petition to straighten or improve a highway. *Lowe v. Brannan*, 105 Ind. 247. See, also, *Pratt v. Amherst*, 140 Mass. 167. But *contra*, on petition to relocate, *Richards v. Bristol Co.*, 120 Mass. 401; *Hyde Parke v. Norfolk Co.*, 117 Mass. 416.

1. **Notice.**—See *Lincoln v. Warren*, 150 Mass. 309; *Austin v. Allen*, 6 Wis. 134; *Babb v. Carver*, 7 Wis. 124.

Under section 9 of the charter of the city of Portland—providing that the city council “have exclusive authority to lay out, alter, or discontinue any and all streets,” etc., in the city—a notice reciting a petition to lay out and re-run a certain street, and designating the time and place where and when a committee of the council will meet the parties interested, and will adjudge and determine whether the public

convenience requires such street to be laid out, is a sufficient notice; and the description of such street, in the notice, as “the westerly part of Congress street,” is sufficiently explicit. *Jones v. Portland*, 57 Me. 42.

2. *Anderson v. Bain*, 120 Ind. 254.

Commissioners and Viewers.—Where land is taken to widen a street under an act, the powers and jurisdiction of the commissioners are limited and restrained to the lines of the street, as enlarged. *Bennett v. Boyle*, 40 Barb. (N. Y.) 551.

A commissioner of public works owning property affected by a special assessment for widening a street, is disqualified by reason of interest from participation in the making of such assessment; and it and the ordinance based thereon are void. *Hunt v. Chicago*, 60 Ill. 183. See, also, *Bradley v. Frankfort*, 99 Ind. 417; 7 Am. & Eng. Corp. Cas. 436.

Petitioners for the alteration cannot be commissioners. *Williams v. Mitchell*, 49 Wis. 284. But see *White v. Coleman*, 6 Gratt. (Va.) 139. Their appointment would be a mere irregularity, not jurisdictional.

As to the *Pennsylvania* practice, see *Ferree v. Board of Surveyors*, 9 Phila. (Pa.) 518; *In re Merchant St.*, 9 Phila. (Pa.) 590.

As to the authority of the commissioners in *Massachusetts*, see *Hyde Park v. Norfolk Co.*, 117 Mass. 416; *Richards v. Bristol Co.*, 120 Mass. 401.

3. **Report.**—Under the charter of a city, commissioners were appointed to assess the benefits and expenses for the widening of an avenue. In making their report, the commissioners failed to estimate the value of sixteen feet of land belonging to S. Application was made for a writ of *mandamus*, directed to the commissioners, to proceed to assess the sixteen feet. *Held*, that no authority being given anywhere by the charter to the board to amend their report when once made and filed, the application must be denied; and if the commissioners, in making the assessment, had mistaken the location, frontage, depth, or any other element

owner,¹ and a statute which makes no provision for such compensation is unconstitutional and void.² Benefits and damages must be assessed in the manner prescribed by statute, and the rules governing such assessment are, in general, substantially the same as those governing the assessment of benefits and damages for the original opening or condemnation of land for the street.³

essential to the proper assessment of damages, that fact could only be shown in a proceeding to vacate the assessment. *State v. Longstreet*, 38 N. J. L. 312.

A provision in the statute authorizing the widening of a street, which requires that the report of the commissioners shall be made within six months, is to be deemed merely directory, and not a matter of jurisdiction. If the report is not made within the time jurisdiction is not lost by the delay. *Matter of Broadway widening*, 63 Barb. (N. Y.) 572.

It is not necessary to the validity of the action of commissioners appointed for the widening of a street, that the person whose property is taken should be named in their report, if it appears that his right to compensation was considered and adjudicated by the commissioners. The constitution of *New York* requires only that the owner shall be justly compensated for property taken for the purpose, and that can be done as well by describing or referring to as by naming him. *Granger v. Syracuse*, 38 How. Pr. (N. Y.) 308.

1. *Speir v. New Utrecht*, 121 N. Y. 420; *In re Chestnut St.*, 118 Pa. St. 593; 22 Am. & Eng. Corp. Cas. 400 and note; *Scott v. Toledo*, 36 Fed. Rep. 385; 22 Am. & Eng. Corp. Cas. 479 and note. See, also, *In re Ninth Ave. & Fifteenth*, 45 N. Y. 729, in which the municipality was held entitled to compensation as an owner of land taken for widening a street.

For the reason that the owner is entitled to compensation before the work is begun where land is taken to widen a street, such a proceeding cannot be joined with a proceeding to grade and gravel a street. *Mendenhall v. Clugish*, 84 Ind. 94.

But if trees within the original limits of a street obstruct it by reason of its widening, they may be removed without compensation therefor to the abutting landowner. *Murray v. Norfolk Co.*, 149 Mass. 328; 28 Am. & Eng. Corp. Cas. 210.

2. *In re Willis Ave.*, 56 Mich. 244; 7 Am. & Eng. Corp. Cas. 410; *In re Widening of Burnish St.*, 140 Pa. St. 531; *Tuttle v. Justices* (Tenn. 1890), 14 S. W. Rep. 486; *Kuntz v. Sumption*, 117 Ind. 1; *Lewis on Em. Domain*, § 368.

3. See *infra*, this title, *Proceedings Under Legislative Authority; Improvements*.

Assessment of Benefits and Damages.—One who is a lessee at the time of the order for taking land to widen a street, is entitled to damages although his lease terminates before the actual taking of the land. In such assessment, injury to personal property or to the good will of the business of a lessee or other owner, is not to be considered. In the absence of a showing that the owner has incurred trouble or expense, or loss of the use of his land by proceedings before the entry thereon, interest on the damages assessed should be allowed only from the time of the actual entry on the land, and not from the time of the passage of the order to take it. *Edmands v. Boston*, 108 Mass. 535.

An assessment of a betterment by the aldermen of Boston for the expense of widening a street under *Massachusetts Stat. of 1866, ch. 174*, may be laid after the widening, and without notice to the abutters of the intention to assess, provided notice is duly given them of intention to take their lands. *Prince v. Boston*, 111 Mass. 226.

Where the section of a street between two cross-streets has been widened, and the assessment for the improvement is confined to the property situated between those streets, in pursuance of a plan for a general widening of the street by sections, on an application for the confirmation of a special assessment, evidence that other lots on the same street, and beyond the limits of said section, will be benefited by such widening, is irrelevant. *Bigelow v. Chicago*, 90 Ill. 49.

Where, on the widening of a street, a portion of plaintiff's block was taken, and as the most prudent course he erected a new building on the site of the entire block, in an action for dam-

In some of the states it is provided by statute that the landowner shall be given a reasonable time in which to remove his trees, fences, and the like, and it is held in those states that if he fails to remove them within the reasonable time allowed him by the authorities, they may remove the same without making any compensation therefor.¹

A municipal corporation may generally dismiss proceedings to widen a street at any time before they are confirmed, even after verdict;² but not after confirmation and final judgment.³

VII. IMPROVEMENTS AND REPAIRS⁴—1. Authority to Make.—Municipal corporations, either from express legislative enactment or by necessary implication, generally have all necessary power to improve and keep the streets in repair.⁵ The matter is generally

ages the question asked him how long it took him to erect the new building was properly excluded. *Boles v. Boston*, 136 Mass. 398. See further as to evidence, *Benton v. Brookline*, 151 Mass. 250.

In a suit against a city, to recover the amount of an award for land taken in widening a street, it was contended that the improvement was conducted by a special commission acting under legislative authority; that a part only of the amount awarded had been collected from assessments, and that the money so collected had been applied to the payment of other awards in full under an order of court in a proceeding to which the plaintiffs in this suit were not parties, and that no additional assessments could be collected. *Held*, that these facts constituted no defense. *Sage v. Brooklyn*, 8 Abb. N. Cas. (N. Y.) 279.

In *South Carolina*, it was held where a street was widened by taking land off the lots on one side, and the expense pursuant to legislative enactment was ordered assessed against the proprietors on both sides of the street, that those whose land was not taken could not be assessed, and that the statute was unconstitutional. *State v. Mayor of Charleston*, 12 Rich. (S. Car.) 480.

See the comprehensive and very valuable note on this subject in 32 Am. & Eng. Corp. Cas. 107-111. Also *Beekman v. Jackson Co.*, 18 Oregon 283; *Benton v. Brookline*, 151 Mass. 250; *Plum v. Kansas City*, 101 Mo. 525; note to *Omaha v. Howell Lumber Co.*, 30 Neb. 633; 32 Am. & Eng. Corp. Cas. 117.

1. *Murray v. Norfolk Co.*, 149 Mass. 328; 28 Am. & Eng. Corp. Cas. 210.

See, also, as to the report of the selectmen fixing the time for removal, and notice thereof, to the landowners. *White v. Foxborough*, 151 Mass. 28; 32 Am. & Eng. Corp. Cas. 97; *State v. Clark*, 67 Wis. 229.

An order to remove all fences and structures encroaching upon the limits of a certain street, as shown by a certain plan, was held not to be an order for laying out or widening a street. *Somerville v. Middlesex*, 122 Mass. 292.

2. *Brokaw v. Terre Haute*, 97 Ind. 451; 7 Am. & Eng. Corp. Cas. 450 and note; *Mayor v. Musgrave*, 48 Md. 272; 30 Am. Rep. 458; *Garrison v. Mayor, etc., of N. Y.*, 21 Wall. (U. S.) 196; *Hamersley v. Mayor, etc., of N. Y.*, 56 N. Y. 533; *In re Anthony Street*, 20 Wend. (N. Y.) 618; 32 Am. Dec. 608; *Pillsbury v. Springfield*, 16 N. H. 565; *Rogers v. St. Charles*, 3 Mo. App. 41.

3. *Stafford v. Mayor, etc., of Albany*, 7 Johns. (N. Y.) 541; *In re Dover Street*, 18 Johns. (N. Y.) 506; *In re Canal Street*, 11 Wend. (N. Y.) 154; *Pollard v. Moore*, 51 N. H. 188; *Jones v. Oxford*, 45 Me. 419; *Hupert v. Anderson*, 35 Iowa 579; *In re Comrs. of Jersey City*, 31 N. J. L. 72.

4. See, also, IMPROVEMENTS, vol. 10, p. 242.

5. See *Knowles v. Seale*, 64 Cal. 377; *Mullarky v. Cedar Falls*, 19 Iowa 21; *Moran v. Lindell*, 52 Mo. 229; *Roberts v. Chicago*, 26 Ill. 249; *Macy v. Indianapolis*, 17 Ind. 267; *Creal v. Keokuk*, 4 Greene (Iowa) 47; *Burlington, etc., R. Co. v. Mt. Pleasant*, 12 Iowa 112; *Jones v. Boston*, 104 Mass. 461; *Jenks v. Racine*, 50 Wis. 318; *Wallich v. Manitowoc*, 57 Wis. 9; *Moran v. Troy*, 9

left to their discretion, and this discretion cannot, as a rule, be controlled by the courts.¹ Where it is discretionary with the local authorities there is, in general, no liability for failure to make improvements, nor for making them in a particular manner, so long as they act within the scope of their authority and are not guilty of actionable negligence.²

Many improvements may be made and paid for out of the public funds, under the "general welfare" clause found in most city charters.³ In such cases the work may be done by the servants of the city without letting it to an independent contractor, unless the statute otherwise provides.⁴ If the statute requires that the work should be awarded to the lowest or best bidder its provisions must be complied with, and the local authorities can-

Hun (N. Y.) 540; *Detroit v. Michigan Paving Co.*, 36 Mich. 335; *Hatch v. Hawkes*, 126 Mass. 177; *Wistar v. Philadelphia*, 80 Pa. St. 505; 21 Am. Rep. 112; *Karst v. St. Paul, etc., R. Co.*, 22 Minn. 118; *Colby v. Beaver Dam*, 34 Wis. 285; *Taber v. Grafmiller*, 109 Ind. 206; *Challiss v. Parker*, 11 Kan. 383.

Under a general power to improve streets, the city may sod a portion instead of graveling the whole. *Murphy v. Peoria*, 119 Ill. 509.

Under a charter provision authorizing a city to cause streets to be "paved, graded, or macadamized," the city is authorized to construct a sidewalk of plank, or other material. *Burlington, etc., R. Co. v. Mt. Pleasant*, 12 Iowa 112.

When the act of incorporation of a town confers power on the town to control its streets, and its duty is to improve them so as to afford a safe and easy transit, it may construct a bridge across a stream dividing the streets, and issue its bonds to pay for the same. *Mullarky v. Cedar Falls*, 19 Iowa 21.

If the members of the common council of a city, in passing an ordinance and letting a contract for the improvement of a street, act in good faith, under a misapprehension, they and the contractor, as well as the adjacent owner of real estate, believing the street to be within the corporate limits of the city, they cannot be held liable for the cost of such improvement, though the place where the same is made is not within the corporate limits. *Newman v. Sylvester*, 42 Ind. 106.

1. *Benson v. Waukesha*, 74 Wis. 31; *Fellowes v. New Haven*, 44 Conn. 240; 26 Am. Rep. 447; *Jelliff v. Newark*, 48 N. J. L. 101; *Welch v. Bowen*, 103 Ind. 252; 11 Am. & Eng. Corp. Cas.

334; *Goszler v. Georgetown*, 6 Wheat. (U. S.) 593; *McCormack v. Patchin*, 53 Mo. 33; 14 Am. Rep. 440; *Gurnee v. Chicago*, 40 Ill. 165; *Municipality No. Two v. Dunn*, 10 La. Ann. 57; *Karst v. St. Paul, etc., R. Co.*, 22 Minn. 118; *Markham v. Mayor, etc.*, 23 Ga. 402; *Gall v. Cincinnati*, 18 Ohio St. 563; *In re Burmeister*, 76 N. Y. 174.

2. *Pepper v. Philadelphia*, 114 Pa. St. 96; *O'Reilly v. Kingston*, 114 N. Y. 439; *Whitehouse v. Fellowes*, 10 C. B. N. S. 765; 100 E. C. L. 765; *Cracknell v. Thetford, L. R.*, 38 L. J., C. P. 353; *Blakemore v. Vestry*, 51 L. J., Q. B. 496; *Hodgson v. Mayor, etc., of York*, 28 L. T. N. S. 836; *Ruck v. Williams*, 3 H. & N. 308; *Lynch v. Mayor, etc., of N. Y.*, 76 N. Y. 60; 32 Am. Rep. 271; *Henderson v. Sandefur*, 11 Bush (Ky.) 550; *Lyon v. Cambridge*, 136 Mass. 419; *Freeport v. Isbell*, 83 Ill. 440; 25 Am. Rep. 407; *Stackhouse v. Lafayette*, 26 Ind. 17; 89 Am. Dec. 450; *Gold v. Philadelphia*, 115 Pa. St. 184.

But the city is liable for the negligence of its servants in doing the work. *Keating v. Cincinnati*, 38 Ohio St. 141; 43 Am. Rep. 421; *Meinzer v. Racine*, 70 Wis. 561; *Hendershott v. Ottumwa*, 46 Iowa 658; 26 Am. Rep. 182; *Waldron v. Haverhill*, 143 Mass. 582; *Martinsville v. Shirley*, 84 Ind. 546; *Princeton v. Gieske*, 93 Ind. 102; 6 Am. & Eng. Corp. Cas. 137; *Vanderlip v. Grand Rapids*, 73 Mich. 522; *Bradwell v. City*, 75 Mo. 213; 42 Am. Rep. 406.

3. See *Rushville Gas. Co. v. Rushville*, 121 Ind. 206.

4. *Platter v. Seymour*, 86 Ind. 323; *Cummins v. Seymour*, 79 Ind. 491; 41 Am. Rep. 618; *Aurora v. Fox*, 78 Ind. 1.

not do the work themselves.¹ It is generally provided, however, that improvements may be made at the expense of the abutting property owners specially benefited thereby, and the cost thereof assessed against their property.² In such a case the assessment must be clearly authorized and the requirements of the statute strictly pursued in all substantial matters.³

2. How Made—*a*. PRELIMINARY STEPS.—In many of the States, a petition by a certain number of the property owners is necessary in order to give the council or municipal authorities power to make the improvement. Where such is the case, the filing of a petition is a jurisdictional requisite, non-compliance with which invalidates the proceedings and assessment.⁴ So, in

1. *Reilly v. Mayor, etc.*, of N. Y., 111 N. Y. 473; *In re Manhattan, etc.*, R. Co., 102 N. Y. 301; 14 Am. & Eng. Corp. Cas. 339; *Mappa v. Los Angeles*, 61 Cal. 309; *Beers v. Dalles City*, 16 Oregon 334.

A statute directing that road officers shall give the contract for repairing the roads in a town to the lowest bidder, does not relieve the township of liability for the unsafe condition of its roads. *Mahanoy Tp. v. Scholly*, 84 Pa. St. 136.

Patented Process.—It has been held that when municipal authorities proceed to make a street improvement under provisions of law which require them to advertise for proposals and give the contract to the lowest bidder, they cannot assess property owners for the expenses of obtaining a patented process or invention. The patentee having the exclusive right to use this, no one can compete with his proposals. *Burgess v. Jefferson*, 21 La. Ann. 143; *Nicolson Pavement Co. v. Fay*, 35 Cal. 695; *Dean v. Charlton*, 23 Wis. 590. But other courts hold that a patented process may be used. *Mayor, etc., of Baltimore v. Raymo*, 68 Md. 569; *Attorney Genl. v. Detroit*, 26 Mich. 263; *Hobart v. Detroit*, 17 Mich. 246; 97 Am. Dec. 185; *In re Eager*, 46 N. Y. 100; *In re Dugro*, 50 N. Y. 513; *Yarnold v. Lawrence*, 15 Kan. 126.

2. See *infra*, this title, *Assessment*.

3. *Allen v. Galveston*, 51 Tex. 302; *Pound v. Chippewa Co.*, 43 Wis. 63; *State v. West Hoboken* (N. J. 1890), 20 Atl. Rep. 737; *In re Powers*, 29 Mich. 504; *People v. Gilon*, 121 N. Y. 551; *Newell v. Wheeler*, 48 N. Y. 486; *Joyes v. Shadburn* (Ky. 1890), 13 S.W. Rep. 361; *First Presbyterian Church v. Ft. Wayne*, 36 Ind. 338; 10 Am. Rep.

35; *Hopkins v. Mason*, 61 Barb. (N. Y.) 469; *Upington v. Oviatt*, 24 Ohio St. 232; *Workman v. Chicago*, 61 Ill. 463. See *infra*, this title, *Assessment*.

4. *Holland v. Mayor, etc.*, of Baltimore, 11 Md. 186; 49 Am. Dec. 195; *Miller v. Mobile*, 47 Ala. 163; 11 Am. Rep. 768; *People v. Brooklyn*, 71 N. Y. 495; *State v. Mayor, etc.*, of Orange, 32 N. J. L. 49; *State v. Elizabeth*, 31 N. J. L. 547; *State v. Mayor, etc.*, of Newark, 37 N. J. L. 415; *Kyle v. Malin*, 8 Ind. 34; *Mowbery v. Jeffersonville*, 38 Ind. 198; *Louisville v. Hyatt*, 2 B. Mon. (Ky.) 177; *Covington v. Casey*, 3 Bush (Ky.) 698; *St. Louis v. Clemens*, 36 Mo. 467; *Welsford v. Weidlein*, 23 Kan. 601; *Turrill v. Grattan*, 52 Cal. 97; *Green v. Jersey City*, 42 N. J. L. 565; *McKee v. Brown*, 23 La. Ann. 306; *Wells v. Burnham*, 20 Wis. 112.

In *Louisiana*, where the statute requires a petition by one-fourth of the number of property owners, it is not necessary for one-fourth of the front proprietors on the whole length of a street in which improvements are to be made, to petition the city council for that purpose. It is sufficient if it be done by those on the portion sought to be improved. *Ready v. New Orleans*, 27 La. Ann. 169.

A petition lacking the essential averments is tantamount to no petition. *Turrill v. Grattan*, 52 Cal. 97.

Where a certain number of property owners are required to petition for the improvement, the names need not all be attached to the same petition. *Campbell v. Park*, 32 Ohio St. 544.

If no petition is required by statute, the matter is in the discretion of the municipality. *Barber, etc., Co. v.*

Gogreve, 41 La. Ann. 1015; Napa City v. Easterby, 76 Cal. 222; 22 Am. & Eng. Corp. Cas. 443; Gafney v. San Francisco, 72 Cal. 146; Ganson v. Buffalo, 2 Abb. App. Dec. (N. Y.) 236.

The *Colorado* act of 1879, provides that the city council of Denver shall construct sewers in a district when the majority of the residents petition for it. An ordinance for the construction of a sewer recited that it was enacted in accordance with the petition of the citizens. It was in evidence that a majority of the residents of the district had not petitioned. *Held*, that the question of whether the majority had petitioned or not was jurisdictional, and the ordinance could not be sustained. *Keese v. Denver*, 10 Colo. 112; also *Mulligan v. Smith*, 59 Cal. 206; *Zeigler v. Hopkins*, 117 U. S. 683; 2 Dillon's *Munic. Corp.*, § 800. *Compare* *Robinson v. Rippey*, 111 Ind. 112; *Osborn v. Sutton*, 108 Ind. 443.

Under the charter of Tacoma, requiring a petition to the council for street improvements to be signed by the resident owners of more than half the abutting property, but not providing how the fact of residence shall appear, it is held that such petition need not show that the signers are a majority of such resident owners, but it will be presumed that the council judged correctly, until the contrary appears. *Wright v. Tacoma*, 3 Wash. T. 410. See, also, *In re Sharp*, 56 N. Y. 257; 15 Am. Rep. 415.

The *Arkansas* statute relating to local improvements in cities, provides that, within a certain time after publication of the ordinance establishing the improvement districts, a petition designating the nature and cost of the improvement shall be presented to the council, signed by a majority in value of the real-estate owners in such district, before appointing the board of improvement. *Held*, that a stockholder in a corporation owning property in the district is not an owner of such property within the statute, nor is an administrator the owner of his intestate's estate. *Rector v. Board of Improvement*, 50 Ark. 116; 19 Am. & Eng. Corp. Cas. 630.

A petition of lot owners for the improvement of "Hope street, between Willow and Schofield streets," sufficiently asks for the work ordered by an ordinance for the improvement of "that portion of Hope street and the sidewalks thereof lying between Schofield and Willow streets." *Wiles v. Hoss*,

114 Ind. 371; 22 Am. & Eng. Corp. Cas. 460.

Sess. Law of *Kansas* 1887, ch. 99, § 4, provides that if a petition of a majority of the resident owners of a majority of the front feet on any street petition the mayor and council "to grade any street, and to grade and pave the intersections thereof," at the cost of the owners, and the petition shall be ordered spread upon the journal, the city council shall have power to assess the costs of the improvement, etc. *Held*, that the petition is valid, though it does not contain a request for grading and paving the intersections. *Wahlgren v. Kansas City*, 42 Kan. 243.

Under a charter prohibiting the change of grade of a street, as established, except on petition of the owners of a majority of the abutting property, etc., it was held that an ordinance and assessment for paving a street were not rendered invalid by the fact that some slight changes and modifications in the grade were made in the course of the paving, without a petition for such changes having been made by the property owners, where it did not appear that such changes increased the cost of the paving. *O'Reilley v. Kingston*, 114 N. Y. 439.

Where, owing to an error in the assessor's maps, it appears that a petition was signed by a majority of property-owners on a street, and the city contracts with A to water the street, both the city and A acting in good faith, A may recover for the service, although, in fact, the city was not authorized to make the contract, a majority of property owners not having signed. *Schier v. Buffalo*, 35 Hun (N. Y.) 564.

A person joining in a petition for the improvement of a street is estopped to deny the legality of a tax assessed therefor, on the ground that two-thirds of the abutting owners did not, as required by the city charter, join in the petition. *Burlington v. Gilbert*, 31 Iowa 356. But *compare In re Sharp*, 56 N. Y. 257; 15 Am. Rep. 415.

Under the charter of the city of Jefferson, *Louisiana*, a petition was required signed by the owners of one-fourth of the land on the entire length of the street to authorize the council to cause a banquette to be constructed thereon, and to impose the burdens thereof on the front proprietors, it was held that if the council made a contract for banquetting a portion only of the street, on the basis that the proprietors of more

some of the States, it is provided that the council must pass a preliminary resolution that the proposed improvement is necessary.¹ Wherever such matters are jurisdictional, the statutory

than one-fourth of the land on the part of the street which was improved had petitioned therefor, other proprietors, even on the part of the street so improved, could not be compelled to contribute to the expense because the contract had been given out by the council in violation of law. *McKee v. Brown*, 23 La. Ann. 306.

The common council of a city may presume that where a property owner petitions for a street improvement, he does so in good faith, and not under a contract by which he is to be relieved from all or any part of his share of the expense of the improvement, while seeking to have others taxed their full shares. *Maguire v. Smock*, 42 Ind. 1.

When a petition, duly and regularly signed and submitted, asking for a local improvement, is before a common council for consideration, the council is not bound to examine a remonstrance filed by some of the petitioners, asking to have their names struck off from the petition. *White v. Buffalo*, 1 Buff. Super. Ct. (N. Y.) 180.

According to the charter of New Orleans, when one-fourth of the front proprietors petition for the improvement of the sidewalks, if a majority fail to object to the request of said petitioners, by a written petition, addressed to the council, they are presumed to have assented to the demand of the petition, and should be bound by a contract entered into in accordance with the petition, to make the improvements which they were legally bound to make. *Daniels v. New Orleans*, 26 La. Ann. 1.

1. It is held that the council may determine the necessity of the improvement without notice, and that a statute providing that the council or board of trustees shall declare such necessity by resolution is sufficiently complied with where the necessity is declared in the resolution ordering the improvement and the property owners are notified thereof after the passage of such resolution. *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 455. See, also, *Quill v. Indianapolis*, 124 Ind. 292. Compare *Smith v. Toledo*, 24 Ohio St. 126; *Welker v. Potter*, 18 Ohio St. 85; *Hoyt v. East Saginaw*, 19

Mich. 39; 2 Am. Rep. 76; *Hewes v. Reis*, 40 Cal. 255.

The notice required by Rev. St. Ohio, § 2304, of the adoption of the preliminary resolution declaring the necessity of opening the street and appropriating the lands, having no reference to any assessment to defray the expenses, is not sufficient to make a subsequent assessment, without further notice, valid. *Scott v. Toledo*, 36 Fed. Rep. 385; 22 Am. & Eng. Corp. Cas. 479.

In cities of the first class, in Ohio, a recommendation by the board of city improvements is required as a prerequisite to the city's contracting for a street improvement; and it must have the concurrence of at least three members of the board of improvements. *Brophy v. Landman*, 28 Ohio St. 542. But see *Hubbard v. Norton*, 28 Ohio St. 116.

In New York, the council need not expressly declare the necessity of the improvement; the exercise of the power itself shows that they deem it necessary or conducive to the public welfare. *Elwood v. Rochester*, 43 Hun (N. Y.) 102. See, also, *Miller v. Anheuser*, 2 Mo. App. 168. So, a street may be graded in Missouri without an ordinance declaring the necessity. *Taylor v. St. Louis*, 14 Mo. 20; 55 Am. Dec. 89.

In California, the board of trustees may fix the grade without a petition. *Napa City v. Easterly*, 76 Cal. 222; 22 Am. & Eng. Corp. Cas. 443. See, also, *Wiles v. Hoss*, 114 Ind. 371; 22 Am. & Eng. Corp. Cas. 460.

In a case arising under the Ohio act of April 5, 1866 (63 Ohio L. 133), which provides that when it shall be deemed necessary by the council of any city embraced in that act, to make the improvements therein mentioned, the council shall declare by resolution the necessity of such improvement, which resolution shall be published as specified in the act, briefly describing the character of such improvement, and referring to the plans, etc., and that persons claiming damages on account of the proposed improvement must file their claims with the city clerk within two weeks after the publication is completed, or be taken to have waived.

requirements must, as a general rule, be strictly complied with or the entire proceeding will be void.¹

b. THE ORDINANCE.—An ordinance, resolution, or order of the governing body must generally be passed or adopted before the improvement can be made, where the abutting property-

them; and that "it shall then be lawful for the city council, in their discretion, to provide by ordinance for such" improvements, it was held that the adoption of the resolution declaring the improvements necessary, and the publication of the same, as required in the act, were conditions precedent to the exercise of the authority to pass a valid ordinance for the improvements, or make an assessment on the adjoining property to pay for them. *Welker v. Potter*, 18 Ohio St. 85.

The provision of the charter of Utica, Laws 1862, 61, ch. 18, § 85, that if the council determine to make improvements requiring the taking of lands, "it shall enter in its minutes a resolution declaring such determination, and containing a brief and general description of the lands so deemed necessary," etc., must be strictly pursued; and the omission to adopt and enter such a resolution is fatal to all the subsequent proceedings. *In re Schreiber*, 3 Abb. N. Cas. (N. Y.) 68.

Where an improvement of a New York City street is provided for by statute, and the proceedings taken conform to the statute, though not instituted within the time specified therein, they are valid and effectual without any resolution of the common council; and an omission to publish a resolution, as the law requires in other cases, in no way impairs the authority given by the statute for the improvement. *Stevenson v. Mayor, etc.*, of N. Y., 3 *Thomp. & C.* (N. Y.) 133.

The determination as to the necessity and the certificate thereof will be conclusive in the absence of fraud or collusion. *Brady v. Mayor, etc.*, of N. Y., 112 N. Y. 480.

1. *Hoyt v. East Saginaw*, 19 Mich. 39; *Case v. Johnson*, 91 Ind. 477; *Logansport v. Dykeman*, 116 Ind. 15; 24 Am. & Eng. Corp. Cas. 534; *Niklaus v. Conkling*, 118 Ind. 289; *Madison v. Smith*, 83 Ind. 502; *Rock Island Co. v. U. S.*, 4 Wall. (U. S.) 435; *Mason v. Fearson*, 9 How. (U. S.) 248; *Wheeler v. Chicago*, 57 Ill. 415; *Merritt v. Portchester*, 71 N. Y. 309; 27 Am. Rep. 47; *Myrick v. La Crosse*, 17 Wis. 442;

State v. Passaic, 41 N. J. L. 90; *Brophy v. Landman*, 28 Ohio St. 542; *Hawthorne v. East Portland*, 13 Oregon 271; 12 Am. & Eng. Corp. Cas. 525; *Fulton v. Lincoln*, 9 Neb. 358.

In the first case above cited, the charter of a city, which gave power to the common council to make street improvements, directed that whenever they "shall deem any such improvement necessary, they shall so declare by resolution," and prescribed the manner of drawing the resolution. *Held*, that the adoption of a preliminary resolution expressly declaring the contemplated improvement necessary, was requisite before the city authorities could lay an assessment for benefits, and that the charter did not permit the courts to sustain the proceedings by inferring that the improvement was necessary from the fact that it was ordered. The legislature may have contemplated that members of the council might vote to order a work to be done, when they would hesitate to declare that it was necessary, if that were the specific question on which they must record their opinion. *Hoyt v. East Saginaw*, 19 Mich. 44.

The charter of Galveston authorizes the city to pave and improve streets whenever, by a vote of two-thirds of the aldermen, they may deem it necessary, provided the city pays one-third and the abutting owners two-thirds, of the cost. *Held*, that a petition by the city to collect of an abutting owner his share of the cost is insufficient to support a judgment by default, if it fails to allege that the two-thirds' vote of the aldermen was passed. *Wood v. Galveston*, 76 Tex. 126.

The city council, at the same meeting at which it passed an ordinance establishing the grade of a certain street, and before the ordinance had been signed by the mayor, passed another, providing that the street should be paved. *Held*, that under Albany City Ordinances, 1876, p. 428, § 28, which provides that "No law for the paving of any street shall be passed unless the level of such street shall have been previously established," the ordinance for paving

owners are to be assessed for the cost thereof.¹ In some states, where the statute does not require an ordinance, a resolution is sufficient,² but an ordinance would be safer in all cases.³ The ordinance must be enacted and put in force in the manner prescribed by statute;⁴ and, as a municipal corporation cannot delegate its authority, the ordinance must be positive⁵ and sufficiently definite to show the locality, extent and general nature of the improvement, although it need not specifically set forth all the details of the work.⁶ Other preliminary steps may also

was void. *In re Delaware, etc., Canal Co.*, 8 N. Y. Supp. 352.

1. *Newman v. Emporia*, 32 Kan. 456.

2. *Indianapolis v. Imberry*, 17 Ind. 175; *Moberry v. Jeffersonville*, 38 Ind. 198; *Emery v. San Francisco Gas Co.*, 28 Cal. 375; *Harney v. Heller*, 47 Cal. 17.

3. See *Citizens' Gas, etc., Co. v. Ellwood*, 114 Ind. 332; 20 Am. & Eng. Corp. Cas. 263; *Newman v. Emporia*, 32 Kan. 456; *Barron v. Krebs*, 41 Kan. 338.

4. *Logansport v. Legg*, 20 Ind. 315; *Price v. Grand Rapids R. Co.*, 13 Ind. 58; *Meyer v. Froman*, 108 Ind. 208; *Rushville Gas Co. v. Rushville*, 121 Ind. 206; *Dennison v. Kansas City*, 95 Mo. 416; *In re Douglass*, 46 N. Y. 42; *In re Anderson*, 60 N. Y. 457; *State v. Mayor, etc., of Bayonne*, 49 N. J. L. 311; *Worthington v. Covington*, 82 Ky. 265.

The charter of the city of South St. Paul, Minn., provides that all ordinances and resolutions shall, before they take effect, be presented to the mayor, and, if he approves thereof, he shall sign the same; and such as he shall not sign he shall return to the common council. A resolution so returned can be passed by a two-thirds vote of the council. *Held*, that resolutions of the council in proceedings to assess real estate for street improvements were of no effect where not approved and signed by the mayor, and it did not appear that they were ever presented to him. *State v. District Court*, 41 Minn. 518.

But in *Indiana* it is held that the fact that an ordinance of a city incorporated under the general law of *Indiana*, under which a street improvement has been made, had not been signed by the mayor at the time the contract for the making of such improvement was let, does not render invalid an assessment against property

for such improvement. *Martindale v. Palmer*, 52 Ind. 411.

5. *Stockton v. Creanor*, 45 Cal. 643; *Merrill v. Abbott*, 62 Ind. 550; *Moore v. Chicago*, 60 Ill. 243.

6. *Ray v. Jeffersonville*, 90 Ind. 567; 3 Am. & Eng. Corp. Cas. 671; *Hitchcock v. Galveston*, 96 U. S. 341; *Ross v. Stackhouse*, 114 Ind. 200; *Wren v. Indianapolis*, 96 Ind. 218; 7 Am. & Eng. Corp. Cas. 599; *St. Louis v. Clemens*, 43 Mo. 395; *Sims v. Hines*, 121 Ind. 534.

An ordinance providing for the grading and paving of a street is not void for uncertainty, because it does not prescribe the grade of such street, when it provides, in accordance with the charter, that the work shall be done under the superintendence of the city paver, or other person appointed by the common council. *State v. New Brunswick*, 30 N. J. L. 395.

Improvement Ordinances.—This subject is treated under IMPROVEMENTS, vol. 10, pp. 281–285. See the following cases in addition to those there cited.

In a *New York* case an ordinance was held void for leaving to the commissioner of public works to decide whether any, and if any, what cross-walks should be laid. *Tappan v. Young*, 9 Daly (N. Y.) 357.

But it is held in a more recent case in the state, that an ordinance, for the paving of an avenue in the city of New York, providing for the relaying of cross-walks, which, in the opinion of the commissioner of public works, should be found not to be in good repair or not on a grade adapted to the new pavement, is not such an unlawful delegation of authority as to vitiate an assessment made under it. *Burchell v. Mayor, etc., of N. Y.*, 56 Hun (N. Y.) 640.

In *Illinois*, where several cases upon this subject have been decided, it is held that where streets and parts of streets embraced in proposed improvements

are similarly situated, and are to be paved in the same way and with the same material, they may be considered one single improvement, and be provided for by a single ordinance. *Wilbur v. Springfield*, 123 Ill. 395; *Springfield v. Green*, 120 Ill. 269; *Murphy v. Peoria*, 119 Ill. 509. And it makes no difference that one of the streets is wider than the others. *Adams Co. v. Quincy*, 130 Ill. 566; 27 Am. & Eng. Corp. Cas. 150.

An ordinance directing the improvement of a street, providing for the pavement of part by general taxation, part by street-car companies, and the rest by special taxation, and providing for the ascertaining of the amount of the special tax, to be estimated by a committee, under the provisions of article 9 of the general law for the incorporation of cities and villages, and reported to the council, sufficiently fixes the amount to be raised by special taxation. *Green v. Springfield*, 130 Ill. 515.

Under Rev. St. *Illinois*, ch. 24, art. 9, § 19, as amended July 1, 1887, providing that ordinances for local improvements by special assessments shall specify the nature, character, locality and description of the improvement, either by setting it forth, or by reference to maps, etc., thereof on file, an ordinance for a sewer, providing for manhole covers "of the same size and weight as those in use" on a certain other sewer, cast-iron boiler fronts of a pattern similar to those in use at the water works, and brick masonry of suitable shape to support the pumping-engine, for which the ordinance provides, is sufficiently specific. *Pearce v. Hyde Parke*, 126 Ill. 287.

Under Rev. St. *Illinois*, 1874, ch. 24, § 134, requiring that any city ordinance providing for a local improvement must set forth the nature, character, locality, and a description of such improvement, an ordinance providing for the construction of a brick sewer "with necessary manholes," is not defective because of failure to specify the location of the manholes. *Springfield v. Mathus*, 124 Ill. 88; 22 Am. & Eng. Corp. Cas. 347.

But under the section of the *Illinois* statute, providing that whenever local improvements undertaken by a city are to be paid for, in whole or in part, by special assessments, the ordinance authorizing the improvements shall specify their nature, character, lo-

cality, and description, a special assessment made under an ordinance, providing that a certain sewer, "connecting with the public main sewer, . . . be reconstructed and deepened to as great a depth as its connection with the said main sewer will admit of," and locating the points for the improvement, is void, as it does not appear from the ordinance what the size or probable cost of the sewer will be, or what it is to be built of. *Kankakee v. Potter*, 119 Ill. 324.

The construction of "a good and substantial sidewalk or foot-pavement," within the meaning of a municipal ordinance, held not to include the filling necessary to bring the walk to the grade of the street. *Smith v. St. Louis Mut. L. Ins. Co.*, 3 Tenn. Ch. 631.

A city ordinance directing that improvements in streets shall be ordered by resolution describing the streets and improvements, and that notice shall be given by the publication of the resolution, is mandatory; and unless its requirements are complied with, in proceedings to open a street, the assessment is void. *Starr v. Burlington*, 45 Iowa 87.

An ordinance which provides for the paving of a street need not state the width of the street. *Adams Co. v. Quincy*, 130 Ill. 560; 27 Am. & Eng. Corp. Cas. 150.

The failure of an ordinance to set out the specifications for work to be done under it, where reference to them is on file in the office of the clerk, will not affect its validity. *Becker v. Washington*, 94 Mo. 375.

A tax ordinance of Newark directed that \$50,000 be raised "for repaving of streets." *Held*, that after a street had been repaved under an ordinance which stated that property benefited would be assessed for such repavement, and which was duly published according to the charter, property owners could not defeat the assessment on the ground that the tax ordinance did not mention the particular streets to be repaved, and the sum to be spent on each. *State v. Newark* (N. J. 1886), 12 Atl. Rep. 770.

A municipal council cannot delegate to a street committee the power to grade and ditch a street according to their discretion. *Chilson v. Wilson*, 38 Mich. 267.

Where the common council passed an ordinance for the improvement of a street, and ordered curb walls to be

be necessary. Thus, the statute may require a preliminary estimate of the cost of the improvement,¹ or that the matter shall

built where the same were not already built, and in good and sound condition, but it did not specify what portion was in good and sound condition and what was not—held, that the ordinance was an attempt to confer on the board of public works an illegal discretion which would tend to open the way to an unfair assessment, and to fraud. *Bryan v. Chicago*, 60 Ill. 507. But the same court held in another case that an ordinance for the curbing “with curb walls where curb walls are not already built” in the designated “portion of Milwaukee avenue,” and filling and paving with wooden blocks a portion of that avenue, did not confer any discretion on the board of public works, and was valid. *Page v. Chicago*, 60 Ill. 441.

A resolution of a board of supervisors to improve a street, need not describe the work with any more exactness than the law itself does. And when a remonstrance against the improvement is referred to a committee, and the board directs the work done before the latter reports, their action is practically a decision on the remonstrance. *Harney v. Heller*, 47 Cal. 15.

An ordinance of a city for the improvement of a street is not inconsistent with *Illinois* Law of 1872, vesting cities with powers to make local improvements by taxation where it requires the city engineer to fix the grade of the street, the cost having been estimated by a committee appointed by the council, and their report approved. *Lake v. Decatur*, 9 Ill. 596.

“Upon a petition to pave a street and notice thereof as required by statute, the street having been opened and used for some years, as a street sixty feet wide, an ordinance, amended after the hearing so as to provide for paving the street to a width of eighty feet, is invalid, because it takes additional twenty feet without compensation, and differs from the improvement advertised, and because the change was made without giving the parties interested any opportunity to be heard.” *State v. Jersey City*, 30 N. J. L. 93.

The charter of the city of St. Louis authorized the construction of sewers

in said city, the dimensions to be determined by ordinance of the city council. *Held*, that an ordinance leaving the determination of the dimensions to the city engineer would create no liability on the part of the property owners to pay for the work done. *St. Louis v. Clemens*, 52 Mo. 133.

An ordinance which simply authorizes the macadamizing of a particular street, without furnishing any directions as to the manner of doing the work, is insufficient to sustain an action by a city contractor on a certified tax bill, against the owner of property adjoining such street. *Haegle v. Mallinckrodt*, 46 Mo. 577.

But an ordinance to improve a street between designated points may properly except an intermediate portion thereof, which, by any existing contract, is to be contemporaneously improved, according to the plan and grade established, without expense to the city; and the separated parts may be improved and assessed as if they were contiguous. *Wilder v. Cincinnati*, 26 Ohio St. 284.

And an omission to specify, in an order for a street improvement, the particular statute under which it was made, is no objection to its validity, where the record showed that the officers intended to and in fact did conform to the statute. *Jones v. Boston*, 104 Mass. 461.

A city ordinance authorizing the regrading of a street, should not be set aside on the ground of irregularity in the manner of its adoption, after the improvement has been substantially completed, and the parties damaged thereby have recovered, in an action at law, the same compensation to which they would have been entitled if the proceedings had been regular. *State v. Mayor, etc., of Morristown*, 34 N. J. L. 445.

1. *Frosh v. Galveston*, 73 Tex. 401. See also *In re Garvey*, 77 N. Y. 523; *Brady v. King*, 53 Cal. 44.

But a preliminary estimate is not necessary unless the statute requires it. *Wetmore v. Campbell*, 2 Sandf. (N. Y.) 341; *Manice v. Mayor, etc., of N. Y.*, 8 N. Y. 120.

Under an act requiring that “before”

be referred to a committee or to certain officers before the ordinance is passed.¹ Notice to the property owners is also necessary, as a general rule, in order to support an assessment against them.²

any kind of work or improvement shall be commenced "a detailed estimate of the cost thereof shall be made under oath by the city engineer and submitted to the council," the "oath" and "detailed estimate" are conditions precedent. *Gilmore v. Hentig*, 33 Kan. 156; 7 Am. & Eng. Corp. Cas. 175; *Hentig v. Gilmore*, 33 Kan. 234.

The Public Works act of Detroit requires proposed public improvements to be submitted to the board of public works for estimates and recommendations. *Held*, that bids for paving contracts could not properly be invited until such reference and report. *Butler v. Detroit*, 43 Mich. 552.

1. *State v. Mayor, etc., of Bayonne*, 49 N. J. L. 311; *Worthington v. Covington*, 82 Ky. 265. See *State v. Perth Amboy*, 38 N. J. L. 425.

2. **Notice.**—See IMPROVEMENTS, vol. 10, pp. 286–290. And in addition to the authorities there cited see the following cases: *Walston v. Nevin*, 128 U. S. 578; 27 Am. & Eng. Corp. Cas. 198; *Palmer v. McMahon*, 133 U. S. 660; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; *Hare's Am. Const. Law*, 212; *Stuart v. Palmer*, 74 N. Y. 183; 30 Am. Rep. 289; *McEneney v. Sullivan*, 125 Ind. 407; *Sewall v. St. Paul*, 20 Minn. 511; *Lehman v. Robinson*, 59 Ala. 219; *Darling v. Gunn*, 50 Ill. 424; *Hewes v. Reis*, 40 Cal. 255.

It is the right of a landowner specially affected by a public improvement, to be informed, either by actual or constructive notice, of the time and place appointed for the meeting of the city council to consider their proposed action. But where the charter provides for constructive notice of improvements by publication, personal notice is not required. *State v. Plainfield*, 38 N. J. L. 95.

Where an ordinance for the macadamizing of a street provides that the city engineer shall give the adjoining property owners the privilege of doing the work in front of their property, proof of failure to give such opportunity will defeat an action on a special tax bill against one of the property owners. And a mere newspaper advertisement for proposals for the mac-

adamizing will not amount to such offer, unless made to have that effect by the terms of the ordinance. *Leach v. Cargill*, 60 Mo. 316.

A notice to pave, placed on an abutter's premises, but under a stone which covered it entirely, held not to comply with an ordinance requiring such notice to be "left or placed on the premises." *Philadelphia v. Edwards*, 78 Pa. St. 62.

The *Pennsylvania* act of 1861, authorizing the councils of Erie to order any street to be paved, and charge the expense against property abutting, etc., provided "that no ordinance for any of the above-named purposes shall be passed until — days' notice of the improvement prayed for has been given in the official paper of the city." Each proceeding of councils in their action upon the improvement was published as an item of news, on the next day only after it occurred in the official paper, but no notice was published by direction of the councils. *Held*, not to be a compliance with the act. The act of councils was of a judicial nature, and such proceedings affecting the rights of individuals are nugatory unless upon reasonable notice. The word "days" after the blank in the act indicated more than one publication. *Olds v. Erie*, 79 Pa. St. 380.

The resolution of a city council authorizing lands to be taken for a street improvement must be strictly followed, in all proceedings under it, or no title will be acquired. Where the resolution notified property owners of an intention to improve the "west half of East street," between certain limits; but the authorities afterwards proceeded to improve only a portion of the street between the limits indicated, held that the proceedings were void. *Stockton v. Whitmore*, 50 Cal. 554.

In *California* a resolution of intention to improve a street, under the act of April 4, 1870, must be published five days, exclusive of Sundays or non-judicial days; and, if the last day of a publication of five days falls on Sunday, the board does not acquire jurisdiction. *People v. McCain*, 50 Cal. 210.

Where the statutory requirement

c. THE CONTRACT.—Authority to make improvements and levy assessments carries with it the incidental power to make contracts for the work.¹ Cities generally have a broad discretion as to the manner of letting contracts and as to the terms under which the work shall be done; but, if the statute contains specific provisions upon the subject, they must be substantially followed.² Thus, if the statute requires that the contract shall be

that a resolution for an improvement shall be published before a contract is made for the improvement is not complied with, the city is not liable to the contractor for not allowing him to go on under the contract thus unlawfully made. *Jardine v. Mayor, etc., of N. Y.*, 11 Daly (N. Y.) 116.

The provision of the city charter of *New York* (Laws 1857, ch. 446, § 7), requiring all resolutions recommending any specific improvement involving appropriation, to be published in all the newspapers employed by the corporation, is not a limitation of the general powers granted. While an omission of such publication would invalidate a local assessment upon property benefited, yet, as to the city and those dealing with it, the irregularity would not be fatal to the ordinance, or to contracts made in pursuance thereof. *Moore v. Mayor, etc., of N. Y.*, 73 N. Y. 238; 29 Am. Rep. 134.

But there are cases in which it seems that failure to give notice will not invalidate the proceedings. See *Amery v. Keokuk*, 72 Iowa 701; *Cleveland v. Tripp*, 13 R. I. 50; *Clapp v. Hartford*, 35 Conn. 66; *Mayor, etc., of Baltimore v. Johns Hopkins Hospital*, 56 Md. 1; *Gillett v. Denver*, 21 Fed. Rep. 822; 7 Am. & Eng. Corp. Cas. 234. The *Maryland* case has, however, been overruled in a late decision. *Ulman v. Mayor, etc., of Baltimore*, 72 Md. 587; 32 Am. & Eng. Corp. Cas. 228.

The determination of a municipality to enter upon a work of public improvement is not invalid because of the lack of prior notice to the owners of property to be affected of intention so to do in the absence of a condition annexed to the gift of power to do the work, requiring the giving of such notice. *In re Zborowski*, 68 N. Y. 88.

So, in *Oregon*, it was held that a section of a city charter providing "that the common council of the city shall have power to lay down all necessary sewers and drains, and cause the same to be assessed on the property directly

benefited by such sewer or drain, and to estimate the proportionate share of cost thereof to be assessed to the several owners so benefited," was not void in not requiring notice of the proposed construction to be given, and that the proceedings under it deprive owners of their property, without due process of law. *Paulson v. Portland*, 16 Oregon 450.

1. *Cumming v. Mayor, etc., of Brooklyn*, 11 Paige (N. Y.) 596; *Mayer v. Mayor, etc., of N. Y.*, 63 N. Y. 459; *Lutes v. Briggs*, 64 N. Y. 404.

2. **Improvement Contracts.**—This subject is treated under IMPROVEMENTS, vol. 10, pp. 290, 294. Additional authorities are here cited.

A contract with a city council, whereby the contractors agreed, among other things, to lay down an asphalt pavement, and to obtain the written consent of the owners of lots abutting on such pavement, to the laying of it, held, an entire contract; that obtaining the consent of owners of abutting property was a condition precedent, to be performed before any work was done; and that the contractors could not recover either for work actually done under the contract, or for a breach of the contract by the city, without averring and proving that they had obtained such consent. *Hitchcock v. Galveston*, 2 Woods (U. S.) 272. But see 96 U. S. 341.

An agreement extending the time for completing a street contract, made after the expiration of the time originally agreed on, is void against the city, as well as against property owners, under act *California*, April 1, 1872, which makes time of the essence of such contracts. *Raisch v. San Francisco*, 80 Cal. 1.

A contract for street work, entered into by a city prior to January 1, 1880, when the new constitution of *California* went into effect, was not affected by it, and could lawfully be extended as to the time of completion

after that date. *Oakland Paving Co. v. Barstow*, 79 Cal. 45.

The macadamizing of a street and the construction of sidewalks are different kinds of work, and, when a street is ordered to be macadamized, the roadway only is meant. Hence, under a resolution of intention to macadamize and curb a street, the board of supervisors of San Francisco do not acquire jurisdiction to order work to be performed on a sidewalk; and if the notice for sealed proposals calls for work also to be done on the sidewalks, the contract following the notice is void, unless the work done on the sidewalks can be separated from that done on the roadway. *Himmelmenn v. Satterlee*, 50 Cal. 68.

Under the *Kansas* law of 1868, concerning cities of the second class, which provided that, before any contract for street improvements should be let, the city engineer should make and submit to the council an estimate of the cost thereof; and that in advertising for bids such estimate should be published—held, that the city was not precluded from making a valid contract without any advertisement for bids, and was not compelled, in case of an advertisement, to let the contract to the lowest bidder. *Yarnold v. Lawrence*, 15 Kan. 126.

An ordinance providing for a street improvement in a city directed that the street should be paved with "Nicholson or wooden-block pavement," and the contract was for "what is known as wooden-block pavement." Held, that it was not necessary that the contract should literally follow the ordinance, it being sufficient that the pavement contracted for corresponded in kind with that provided for in the ordinance. *Martindale v. Palmer*, 52 Ind. 411.

Where a contract for street paving embraces a number of disconnected streets, the fact that the paving on some of them is unfinished, will not prevent recovery on special tax bills for work on other streets where the work has been completed. And if the paving called for by the contract has been completed on the particular street, that is sufficient, regardless of the question whether the remainder of the street is paved or not. *Neenan v. Smith*, 60 Mo. 292.

After a contract for paving has been approved by the proper officers, or a condition waived by them, the lot

owner cannot defend against the city's claim therefor, on the ground that the condition was not fulfilled—the contractor making no complaint. *Philadelphia v. Brooke*, 81 Pa. St. 23.

In *California*, under the acts of 1864 and 1870, authorizing the city council of Oakland to order the whole or any portion of the streets macadamized, the council has power to let the work of macadamizing separate portions of a street in one contract. *Alameda Macadamizing Co. v. William*, 70 Cal. 534. See, also, as to letting work under different contracts, *Ede v. Cogswell*, 79 Cal. 278.

A city cannot let out a contract for street improvement in excess of that contemplated by the resolution authorizing the contract. *Texas Transp. Co. v. Boyd*, 67 Tex. 153.

A contract for paving a street in the city of New York provided that the contractor should not be entitled to demand or receive payment for work or materials until the work should be fully completed in the manner agreed, and such completion certified by the inspectors employed thereon, and by the water purveyor, or other officer designated by the commissioner of public works; wherefor, the city agreed to pay to the contractor, on the confirmation of the assessment, the sum specified in such agreement. A certificate of the completion of the work was given by the inspector, but none had been given by the water purveyor, nor by any other officer designated by the commissioner of public works. Such commissioner, however, had certified that the work had been returned as properly completed, and had been accepted. Held, 1. That it was competent for the parties to make these provisions for determining whether or not the contract had been performed, and they having done so, in express terms, the obtaining of both certificates became a condition precedent to any right of recovery by the contractor. 2. That the decision of the question of completion having been referred, by the contract, to the inspector and purveyor, it could not afterward be withdrawn and referred to the decision of a court or jury, without showing impossibility of performance, or that the certificate had been unreasonably and in bad faith refused. 3. That the certificate of the commissioner of public works himself, that the work had been performed and accepted, was not a sufficient compliance with the

let to the lowest bidder, the statutory provision must be complied with, or the contract will be void.¹ So, where the statute prohibited any contract unless authorized by the city council and the council authorized a contract for paving, upon condition that the contractor should be selected by a majority of the property-owners, it was held that a contractor not so selected could not compel the property owners to pay for the work.²

terms of the contract. *Bowery Nat. Bank v. Mayor, etc., of N.Y.*, 2 Thomp. & C. (N. Y.) 523.

Const. *California*, art. 11, § 19 (which went into operation January 1, 1880), prohibits the letting of any contracts by a city for street improvements the cost of which is chargeable upon private property by special assessments, unless the assessments therefor shall have been previously levied, collected, and paid into the city treasury. *Held*, that a contract for street work, made by a city at a time when there was no such constitutional restriction, could lawfully be extended, as to time of completion, by agreement made after January 1, 1880, but before the expiration of the period originally fixed for completion. *Following Oakland Paving Co. v. Barstow*, 79 Cal. 45; *Ede v. Cogswell*, 79 Cal. 278.

The city council is the sole judge whether the work was done according to contract, and not the person for whose benefit the improvement was made. *Joyes v. Shadburn* (Ky. 1890), 13 S. W. Rep. 361.

If a city contracts for a street improvement, and so fails to comply with the requirements of its charter that the cost is not chargeable to a special fund, it is liable generally to the contractor. And it cannot defeat his action by showing that it neglected its duty to either approve or disapprove the work. *North Pac. Lumbering, etc., Co. v. East Portland*, 14 Oregon 3.

But where contracts under which paving and curbing were done, for which a lien was filed, expressly stipulated that the city should be under no expense for the same, except for intersections, it was held not a ground for charging the city that she still retained a market plat in the center of the street. *Howell v. Philadelphia*, 38 Pa. St. 471.

The charter of a city required street improvements to be made by the adjacent proprietors, and authorized the city officers to make them only in

case of the default of the proprietors. *Held*, that a contract made in the first instance by city officers with A to do certain work, gave A no rights on which he could recover against the city even after performance. *Newbery v. Fox*, 37 Minn. 141.

The *California* act of 1863, p. 526, does not empower the board of supervisors, after the time fixed in a contract for grading a street has expired, and, after having refused to extend the time, to grant the contractor an extension thereof, such order to extend is void. *Turney v. Dougherty*, 53 Cal. 619.

1. *In re Manhattan R. Co.*, 102 N. Y. 301; 14 Am. & Eng. Corp. Cas. 339; *In re Robbins*, 82 N. Y. 131; *In re Lange*, 85 N. Y. 307; *Reilly v. Mayor, etc., of N. Y.*, 111 N. Y. 473; *Mappa v. Los Angeles*, 61 Cal. 309; *Beers v. Dalles City*, 16 Oregon 334.

Where a city charter required that all contracts, etc., should be given to the lowest bidder, an ordinance and a contract thereunder specifying a particular price to be paid to contractors of grading work where "no price is mentioned for rock work," it was held void. *State v. Mayor, etc., of Paterson*, 36 N. J. L. 159.

In *New York*, it is held that in advertising for bids upon contracts for building a sewer, it is not proper to fix the price for any items of the work, such as rock excavations, although it is difficult to estimate beforehand the amount of that kind of work to be done, the city charter and an ordinance providing that contracts shall be given to the lowest bidder, and that the advertisement "shall state the nature and extent, as near as possible, of the works required." The whole assessment is not, however, to be vacated for such error; but a deduction should be made, proportioned to the increase in the cost of the work caused thereby. *In re Merriam*, 84 N. Y. 596.

2. *Reilly v. Philadelphia*, 60 Pa. St. 467.

3. Assessment—*a.* AUTHORITY TO ASSESS.—The validity of statutes authorizing assessments for the improvement of streets was at one time denied by many of our courts, but the later authorities, almost without exception, declare that such statutes are, when properly framed, not unconstitutional, and it is now the established doctrine that property specially benefited by the improvement of a street may be assessed therefor, notwithstanding the general public may also be incidentally benefited by such improvement.¹ Judge Dillon, after a careful review of the authorities, lays down the following propositions as the law upon this subject: "1. A local assessment upon property immediately and specially benefited by a local improvement of a street, although resting for its foundation upon the taxing power, is distinguishable in many respects from a tax levied for the general purposes of the state or the general purposes of the municipality. 2. A local assessment or tax upon the property benefited by a local improvement may be authorized by the legislature. 3. Special benefits to the property assessed, that is, benefits received by it in addition to those received by the community at large, is (are) the true and only just foundation upon which local assessments can rest; and to the extent of special benefits it is everywhere admitted that the legislature may authorize local assessments or taxes to be made.² The authority of municipal corporations to make such assessments must, however, come from the legislature, and it cannot be inferred from a mere general-welfare clause or the like."³

For a further consideration of the subject of letting contracts for local improvements, see MUNICIPAL CORPORATIONS, vol. 15, pp. 1090-1100.

1. Elliott on Roads and Streets 369; 2 Dillon's Munic. Corp., §§ 739-761; Cooley's Const. Lim. 619; *In re Comrs. of Elizabeth*, 49 N. J. L. 488; *Montgomery Co. v. Fullen*, 111 Ind. 412; 19 Am. & Eng. Corp. Cas. 669; *Cleveland v. Tripp*, 13 R. I. 50; *Charnock v. Fordoche, etc.*, *Levee District Co.*, 38 La. Ann. 323; *Richmond, etc., R. Co. v. Lynchburg*, 81 Va. 473; *McGehee v. Mathis*, 21 Ark. 40; *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419; 55 Am. Dec. 266; *Com. v. Woods*, 44 Pa. St. 113; *Lexington v. McQuillan*, 9 Dana (Ky.) 514; 35 Am. Dec. 159; *Moale v. Mayor, etc., of Baltimore*, 5 Md. 314; 61 Am. Dec. 276; *King v. City*, 2 Oregon 146; *Reeves v. Wood Co.*, 8 Ohio St. 333; *Sewall v. St. Paul*, 20 Minn. 511; *Hines v. Leavenworth*, 3 Kan. 186; *Hurford v. Omaha*, 4 Neb. 336; *Wil- lard v. Presbury*, 14 Wall. (U. S.) 676;

Palmyra v. Morton, 25 Mo. 593; *Eyer- man v. Blakesly*, 78 Mo. 145; *Busbee v. Wake Co.*, 93 N. Car. 143; *Galves- ton v. Heard*, 54 Tex. 420.

See IMPROVEMENTS, vol. 10, pp. 270-281, 295-305.

2. 2 Dillon's Munic. Corp., § 761.

3. *Mayor, etc., of Savannah v. Har- tridge*, 8 Ga. 23; *Drake v. Phillips*, 40 Ill. 388; *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468; *Reed v. Toledo*, 18 Ohio 161; *Vance v. Little Rock*, 30 Ark. 439; *Caldwell v. Rupert*, 10 Bush (Ky.) 179; *Nelson v. La Porte*, 33 Ind. 258; *Richmond v. Daniel*, 14 Gratt. (Va.) 387; *Green v. Ward*, 82 Va. 324; *Lott v. Ross*, 38 Ala. 156; *Kyle v. Malin*, 8 Ind. 34; *Cincinnati v. Bry- son*, 15 Ohio 625; 65 Am. Dec. 593; *Annapolis v. Harwood*, 32 Md. 471; *Winston v. Taylor*, 99 N. Car. 210; *Hare v. Kennerly*, 83 Ala. 608; *Fair- field v. Ratcliff*, 20 Iowa 396; *In re Second Ave. M. E. Church*, 66 N. Y. 395; *Griswold v. Pelton*, 34 Ohio St. 482; *Niklaus v. Conkling*, 118 Ind. 289.

Authority to Assess.—The legislature has power, in an act providing for lay-

b. WHAT PROPERTY MAY BE ASSESSED.—As a general rule,

ing out and improving an avenue and establishing an assessment district, to direct that the expenses shall be apportioned on such district according to the ownership per lineal foot of frontage on said avenue. *Stebbins v. Kay*, 51 Hun (N. Y.) 589.

The common council of the city of New York are authorized to assess the cost of a local improvement upon the property benefited thereby, and to include, as part of such cost, the fees of the officers employed to make the assessment. *In re Tappan*, 54 Barb. (N. Y.) 225; 36 How. Pr. (N. Y.) 390.

The legislature has constitutional power to confer upon municipal corporations the right to make assessments upon the property benefited, for the purpose of defraying the expense of making local improvements. *Woodhouse v. Burlington*, 47 Vt. 301. See also *Chess v. Birmingham*, 1 Grant (Pa.) 438.

The *Massachusetts* Stat. 1869, ch. 390, empowering the city council of Worcester to construct sidewalks; and assess the cost on the abutters, held, not to be unconstitutional for omitting to provide for a trial by jury, or for committing the assessment to the council. *Chapin v. Worcester*, 124 Mass. 464.

The cost of the reconstruction of the city streets, as well as the cost of the original construction, may be imposed upon the owners of real estate alone, without violating the constitutional limitations upon the legislative power of taxation. *Broadway Baptist Church v. McAtee*, 8 Bush (Ky.) 508; 8 Am. Rep. 480. See also *Preston v. Rudd*, 84 Ky. 150.

The authority to levy and collect "assessments" for municipal improvements is an express constitutional power, resting alone upon constitutional authority. *Hurford v. Omaha*, 4 Neb. 336.

Corporate authorities may levy special assessments for work already done in good faith by them, or under their direction, in anticipation of such assessment. *Ricketts v. Hyde Park*, 85 Ill. 110.

Illinois Rev. Stat. 1874, 233, § 116, gives cities, towns, and villages exclusive power to determine whether a proposed public improvement shall be made by special assessments, special

taxation of contiguous property, or by general taxation; and the courts have no power to interfere with the exercise of this discretion. *Fagan v. Chicago*, 84 Ill. 227. See, also, *Hoyt v. East Saginaw*, 19 Mich. 39; *Teegarden v. Racine*, 56 Wis. 545.

In *Kansas* a city of the second class has power to stipulate in one contract for making sidewalks on several streets, and to assess the costs thereof upon the different lots fronting on such sidewalks, according to the front foot thereof. And such a city has power to make a sidewalk on a street before it is graded. *Challis v. Parker*, 11 Kan. 394.

Under the *Massachusetts* statute, which provides that whenever the mayor and aldermen of Cambridge shall deem it expedient to construct sidewalks in any street of said city, they are authorized to construct such sidewalks with edgestones, and in front of buildings or occupied premises to cover the same with bricks or flat stones, and the expense of such edgestones and covering materials shall be assessed upon the abutters in just proportions, the mayor and aldermen have not the power to include sidewalks in two different streets in one single assessment. The case of each street should be considered separately, and with a view to its own special circumstances. *Arnold v. Cambridge*, 106 Mass. 352.

The charter of *Oswego* forbids the common council to create any obligation whatever on the part of the city which should not be payable within the year, and could not be discharged from the income of the year; and forbids them to make appropriations for expenses, not especially provided for, beyond a certain limit. Held, that these provisions did not restrict the corporation from making expenditures for local improvements, to be reimbursed by assessments on the property benefited, nor from making a contract for the construction of such improvements, which, by its terms, was not payable within the year. *Baldwin v. Oswego*, 1 Abb. App. Dec. (N. Y.) 62.

See generally *Richards v. Cincinnati*, 31 Ohio St. 506; *Maple v. Beltzhoover* (Pa. 1889), 18 Atl. Rep. 650; *Guild v. Chicago*, 82 Ill. 472; *Bradley v. McAtee*, 1 Bush (Ky.) 667; 3 Am. Rep. 309; *Wilson v. Allegheny*, 79 Pa. St. 272.

all property is subject to assessment, unless the statute exempts it, and exemption from taxation does not necessarily mean exemption from local assessments.¹ Property may be subject to assessment and yet not be subject to sale upon the assessment.² In some of the states school property is not subject to assessment.³ In others, cemetery property is not subject to assessment,⁴ and property held for governmental purposes by the *United States*, the state or the municipality is generally exempt.⁵ A railroad track, and railway property generally may be assessed as any other property, provided it is specially benefited and is so situated or of such a nature as to come within the terms of the statute authorizing special assessments;⁶ but it has

1. *In re* Nassau Street, 11 Johns. (N. Y.) 77; *Roosevelt Hospital v. Mayor, etc., of N. Y.*, 84 N. Y. 108; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; 11 Am. Rep. 412; *Boston Seamen's Soc. v. Mayor, etc., of Boston*, 116 Mass. 181; 17 Am. Rep. 153; *Beals v. Providence Rubber Co.*, 11 R. I. 381; *Broadway Baptist Church v. McAtee*, 8 Bush (Ky.) 508; 8 Am. Rep. 480; *Mayor, etc., of Baltimore v. Green Mt. Cemetery*, 7 Md. 517.

2. *Louisville v. Nevin*, 10 Bush (Ky.) 549; 19 Am. Rep. 78; *Lima v. Cemetery Assoc.* 42 Ohio St. 128; 5 Am. & Eng. Corp. Cas. 547; 51 Am. Rep. 801.

3. *Board of Education v. Toledo* (Ohio, 1891), 26 N. E. Rep. 404.

Church property is subject to a street assessment in *Indiana*. *Rausch v. United Brethren in Christ Church*, 107 Ind. 1. But see *Lowe v. Board*, 94 Ind. 553; *First Presbyterian Church v. Fort Wayne*, 36 Ind. 338; 10 Am. Rep. 35. A religious corporation is not exempt in *Illinois*. *Chicago v. Baptist, etc., Union*, 115 Ill. 245; 13 Am. & Eng. Corp. Cas. 409. Nor in *Georgia*. *Atlanta v. First Presbyterian Church* (Ga. 1892), 13 S. E. Rep. 252.

4. *State v. Mayor, etc., of Newark*, 36 N. J. L. 478; 13 Am. Rep. 464; *Olive Cemetery Co. v. Philadelphia*, 93 Pa. St. 129; 39 Am. Rep. 732; *Oakland Cemetery Assoc. v. St. Paul*, 36 Minn. 529; 17 Am. & Eng. Corp. Cas. 635.

Contra, *Buffalo Cemetery v. Buffalo*, 46 N. Y. 506; 118 N. Y. 61; *McBean v. Chandler*, 9 Heisk. (Tenn.) 349; 24 Am. Rep. 308; *St. Josephs v. O'Donoghue*, 31 Mo. 345; *Mayor, etc., of Baltimore v. Green Mt. Cemetery*, 7 Md. 517.

As to when a reversioner cannot be assessed, see *Newark v. State*, 34 N. J. L. 523.

5. *Polk Co. Sav. Bank v. State*, 69 Iowa 24; *Lowe v. Howard Co.*, 94 Ind. 553; *Indianapolis, etc., R. Co. v. Indianapolis*, 12 Ind. 620; *Fort Wayne v. Shoaff*, 106 Ind. 66. See, also, *Worcester Co. v. Mayor, etc., of Worcester*, 116 Mass. 193; 17 Am. Rep. 159; *People v. Brooklyn*, 111 N. Y. 505; *Leonard v. Brooklyn*, 71 N. Y. 498; 27 Am. Rep. 80; *Rochester v. Bush*, 80 N. Y. 302; *State v. Gaffney*, 34 N. J. L. 133; *Green v. Hotelling*, 44 N. J. L. 347; *Galveston Wharf Co. v. Galveston*, 63 Tex. 14; 9 Am. & Eng. Corp. Cas. 422; *Nashville v. Smith*, 86 Tenn. 213; 23 Am. & Eng. Corp. Cas. 562; *People v. Salomon*, 51 Ill. 37; *Fort Dodge v. Moore*, 37 Iowa 388; *Piper v. Singer*, 4 S. & R. (Pa.) 354; *Erie Co. v. Erie*, 113 Pa. St. 360; *Fall v. Mayor, etc., of Marysville*, 19 Cal. 391; *Doyle v. Austin*, 47 Cal. 353. Compare *Louisville v. Com.*, 1 Duv. (Ky.) 295; *Hassan v. Rochester*, 67 N. Y. 528.

Statutes exempting property should be strictly construed. *Providence Bank v. Billings*, 4 Pet. (U. S.) 514; *Crawford v. Burrell Tp.*, 53 Pa. St. 219; *M. E. Church v. Ellis*, 38 Ind. 3; *Phillips Exeter Academy v. Exeter*, 58 N. H. 306; *Anderson v. State*, 23 Miss. 459; *Pacific R. Co. v. Cass Co.*, 53 Mo. 17; 2 Dillon's Munic. Corp. § 776.

6. *Peru, etc., R. Co. v. Hanna*, 68 Ind. 562; *Chicago, etc., R. Co. v. People*, 120 Ill. 104; 31 Am. & Eng. R. Cas. 487; *Chicago v. Baer*, 41 Ill. 306; *Chicago City R. Co. v. Chicago*, 90 Ill. 573; 32 Am. Rep. 54; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159; *Burlington, etc., R. Co. v. Spearman*, 12 Iowa 112; *Bridgeport v. New*

been held that a railroad track or right of way in a street is not assessable as "property abutting on a street,"¹ nor as land "bordering on or touching the street."² Authority to assess "adjoining" property does not include authority to assess "adjacent" property;³ but where the authority was given to assess

York, etc., R. Co., 36 Conn. 255; 4 Am. Rep. 63; Ludlow v. Cincinnati Southern R. Co., 78 Ky. 357; 7 Am. & Eng. R. Cas. 231; Appeal of North Beach, etc., Co., 32 Cal. 499; Columbus v. Columbus, etc., Co., 45 Ohio St. 92; 32 Am. & Eng. R. Cas. 292. Compare State v. Newark, 27 N. J. L. 185; Chicago v. Sheldon, 9 Wall. (U. S.) 50; People v. Gilon, 126 N. Y. 147; State v. Corrigan, etc., R. Co., 85 Mo. 263; 55 Am. Rep. 361; Mayor, etc., of Baltimore v. Scharf, 54 Md. 499; Galveston City R. Co. v. Nolan, 53 Tex. 139; 3 Am. & Eng. Corp. Cas. 387; Allegheny v. Western Pa. R. Co. (Pa. 1891), 21 Atl. Rep. 763; State v. Ramsey Co., 31 Minn. 354; 13 Am. & Eng. R. Cas. 419; Mayor, etc., of Mobile v. Royal St. R. Co., 45 Ala. 322. It has been held that where the track merely crosses a street it is not assessable. Great Eastern R. Co. v. Hackney District Board, L. R., 8 App. Cas. 687; 13 Am. & Eng. R. Cas. 404; Junction R. Co. v. Philadelphia, 88 Pa. St. 424; New York, etc., R. Co. v. Morrisania, 7 Hun (N. Y.) 562.

Under the city charter of Troy, N. Y., assessments for local improvements may be laid upon the track, rails, and ties of a railroad laid in the streets. Troy, etc., R. Co. v. Kane, 9 Hun (N. Y.) 506.

The charter of New Haven authorized the city to pave its streets, and assess upon the persons whose property was especially benefited thereby, a proportionable and reasonable part of the expense, which assessment was declared a lien upon the property especially benefited, liable to be foreclosed in the same manner as a mortgage in favor of a city; and provided that any person aggrieved by such assessment might appeal therefrom to the superior court. Held, 1. That the rails, sleepers, ties and spikes of a horse-railroad company, so laid into and attached to the soil of the street as to become a part of the realty, were real property, and as such liable to assessment for the expense of paving the street through which they were laid.

2. That the right and power to assess

were in no way dependent upon a lien; that the lien was intended merely as security in addition to a proper remedy at law, and that an action of debt would lie to recover such assessment.

3. That the company having suffered the city to make the improvement and incur the expense with full knowledge of the proceedings, and without objections, were estopped from setting up the claim that their charter required them to pave the road covered by their track at their own expense. New Haven v. Fair Haven, etc., R. Co., 38 Conn. 422; 9 Am. Rep. 399. But see New York, etc., R. Co. v. New Haven, 42 Conn. 279.

Where, in the improvement of a street by special assessment, there was, in the center thereof, a horse railway, and there was no evidence that such railway company was exempt from such assessment, the presumption is, that the track was liable to such assessment, and it was error, on account of its omission, to render judgment on the assessment against other property for the improvement. Page v. Chicago, 60 Ill. 441.

1. Chicago, etc., R. Co. v. South Park Comrs., 11 Ill. App. 562.

2. O'Reilly v. Kingston, 114 N. Y. 439.

A railroad company whose only interest in a track is the contract right to run trains over it has no such interest as is subject to assessment for a local improvement. Louisville, etc., R. Co. v. East St. Louis, 134 Ill. 656. See, also, Bloomington v. Chicago, etc., R. Co., 134 Ill. 451.

3. *In re* Ward, 52 N. Y. 395; Philadelphia v. Eastwick, 35 Pa. St. 75; Pound v. Plumstead Board, L. R., 7 Q. B. 183; Johnson v. District of Columbia, 6 Mackey (D. C.) 21. See also ADJACENT, vol. 1, p. 190; ADJOINING, vol. 1, p. 191.

A landowner whose land abuts on a street cannot, however, prevent it from being assessed by conveying a narrow strip for that purpose after the improvement has been ordered. State v. North Bergen, 37 N. J. L. 402. See, also, Richards v. Cincinnati, 31 Ohio St. 506.

"contiguous" property, it was held that land separated from the street or roadway improved merely by a sidewalk might be assessed for the improvement.¹

c. SYSTEM OR MODE OF ASSESSMENT.—This subject has been treated at some length elsewhere in this work,² but Judge Dillon, after a careful review of the authorities, has so admirably and concisely stated the law governing the system or mode of assessment for street improvements that it cannot be out of place to give the result of his investigation in his own words: "1. When not restrained by the constitution of the particular State, the legislature has a discretion, commensurate with the broad domain of legislative power, in making provisions for ascertaining what property is specially benefited, and how the benefits shall be apportioned."³ 2. The assessments may be made upon

The constitution of *Arkansas* provides that nothing therein shall be construed to prohibit the general assembly from authorizing assessments on land for local improvements in towns and cities, "to be based upon the consent of a majority in value of the property-holders owning property adjoining the locality to be affected." *Held*, that "property adjoining the locality to be affected" is any property adjoining or near the improvement which is physically affected, or the value of which is commercially affected, directly by the improvement, to a degree in excess of the effect on the property in the town or city generally. *Little Rock v. Katzenstein*, 52 Ark. 107.

Where a strip of land, ninety-one feet wide, was dedicated for a street, and the municipal authorities improved a street thereon, ninety feet wide, leaving one foot on one side thereof unused, except in sloping the embankments and excavations, it was held that the owners of property abutting on such foot of land were liable to be assessed as owners of property abutting on the improvement. *Richards v. Cincinnati*, 31 Ohio St. 506.

1. *Chicago, etc., R. Co. v. Quincy* (Ill. 1891), 29 N. E. Rep. 192. *Compare Raxedale v. Seip*, 32 La. Ann. 435.

2. IMPROVEMENTS, vol. 10, pp. 295-407.

3. This is settled, almost without dissent, but the courts do not all agree as to the extent of the legislative power. The *New York* courts, and other courts that have followed the decisions in that State, hold that this power is almost unlimited. *People v. Mayor*,

etc., of Brooklyn, 4 N. Y. 419; 55 Am. Dec. 266; *Fagan v. Chicago*, 84 Ill. 231; *White v. People*, 94 Ill. 604; *Dickson v. Racine*, 61 Wis. 545; 7 Am. & Eng. Corp. Cas. 197; *Com. v. Woods*, 44 Pa. St. 113; *Scoville v. Cleveland*, 1 Ohio St. 135; *Alexander v. Mayor, etc., of Baltimore*, 5 Gill (Md.) 383; 46 Am. Dec. 630; *Chapin v. Worcester*, 124 Mass. 464; *Burlington v. Quick*, 47 Iowa 222; *Farrar v. St. Louis*, 80 Mo. 379.

Other courts have held that the apportionment must be according to some rule capable of producing reasonable equality. *New Brunswick, etc., Co. v. Street Comrs.*, 38 N. J. L. 190; 20 Am. Rep. 380; *State v. Reimenschneider*, 39 N. J. L. 625; *Seely v. Pittsburgh*, 82 Pa. St. 360; 22 Am. Rep. 760.

Assessments for sewers, levied according to the superficial area of lots, without regard to actual or probable benefits, are unlawful; and, though the legislature has authority to prescribe the rule for apportioning benefits in levying such assessments, the rule adopted must, at least, be one which it is legally possible may be just and equal as between the parties assessed. *Thomas v. Gain*, 35 Mich. 155; 24 Am. Rep. 535.

An assessment made upon lots in a city, for the purpose of improving a street, may be apportioned by reference to the number of front feet of the lots, or by any other standard which will approximate equality; yet, whatever standard is adopted, it must be levied with uniformity and equality. If a lot within the district declared to be benefited is not assessed, and the whole expense is assessed upon the remaining

all the property specially benefited by the particular improvement according to the exceptional benefit each lot or parcel of property actually and separately receives.¹ . . . 3. Where the property is urban, and has been platted into blocks, with lots of equal depth which abut the local improvement for which the assessment is made, and there are no special constitutional restrictions in the way, and nothing in the nature and circumstances of the particular case to make an assessment in proportion to the frontage of the lots upon the improvement work manifest injustice, it is generally, but not always, regarded as within the competency of the legislature to provide that it may be so made.² 4. Under the same conditions and restrictions the legislature may authorize the assessment upon the lots benefited, in proportion to their superficial area.³ 5. Whether it is competent for

lots, the whole assessment is void. *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677.

1. See *In re Amsterdam*, 126 N. Y. 158; *Friedenwald v. Mayor, etc., of Baltimore* (Md. 1891), 21 Atl. Rep. 555; *St. John v. East St. Louis*, 50 Ill. 92; *Clapp v. Hartford*, 35 Conn. 66; *Rogers v. St. Paul*, 22 Minn. 507; *Cooley's Const. Lim.* *497, *505, *511; *Burroughs on Taxation*, 460.

See, also, IMPROVEMENTS, vol. 10, p. 295.

An assessment for a street improvement should show the amount for which each lot or piece of land is liable; the affidavit for the precept should conform to it in this respect; and this should appear although the different lots or pieces of land belong to the same owner. *Balfe v. Johnson*, 40 Ind. 235; *St. Louis v. Provenchere*, 92 Mo. 66; 17 Am. & Eng. Corp. Cas. 628; *Welty on Assessments*, § 311.

2. *Rutherford v. Hamilton*, 97 Mo. 543; *St. Louis v. Clemens*, 49 Mo. 552; *Newman v. Emporia*, 41 Kan. 583; *Bacon v. Mayor, etc., of Savannah*, 86 Ga. 301; 32 Am. & Eng. Corp. Cas. 243; *O'Reilly v. Kingston*, 39 Hun (N. Y.) 285; *Norfolk City v. Ellis*, 26 Gratt. (Va.) 224; *Joyes v. Shadburn*, (Ky. 1890), 13 S. W. Rep. 361; *Wilbur v. Springfield*, 123 Ill. 395; *Elliott on Roads and Streets* 396, 397; note to *Hayden v. Atlanta*, 70 Ga. 817; 7 Am. & Eng. Corp. Cas. 233.

The rule in such cases is to assess each lot in the proportion that its frontage bears to that of all the lots fronting the improvement. *Neenan v. Smith*, 50 Mo. 525; *St. Louis v. Clemens*, 49 Mo. 552.

Thus under 1 *Indiana Rev. St.* 1876, p. 893, providing that, in case of street improvements, "the owners of lots bordering on . . . the part to be improved shall be liable to the contractors for their proportion of the cost of such improvement in the ratio of the front line of lots owned by them to the whole improved line," it was held that the complaint must state the length of the improved line upon the street, and the length of the front line of the lot. *Mendenhall v. Clugish*, 84 Ind. 94.

Where corner lots are so situated that the streets bounding each one of them upon its end and side are improved, they may properly be doubly assessed, because they have, in fact, a double frontage. *Morrison v. Hershire*, 32 Iowa 271; *Wolf v. Keokuk*, 48 Iowa 129; *Springfield v. Green*, 120 Ill. 269.

See IMPROVEMENTS, vol. 10, p. 306, and authorities there cited.

But assessments on this basis have been held invalid in some cases. *Peay v. Little Rock*, 32 Ark. 31; *McBean v. Chandler*, 9 Heisk. (Tenn.) 349; 24 Am. Rep. 308; *Lexington v. McQuillan*, 9 Dana (Ky.) 513; 35 Am. Dec. 159. See, also, *Thomas v. Gain*, 35 Mich. 155; 24 Am. Rep. 535; *Washington Ave.*, 69 Pa. St. 352; 8 Am. Rep. 255; *State v. Ramsey Co.*, 29 Minn. 65.

3. *Gillette v. Denver*, 21 Fed. Rep. 822; 7 Am. & Eng. Corp. Cas. 234 and note; *Farrar v. St. Louis*, 80 Mo. 379; *Hines v. Leavenworth*, 3 Kan. 186; *Williams v. Cammack*, 27 Miss. 209; 61 Am. Dec. 508; *Smith v. Aberdeen*, 25 Miss. 458; *State v. Portage*, 12 Wis. 562; *Wallace v. Shelton*, 14 La. Ann.

the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvement, thus for itself conclusively determining not only that such property is specially benefited, but that it is benefited to the extent of the cost of the improvement, and then to provide for the apportionment of the amount by an estimate to be made by designated boards or officers, or by frontage or superficial area, is a question upon which the courts are not agreed."¹ The weight of authority seems to support the doctrine that the matter is entirely within the discretion of the legislature;² but Judge Dillon concludes that, upon principle, the cost of a local improvement should be assessed upon particular property only to the extent that it is specially and peculiarly benefited, and that the excess should be paid out of the general treasury.³

Taxing districts may also be laid out and assessments made upon the property situated within the district for improvements therein, and where this is done in a proper manner, the courts will not interfere.⁴

d. DESCRIPTION OF OWNERS AND PROPERTY.—The assessment should contain such a description of the property as will enable the proper officer to convey title in the event of a sale.⁵ Reasonable certainty is all that is required, but the description

503; *McGehee v. Mathis*, 21 Ark. 40; *Clapp v. Hartford*, 35 Conn. 66. But see *Preston v. Rudd*, 84 Ky. 150; *Seely v. Pittsburgh*, 82 Pa. St. 360; 22 Am. Rep. 760; *Lee v. Ruggles*, 62 Ill. 427; *People v. Jefferson Co. Ct.*, 55 N. Y. 604.

1. 2 Dillon's Munic. Corp., § 761.

2. *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560; *Sheley v. Detroit*, 45 Mich. 431; *Lafayette v. Fowler*, 34 Ind. 140; *Fort Wayne v. Cody*, 43 Ind. 197; *Ex parte Mayor, etc., of Albany*, 23 Wend. (N. Y.) 277; *Cook v. Slocum*, 27 Minn. 509; *St. Joseph v. O'Donoghue*, 31 Mo. 345; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159; *Burnett v. Mayor, etc., of Sacramento*, 12 Cal. 76; 73 Am. Dec. 518; *Hines v. Leavenworth*, 3 Kan. 186; *White v. People*, 94 Ill. 604; *Fagan v. Chicago*, 84 Ill. 231; *Ludlow v. Cincinnati Southern R. Co.*, 78 Ky. 357; 7 Am. & Eng. R. Cas. 231; *Mayor, etc., of Baltimore v. Johns Hopkins Hospital*, 56 Md. 1; *Terry v. Hartford*, 39 Conn. 291.

3. 2 Dillon's Munic. Corp., § 761. See, also, *Seely v. Pittsburgh*, 82 Pa.

St. 360; 22 Am. Rep. 760; *Hammett v. Philadelphia*, 65 Pa. St. 146; 3 Am. Rep. 615; *Wistar v. Philadelphia*, 111 Pa. St. 604; 13 Am. & Eng. Corp. Cas. 270; *State v. Newark*, 37 N. J. L. 415; 18 Am. Rep. 729; *Barnes v. Dyer*, 56 Vt. 469; 5 Am. & Eng. Corp. Cas. 503; *McBean v. Chandler*, 9 Heisk. (Tenn.) 349; 24 Am. Rep. 308; *Elliott on Roads and Streets* 391, 392, 393.

4. *Mayor, etc., of Baltimore v. Hughes*, 1 Gill & J. (Md.) 480; *Litchfield v. Vernon*, 41 N. Y. 123; *Shaw v. Dennis*, 10 Ill. 416; *St. Louis v. Octers*, 36 Mo. 456; *Philadelphia v. Field*, 58 Pa. St. 320. See, also, *Atchison v. Price*, 45 Kan. 296; 33 Am. & Eng. Corp. Cas. 130; *Blair v. Atchison*, 40 Kan. 353; *Gillette v. Denver*, 21 Fed. Rep. 822; 7 Am. & Eng. Corp. Cas. 234; *State v. Ramsey Co.*, 33 Minn. 295; 7 Am. & Eng. Corp. Cas. 240; *Note to Little Rock v. Board*, 42 Ark. 152; 7 Am. & Eng. Corp. Cas. 253, 260; *Cooley's Const. Lim.* *507; *Burroughs on Taxation* 459, 460, 464.

5. *In re New York, etc., R. Co.*, 90 N. Y. 342; 1 Am. & Eng. R. Cas. 542; *Naltner v. Blake*, 56 Ind. 127.

must sufficiently identify the property to enable a surveyor to locate it.¹

The persons upon whose property the assessment is made should be named or in some way identified;² but immaterial errors in naming the owners will not, as a rule, defeat the proceedings.³ Where the owner is unknown it is sufficient to assess the property to "owner unknown."⁴ An assessment against "the estate of A B," or "the heirs of A B, deceased," would seem to be sufficient in a proper case.⁵

e. NOTICE AND OBJECTIONS.—There is a decided conflict among the authorities upon the question of the necessity of notice to the owners of property assessed. Some of the courts hold that the legislature or local authorities may arbitrarily decide that the improvement benefits the land to the full extent of

1. *People v. Stahl*, 101 Ill. 346; *State v. Mulford*, 43 N. J. L. 550; *Hannah v. Collins*, 94 Ind. 203; *Orono v. Veazie*, 61 Me. 431; *Hewes v. Reis*, 40 Cal. 261.

It is sufficient if the description supplies the means of identification. *Rucker v. Steelman*, 73 Ind. 396. See, also, *Sloan v. Sewell*, 81 Ind. 180; *Eads v. Retherford*, 114 Ind. 273; *Noble v. Indianapolis*, 16 Ind. 506.

2. *Bennett v. Buffalo*, 17 N. Y. 383.

If the names of the owners and occupants of property assessed are the same, in an assessment, as upon the tax lists of previous years, this is all the law requires in respect to the mode of stating the names of owners and occupants. *In re Tappan*, 54 Barb. (N. Y.) 225; 36 How. Pr. (N. Y.) 390.

A testator devised land to his three executors, in trust that they should in their discretion allow his daughter to reside on it for life, or rent it and pay her the income for her life. Two of the executors leased the land for the daughter's life and the daughter conveyed her life estate to the lessee. *Held*, that the land was properly assessed with a flagging charge in the name of the lessee as owner. *Remsen v. Wheeler*, 51 Hun (N. Y.) 643.

3. *Kendig v. Knight*, 60 Iowa 29.

The omission, in a city ordinance apportioning an assessment for street improvements upon owners of lots, to name the owners and apportion to each a specific sum, commensurate with the frontage of his lot, while technically a defect, is not a sufficient reason for holding the ordinance fatally defective, when the amount to be paid by each lot owner was substantially appor-

tioned to him. If the ownership should change after the expense is incurred, the vendee would have the right to compel his vendor to pay the assessment. *Covington v. Boyle*, 6 Bush (Ky.) 204; *Covington v. Dressman*, 6 Bush (Ky.) 210.

A provision, in the charter of a city, that "the city engineer shall, on the completion of a sewer, make out a certified bill of assessment against each lot, in the name of the owner," is directory merely, in regard to the insertion of the owner's name, and consequently a mistake as to the name does not vitiate the bill. *St. Louis v. De Noue*, 44 Mo. 136.

But, where, in an assessment under *New York Laws* 1850, ch. 144, two lots were accidentally assessed against persons not the owners, it was held that a sale of the lots by the city street commissioner was absolutely void for want of jurisdiction. *Chapman v. Brooklyn*, 40 N. Y. 372.

4. *Nichols v. McGlathery*, 43 Iowa 189; *Rapp v. Lowry*, 30 La. Ann. 1272; *Oliver v. Robinson*, 58 Ala. 46.

5. *Noble v. Indianapolis*, 16 Ind. 506. *Carr v. State*, 103 Ind. 548; *Jenkins v. Rice*, 84 Ind. 342; *Wheeler v. Anthony*, 10 Wend. (N. Y.) 346; *State v. Jersey City*, 24 N. J. L. 108; *Ronken-dorff v. Taylor*, 4 Pet. (U. S.) 349; *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75; 32 Am. Dec. 243; *Pond v. Grafton*, 16 Ind. 510.

A city assessment is not invalidated by the fact that it describes the lot as belonging to Mrs. F, instead of "to the estate of Mrs. F," when the person named is no longer living. *New Orleans v. Ferguson*, 28 La. Ann. 240.

the cost of making the improvement, and that notice is therefore unnecessary.¹ But, upon principle, the property-owner should be given "his day in court," and should have an opportunity at some stage of the proceedings to object to the amount of the assessment, at least. This is a matter for judicial determination, and notice would therefore seem to be essential.² In most of the States the statutes provide for notice and an opportunity to make objections, and where such is the case they should be strictly followed.³

1. *Amery v. Keokuk*, 72 Iowa 701; *Cleveland v. Tripp*, 13 R. I. 50; *Clapp v. Hartford*, 35 Conn. 66; *Gillette v. Denver*, 21 Fed. Rep. 822; 7 Am. & Eng. Corp. Cas. 234.

In *Iowa*, where a sewer was constructed, its cost assessed against each lot according to the number of square feet, and such taxes duly entered on the proper tax-books as special taxes for the construction of the sewer, but no notice of the assessment was given the owners, it was held that the tax could be recovered under the code, providing that a recovery may be had for such improvements, notwithstanding any irregularity in the action of the city or its officers. *Dittoe v. Davenport*, 73 Iowa 66.

2. *Elliott on Roads & Streets* 415; *Hare's Am. Const. Law* 312; *Cooley's Const. Lim.* (5th ed.) 615 and note; *Walston v. Nevin*, 128 U. S. 578; 27 Am. & Eng. Corp. Cas. 198; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; 2 *Dillon's Munic. Corp.* (4th ed.), § 802a; *Stuart v. Palmer*, 74 N. Y. 183; 30 Am. Rep. 289; *McLaughlin v. Miller*, 124 N. Y. 510; *Washington Ave.*, 69 Pa. St. 352; 8 Am. Rep. 255; *Garvin v. Daussman*, 114 Ind. 429; *Kuntz v. Sumption*, 117 Ind. 1; 23 Am. & Eng. Corp. Cas. 531; *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 463; *Tide Water Co. v. Coster*, 18 N. J. Eq. 518; 90 Am. Dec. 634; *Boorman v. Santa Barbara*, 65 Cal. 313; *Rich v. Chicago*, 95 Ill. 286.

3. 2 *Dillon's Munic. Corp.*, § 804; *Hewes v. Reis*, 40 Cal. 255; *Lent v. Tillson*, 72 Cal. 404; 19 Am. & Eng. Corp. Cas. 640; *Barker v. Omaha*, 16 Neb. 269; 7 Am. & Eng. Corp. Cas. 293; *Darling v. Gunn*, 50 Ill. 424; *Butler v. Saginaw Co.*, 26 Mich. 22; *Philadelphia v. Miller*, 49 Pa. St. 440; *Cowen v. West Troy*, 43 Barb. (N. Y.) 48; *Sewall v. St. Paul*, 20 Minn. 511; *State v. Jersey City*, 26 N. J. L. 444; *Dubuque v. Wooten*, 28 Iowa 571; *Ottawa v. Chicago, etc.*, R. Co., 25 Ill. 43; *Risley v. St. Louis*, 34 Mo. 404; *Lyon*

v. Alley, 130 U. S. 177; 27 Am. & Eng. Corp. Cas. 99; *Simons v. Kern*, 92 Pa. St. 455; *Morgan v. Guttenberg*, 40 N. J. L. 394.

Notice.—The publication of the time and place of hearing objections to the report of the commissioners must conform strictly to the requirements of the charter. *State v. Mayor, etc., of Bayonne*, 49 N. J. L. 311.

An owner of abutting property has an absolute right to notice and a hearing before being charged with an assessment for grading a street, and the fact that it would have been the same if he had had notice does not make it valid. *Ulman v. Mayor, etc., of Baltimore*, 72 Md. 587; 32 Am. & Eng. Corp. Cas. 228.

A city ordinance contained a provision that "the city council may provide for the grading, paving, macadamizing, or repairing of any street or alley, . . . and, in all cases of improvements for which a special tax is to be levied, notice shall be given by publication of a copy of such resolution in the official paper of the city, not less than two weeks," and that after such publication the council might authorize the city engineer to advertise for bids. *Held*, that the terms of the ordinance were mandatory, and that the city council had no power to levy a tax upon the owners of abutting property for an improvement, when no notice had been given by publication. *Roche v. Dubuque*, 42 Iowa 250. See also *Taber v. Ferguson*, 109 Ind. 227.

On *scire facias* on a municipal lien for grading a street defendant may show that he had no notice in the original proceedings. He is not concluded by the confirmation of the report of the viewers. He may show that the damages were occasioned by grading elsewhere than on the street. *Pennsylvania* act of March 20, 1873, § 7, cannot be construed to validate an assessment thus made without notice. *Hershberger v. Pittsburgh*, 115 Pa. St. 78.

The authorities cited below¹ will serve to show the usual

Under the *New York* law, which requires a publication of notice of an ordinance relating to street improvements and inviting "persons interested therein" to present objections, a notice which states that "any person" having objections to the passage of the ordinance is hereby requested to present them, without stating the time when this is to be done, is insufficient. *In re Delaware, etc., Canal Co.*, 8 N. Y. Supp. 352.

Under section 27, art. 9, of the *Illinois* general City and Village act (1 Starr & C. St., ch. 24, par. 143), providing that commissioners to assess benefits from improvements shall notify, by mail, "each owner of the premises assessed, whose name and place of residence is known to them," it is held an affidavit by one of the commissioners that he had notified each owner whose name and residence was known to him, is insufficient. *Murphy v. Peoria*, 119 Ill. 509.

Under the charter of St. Louis, requiring such notice to be given to any person against whose property it is proposed to assess benefits, as is provided in cases of condemnation, a return by the marshal that he had served notice on certain persons "by having had personal service," is insufficient, for failing to state in what the service consisted. *State v. St. Louis*, 67 Mo. 113.

No action lies to enforce a lien for an assessment for a street improvement in San Francisco until the thirty days' notice required by the *California* act of 1870, § 10, in that regard, has been given. *People v. Reay*, 52 Cal. 423.

By the Brooklyn city charter (Laws of *New York*, 1854, ch. 384, tit. 4, § 24), the assessors for street assessments, after hearing parties interested, are to make a report, with the objections presented to them, which the common council are to refer to a committee, who, after a hearing pursuant to notice published, are to report to the common council. *Held*, that the omission of the committee to publish notice of hearing was fatal to the assessment. *In re Ford*, 6 Lans. (N. Y.) 92.

The provision of the *Pennsylvania* act of January 6, 1864 (P. L. 1131), requiring previous notice of the meeting of the board of viewers to hear the proofs and allegations of the parties, is of a mandatory nature, and the giving

of the notice is a requisite to the making of the assessment. *Hershberger v. Pittsburgh*, 115 Pa. St. 78. See also *Scott v. Toledo*, 36 Fed. Rep. 385.

"The city of St. Paul, in order to justify the grading and filling of a street, under the proceedings authorized in its charter (title 1, ch. 7), must show the notices of assessment of damages and its confirmation, as required by sections 8 and 15, these being jurisdictional." *Overmann v. St. Paul*, 39 Minn. 120.

Notices Held Sufficient.—The notice of an assessment for benefits in the city of Bayonne complies with the charter, and act *New Jersey* April 13, 1876, if it describes lands by given distances along specified streets and avenues, and substantially shows that such lands are assessed for benefits. *State v. Bayonne*, 52 N. J. L. 503.

Code *Iowa*, § 478, authorizing cities to provide, by ordinance, the mode in which a charge on landowners for street improvements shall be assessed, confers the power to determine the kind of notice of the assessment to be given the landowners; and a notice by publication, having been prescribed by ordinance, is sufficient. *Lyman v. Plummer*, 75 Iowa 353. See also *Lent v. Tillson*, 72 Cal. 404; 19 Am. & Eng. Corp. Cas. 640.

Provisions of a charter and ordinance in reference to assessments for street improvements are not unconstitutional for failure to provide for notice, where the assessment can only be enforced in a legal proceeding in court, in which notice is required, and in which the validity of the proceedings may be questioned; *following Garvin v. Daussman*, 114 Ind. 429. *Law v. Johnston*, 118 Ind. 261.

Under the statute of *Indiana* which requires the common council, whenever it deems it necessary to make street improvements, to give two weeks' publication, stating the time and place where the property owners can make objections to the construction of the proposed improvements, the appointment of a committee to hear such objections is unnecessary, and a notice to file objections with the clerk is sufficient. *Quill v. Indianapolis*, 124 Ind. 292. See, also, *State v. Elizabeth*, 51 N. J. L. 246; *Nevin v. Roccle*, 86 Ky. 492; *Allen v. Charlestown*, 111 Mass. 123.

1. **Objections to Assessment.**—The

city charter of Albany provides that when the apportionment for an improvement shall have been perfected the board of apportionment shall cause a notice to be published in the official papers of the city for fifteen days, during which time the apportionment shall be open for examination by any person interested; and on the application in writing of any person considering himself aggrieved the board may review and correct such apportionment. *Held*, that the statute contemplates the giving of fifteen days in which interested persons may examine the assessment, and during this time, or at any time before action has been taken by the board, objections may be made in writing to the assessment; and therefore a restriction limiting the time in which objections can be made, though more than fifteen days from the first publication, renders the notice nugatory. *In re Delaware, etc., Canal Co.*, 8 N. Y. Supp. 352.

Under the statute of *Illinois*, which provides that the hearing of objections to assessments shall be conducted as other cases at law, the court has no power to change the assessment upon inspection of the assessment roll and a plat of the land affected, without any evidence showing that the assessment was improperly made. *De Koven v. Lake View*, 130 Ill. 541.

The owner of land specially assessed for improving a street cannot object to the confirmation of such assessment because the municipality has not acquired title to the soil of the proposed street; *following Hunerberg v. Hyde Park*, 130 Ill. 156; 27 Am. & Eng. Corp. Cas. 117; *Leman v. Lake View*, 131 Ill. 388. See also *Holmes v. Hyde Park*, 121 Ill. 128; 17 Am. & Eng. Corp. Cas. 626.

Where a purchaser takes title to lands, with knowledge of assessments against them while held by a former owner, and assumes to pay them in his deed, he may object to the legality of these assessments, in an action between him and the city, and the purchaser under the city. *State v. Mayor, etc., of Jersey City*, 35 N. J. L. 381.

Objections to the validity of an assessment cannot be raised by the mayor of a city, by refusing to sign a warrant for payment of money thereunder, after the city authorities have treated it as valid, and have authorized the levying of a tax to meet it; and the money has been collected and deposited in the city treasury, and its payment to the proper officers has been ordered by the legisla-

tive branch of the city government, and by the comptroller who has signed the warrant therefor. *People v. Brooklyn*, 3 Hun (N. Y.) 596.

It is no valid objection to an assessment for flagging a sidewalk that part of the old flagging was re-laid and part of the old curb re-set, and included in the expense, if the ordinance does not direct that new material be exclusively used. Nor is it an objection that more than one lot is included in one assessment; where the lots so assessed together were the property of one owner. Both are matters within the discretion of the commissioners and assessors. *In re Anderson*, 39 How. Pr. (N. Y.) 184.

A taxpayer, by appearing in court and resisting the entering of a judgment against his property on a certain assessment, will not be deemed to have waived his right to object thereto, that he has been afforded no proper opportunity to be heard respecting the fairness of such assessment. *Nashville v. Weiser*, 54 Ill. 245.

So, where a landowner has been assessed for the extension of a street, under the *Massachusetts* statute, he is not estopped from petitioning for a jury to revise the assessment because he has asked for an apportionment of the tax. *Gardner v. Boston*, 106 Mass. 549.

But the owner of town lots, who, with full knowledge, makes no objection to an ordinance requiring him to build a sidewalk in front of his property under penalty of having the same done by the town at his expense, and to the construction of such sidewalk on his default, is estopped from denying the authority of the town to construct such sidewalk. *Powers v. New Haven*, 120 Ind. 185; *Ross v. Stackhouse*, 114 Ind. 200.

So, after the work of improving a street has been completed, and paid for by the city, it is too late to object to irregularities in the preliminary proceedings and in the manner in which the assessment was made. *State v. Mayor, etc., of Jersey City*, 52 N. J. L. 490. See also *Katz v. Bedford*, 77 Cal. 319; *Rector v. Board of Improvement*, 50 Ark. 116; 19 Am. & Eng. Corp. Cas. 630; *People v. Goodwin*, 5 N. Y. 571; *Rutland v. Pierpont*, 61 Vt. 306; *Ferson's Appeal*, 96 Pa. St. 140.

Where an excessive assessment for a street improvement has been made, abutting owners are not precluded from objecting to the assessment by the fact that only the fair cost of the work was

grounds and manner of making objections to the assessment.

f. LIEN OF THE ASSESSMENT.—"It is undoubtedly a sound proposition," says Judge Dillon, "that taxes, whether general or special, are not liens upon the property against which they are assessed, unless made so by the charter, or unless the corporation is authorized by the legislature to declare them to be liens."¹ But assessments for street improvements are generally made liens upon the property specially benefited, by express legislative enactment.² Statutes giving liens for street assessments are remedial in their nature and should be liberally construed so as to accomplish the purpose of the legislature.³ The lien attaches at the time fixed by the statute, and subsequent purchasers are regarded as purchasers *pendente lite*.⁴

assessed on private property, and the rest was assessed on abutting public property. *In re McCready*, 90 N. Y. 652; *distinguished In re Livingston*, 121 N. Y. 94.

But "it cannot be objected against the amount of a special assessment for curbing the streets of a city of the first class that it was improperly ascertained by the city clerk instead of the council, where the council fixed the rate of the levy, and the clerk, by direction of the council, only computed the amount of assessment at that rate on the lots liable therefor." *Topeka v. Gage*, 44 Kan. 87. See generally, as to objections and defenses to assessments, *Granger v. Buffalo*, 6 Abb. N. Cas. (N. Y.) 228; *Sheehan v. Gleeson*, 46 Mo. 100; *Dickson v. Racine*, 65 Wis. 306; 7 Am. & Eng. Corp. Cas. 197; *Erie City v. Butler*, 120 Pa. St. 374; *State v. Ramsey Co.*, 29 Minn. 62; *Donnelly v. Howard*, 60 Cal. 291; *Nashville v. Weiser*, 54 Ill. 245; *In re McCormack*, 60 Barb. (N. Y.) 128; *In re Dunning*, 60 Barb. (N. Y.) 377; *Hopkins v. Mason*, 61 Barb. (N. Y.) 469; *People v. Rochester*, 5 Lans. (N. Y.) 142.

1. 2 Dillon's Munic. Corp., § 821, citing *Philadelphia v. Greble*, 38 Pa. St. 339; *Allegheny's Appeal*, 41 Pa. St. 60; *Heme v. Levee Comrs.*, 19 Wall. (U. S.) 655; *Meriwether v. Garrett*, 102 U. S. 472; *Jefferson v. Whipple*, 71 Mo. 519; *Kansas City v. Payne*, 71 Mo. 159. See also *State v. Aetna L. Ins. Co.*, 117 Ind. 251; *Ganse v. Bullard*, 16 La. Ann. 107; *Randolph v. Bayne*, 44 Cal. 366; *Dougherty v. Henarie*, 47 Cal. 9.

2. See *McMasters v. Com.*, 3 Watts (Pa.) 292; *Justice v. Logansport*, 101

Ind. 326; 9 Am. & Eng. Corp. Cas. 451; *Dowdney v. Mayor, etc.*, of N. Y., 54 N. Y. 186; *Eschbach v. Pitts*, 6 Md. 71; *Mayor, etc., of N. Y. v. Colgate*, 12 N. Y. 140; *Vreeland v. Jersey City*, 37 N. J. Eq. 574; *Walsh v. Mathews*, 29 Cal. 123; *Provident Inst. v. Mayor, etc., of Jersey City*, 113 U. S. 506.

The legislature may make the assessment a lien upon the separate property of a married woman. *Leavenworth v. Stille*, 13 Kan. 539.

The fact that a separate lien, for the cost of laying a sidewalk, is filed against each lot of a block, does not affect the validity of the lien. *Maple v. Borough of Beltzhoover (Pa.)*, 18 Atl. Rep. 650.

3. *Eckhard v. Donohue*, 9 Daly (N. Y.) 214; *Hudler v. Golden*, 36 N. Y. 447; *Weed v. Tucker*, 19 N. Y. 422.

An assessment for grading or paving a street a certain distance, may be a valid lien, although the ordinance therefor and contract thereunder were for a greater distance, the city having adopted the action of its engineer. *Hutchinson v. Pittsburg*, 72 Pa. St. 320.

4. *Chaney v. State*, 118 Ind. 494. See also *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419; 55 Am. Dec. 266; *Emery v. Bradford*, 29 Cal. 75; *Philadelphia v. Tryon*, 35 Pa. St. 401; *Jones v. Schulmeyer*, 39 Ind. 119; *Langsdale v. Nicklaus*, 38 Ind. 289. But see *Lyon v. Alley*, 130 U. S. 177; 27 Am. & Eng. Corp. Cas. 99.

Power of Legislature to Modify or Destroy Lien.—As to when the legislature may modify a lien or take away the right to enforce it, see Elliott on

g. **PERSONAL LIABILITY.**—There is some conflict among the authorities as to whether the property owner can be made personally liable for the assessment. In the absence of a statute upon the subject it would seem clear, upon principle, that there can be no personal liability.¹ It would seem, also, that a statute attempting to impose such liability in addition to an assessment upon the land should be held unconstitutional,² but such statutes have been upheld by some of the courts.³

h. **COLLECTION AND ENFORCEMENT.**—The mode of collecting and enforcing assessments is, within constitutional limits, entirely under the control of the legislature. It may provide for their collection in a summary method, or by a suit in equity or an action at law,⁴ and where a complete and specific remedy is expressly provided it will generally be regarded as exclusive.⁵ If the statute is silent upon the subject the assessment may be enforced by any appropriate action at law or suit in equity.⁶ Where

Roads and Streets 434, 435; *Antoni v. Greenhow*, 107 U. S. 766; *Edwards v. Kearzey*, 96 U. S. 595; *Bangor v. Goding*, 35 Me. 73; 56 Am. Dec. 688; *Frost v. Ilsley*, 54 Me. 345; *Watson v. New York Cent. R. Co.*, 47 N. Y. 157; *Hall v. Bunte*, 20 Ind. 304; *Martin v. Hewitt*, 44 Ala. 418; *Handel v. Elliott*, 60 Tex. 145; *Weaver v. Sells*, 10 Kan. 609; *Hoffman v. Walton*, 36 Mo. 613; *Streubel v. Milwaukee, etc., R. Co.*, 12 Wis. 67; *Chowning v. Barnett*, 30 Ark. 560.

1. *Green v. Ward*, 82 Va. 324; *Wolf v. Philadelphia*, 105 Pa. St. 25; *New Albany v. Sweeney*, 13 Ind. 245; *Balfe v. Lammers*, 109 Ind. 350; *Greenfield v. State*, 113 Ind. 599; *Randolph v. Bayne*, 44 Cal. 366. *Compare* *Moale v. Baltimore*, 61 Md. 224.

2. *Higgins v. Ausmuss*, 77 Mo. 351; *Neenan v. Smith*, 50 Mo. 525; *Taylor v. Palmer*, 31 Cal. 240; *Gaffney v. Gough*, 36 Cal. 104; *Broadway Baptist Church v. McAtee*, 8 Bush (Ky.) 508; 8 Am. Rep. 480; *Burlington v. Quick*, 47 Iowa 226; *Craw v. Tolono*, 96 Ill. 255; 36 Am. Rep. 143; *Virginia v. Hall*, 96 Ill. 278; *Macon v. Patty*, 57 Miss. 378; 34 Am. Rep. 451.

An assessment for benefits from a street improvement may not be made a personal charge against the owner of the land as well as a charge on the land. *Seattle v. Yesler*, 1 Wash. 571.

3. *Mayor, etc., of N. Y. v. Colgate*, 12 N. Y. 143; *Litchfield v. McComber*, 42 Barb. (N. Y.) 288; *Lefevre v. Mayor, etc., of Detroit*, 2 Mich. 586; *Lovell v. City*, 10 Minn. 293; *Nichols v. Bridgeport*, 23 Conn. 190; 60 Am.

Dec. 636; *Lowell v. French*, 6 Cush. (Mass.) 223; *New Orleans v. Wire*, 20 La. Ann. 500; *Bonsall v. Lebanon*, 19 Ohio 419; *Clemens v. Mayor, etc., of Baltimore*, 16 Md. 208; *Dashiell v. Mayor, etc., of Baltimore*, 45 Md. 615; *Handy v. Collins*, 60 Md. 229; 45 Am. Rep. 725; *Hazzard v. Heacock*, 39 Ind. 172.

The charter of the city of Muscatine provides that the city may require abutting owners to pave streets, and, on default, may assess the lots, "which shall have the effect of a tax thereon, and they may be sold therefor as for a tax." It further provides that "all the provisions of law relating to special assessments, and for the enforcement and collection of the same, shall apply to the assessments." *Held*, that the assessment was not only a lien on the land, but was a claim against the owner, which could be collected by action. *Muscatine v. Chicago, etc., R. Co.*, 79 Iowa 645.

4. *Elliott on Roads and Streets* 435.

It has been held that the legislature may not only provide for a summary collection of taxes and assessments, but may also declare what shall make a *prima facie* case. *St. Louis v. Coons*, 37 Mo. 44; *Kiley v. St. Joseph*, 67 Mo. 491. See, also, *Flournoy v. Jeffersonville*, 17 Ind. 169; 79 Am. Dec. 468.

5. 2 Dillon's Munic. Corp., § 815.

6. **Summary Enforcement.**—The charter of the city of Grand Rapids, relating to special assessments, provides that it shall be the duty of the marshal, on receiving a warrant for such assessment, "to levy and collect

the same by distress and sale of any personal property upon such premises or in the possession of the persons chargeable with such assessments, and, in case sufficient personal property cannot be found," the marshal shall make a return to that effect. A subsequent section authorizes the assessment to be satisfied out of the real property benefited, upon the marshal's filing with the clerk a certificate showing *inter alia*, that "I have been unable to find any personal property upon any of the parcels above described in the possession of the person or persons chargeable with said assessment out of which to levy and collect the same," etc. *Held*, that the word "or" must be considered as standing between the words "described" and "in the possession of the person," etc., that it is not sufficient for the marshal's certificate to recite that he can find no personal property on the premises; and that it may be shown to defeat a sale of the premises that the person chargeable with the assessment had personal property situate in another part of the city which might have been, but was not, levied upon by the marshal. *Tompkins v. Johnson*, 75 Mich. 181.

A warrant to the collector, to which is attached the ordinary taxes and the amounts due for opening the avenue, is sufficient to cover the assessment for that purpose, though the word "assessment" is omitted therefrom. *Stebbins v. Kay*, 51 Hun (N. Y.) 589.

A city clerk cannot issue a valid precept for the collection of an assessment for street improvements without an order of the common council; and a sale made under such precept is void. *Langohr v. Smith*, 81 Ind. 495. See further, as to collection by precept, *Clements v. Lee*, 114 Ind. 397; *Jenkins v. Stetler*, 118 Ind. 275; *Martindale v. Palmer*, 52 Ind. 411; *Crowell v. Jaqua*, 114 Ind. 446; *Palmer v. Stumph*, 29 Ind. 329; *Wilson v. Poole*, 33 Ind. 443; *Wren v. Indianapolis*, 96 Ind. 206; 7 Am. & Eng. Corp. Cas. 599; *Jeffersonville v. Patterson*, 32 Ind. 140.

A power of sale to enforce a lien for a municipal assessment cannot be exercised after the time limited. *State v. Taylor*, 59 Md. 338.

Power to collect by distress and sale must be given expressly or by necessary implication. 2 Dillon's Munic. Corp., § 818; *Merriam v. Moody*, 25

Iowa 163; *Camden v. Allen*, 26 N. J. L. 398; *City Council v. Dunbar*, 50 Ga. 387; *McInerny v. Reed*, 23 Iowa 410; *St. Louis v. Russell*, 9 Mo. 507.

Tax Bills.—In *Missouri* and some of the other states it is provided that tax bills may be issued to the contractor, who is authorized to collect the same by suit. *St. Louis v. De Noue*, 44 Mo. 136; *Chambers v. Satterlee*, 40 Cal. 497; *New Orleans v. Wise*, 20 La. Ann. 500; *St. Joseph v. Anthony*, 30 Mo. 537. See, as to the pleading and practice in such cases, *Wand v. Green*, 7 Mo. App. 82; *Kinealy v. Gay*, 7 Mo. App. 203; *Stifel v. Daugherty*, 6 Mo. App. 573; *Risley v. St. Louis*, 34 Mo. 404; *Kefferstein v. Knox*, 56 Mo. 186; *Municipality No. Two v. Guillotte*, 14 La. Ann. 295; *Himmelman v. Cofran*, 36 Cal. 411; *Kiley v. Oppenheimer*, 55 Mo. 374; *Smith v. Barrett*, 41 Mo. App. 460.

Collection by Action or Suit.—See *Dugan v. Mayor, etc., of Baltimore*, 1 Gill & J. (Md.) 499; *State v. Southern Steamship Co.*, 13 La. Ann. 497; *Geneva v. Cole*, 61 Ill. 397; *Mayor, etc., of Jonesboro v. M'Kee*, 2 Yerg. (Tenn.) 167; *Perry Co. v. Selma, etc., R. Co.*, 58 Ala. 546; *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 227; *Burlington v. Burlington, etc., R. Co.*, 41 Iowa 134.

The term "ordinary process of law," as used in the *Missouri* act, providing for the assessment and collection of taxes for special improvements by the ordinary process of law, does not mean ordinary personal judgment and execution, but such process as is adapted to enforce a lien or specific charge upon the property assessed. *Neenan v. Smith*, 50 Mo. 525.

For the collection of assessments for street improvements in the city of New York, resort may be had primarily to either the land or to the owner thereof; but when the land is resorted to, and the lien or incumbrance created, in the first instance, such action necessarily extinguishes the personal liability of the owner of the land. *De Peyster v. Murphy*, 39 N. Y. Super. Ct. 255.

There is no statutory authority in *California* for a decree to enforce the lien of a street assessment, in the absence of any of the parties interested. *Diggins v. Reay*, 54 Cal. 525.

A lien for a street assessment in San Francisco cannot be enforced without making all the owners of the property defendants, and serving them all with summons. *Hancock v. Bowman*, 49

Cal. 413. See also *San Francisco v. Doe*, 48 Cal. 560; *Himmelmänn v. Spanagel*, 39 Cal. 389.

If an ordinance of a city provides that the city shall have a lien on lots, for improvements made by the city on the street, which lien may be enforced by a suit against the owner; to authorize a judgment in favor of the city, enforcing the lien, it is necessary to allege that the defendant owns the lot, and, if it is denied, prove it. *Santa Barbara v. Huse*, 51 Cal. 251.

In *Missouri* when a statute authorizes the levy of a special tax upon city lots, to pay for improvements, and makes the tax a lien upon such lots, judgment to enforce the payment of the tax should be limited to the property and its owners. A personal judgment against the owners for the tax assessed is unwarranted. *St. Louis v. De Nove*, 44 Mo. 136. See, also, *Davis v. Cincinnati*, 36 Ohio St. 24.

In *Ohio* an action for the collection of a special assessment for a street improvement may be brought in the name of the corporation for the benefit of the contractor. *Gest v. Cincinnati*, 26 Ohio St. 275.

But the assignment by a municipal corporation of a claim for a sewer assessment does not empower the beneficiary to maintain an action thereon in his own name; the statute permitting such assignee to sue, being repealed by the *Cincinnati Munic. Code of 1869*. *Scully v. Ackmeyer*, 2 Cin. Sup. Ct. Rep. (Ohio) 296.

In a proceeding by a city to collect an assessment for street improvement, an affidavit of defense which alleges that the contract was fraudulently let and the work badly done, without alleging any specific defect in the work, or any special injury which defendant suffered therefrom, is bad. *Pittsburgh v. MacConnell*, 130 Pa. St. 463.

A contractor can recover from the city if it fails to set in motion the necessary machinery to enable him to recover the amount from property owners who were to have been assessed for the expense. *Smith v. Buffalo*, 44 Hun (N. Y.) 156. See also *Atchison v. Byrnes*, 22 Kan. 65.

But where a contract for street grading provided, in accordance with the city charter, for payment in special tax bills, and that in no event should the city be liable for the work, no recovery can be had against the city though through an informality in the passage

of the ordinance the tax bills are worthless. *Keating v. Kansas*, 84 Mo. 415. See, also, *Raisch v. San Francisco*, 80 Cal. 1.

In a recent case in *New York*, plaintiff's complaint alleged that there was a sum of money belonging to her in the official custody of a county clerk, the same being the surplus arising upon the foreclosure of a mortgage upon certain lands belonging to her in the town of A; that an assessment for a local improvement had been laid upon said lands in pursuance of statutes unconstitutional and void, and that the assessment was invalid; that a tax had been levied upon the premises, and a warrant issued to the town collector, who had levied upon the money and paid it to the county treasurer for the town; that bonds of the town had been issued to provide for the expenses of the improvement, which were valid obligations of the town, and the money so paid was applied to the payment of said bonds, and that the town had wrongfully received the money, without the knowledge or consent of the plaintiff, and applied it to its own use, and had failed and neglected to pay it over. *Held*, that the complaint set forth a good cause of action. *Horn v. New Lots*, 83 N. Y. 100; 38 Am. Rep. 402.

As to foreclosing street improvement liens, see generally, *Miller v. Mayo*, 88 Cal. 568; *Waterbury v. Schmitz*, 58 Conn. 522; *Philadelphia v. Baker*, 140 Pa. St. 11; *Philadelphia v. MacPherson*, 140 Pa. St. 5; *Mt. Pleasant v. Baltimore, etc., R. Co.*, 138 Pa. St. 365; *Robinson v. Merrill*, 87 Cal. 11; *Sullivan v. Mier*, 67 Cal. 264.

See, also, on the general subject, *Morgan v. Guttenberg*, 40 N. J. L. 394; *Wolff v. Baltimore*, 49 Md. 446; *Fass v. Seehawer*, 60 Wis. 525; 4 Am. & Eng. Corp. Cas. 527; *Reilley v. Albany*, 40 Hun (N. Y.) 405; *Bucroft v. Council Bluffs*, 63 Iowa 646; *Greencastle v. Allen*, 43 Ind. 347; *Baker v. Portland*, 5 Sawy. (U. S.) 566; *Himmelmänn v. Hoadley*, 44 Cal. 276; *Butler v. Robinson*, 75 Mo. 192; *Sims v. Hines*, 121 Ind. 534.

Time for Enforcing Assessment—Where the statute expressly limits the time for enforcing an assessment the proceedings must be commenced within the time prescribed. *Elliott on Roads and Streets* 439. But ordinary general statutes of limitation do not, as a rule, apply to municipal corporations. *Magee v. Com.*, 46 Pa. St. 358; *District of*

Columbia v. Washington, etc., R. Co., 1 Mackey (D. C.) 361; *Elliott v. Williamson*, 11 Lea (Tenn.) 38.

Under the *South Carolina* betterment law, a complaint for improvements must be filed within forty-eight hours. *Held*, that it must be filed within forty-eight hours from the time of the judgment of the circuit court, although the cause is further prosecuted by appeal. *Garrison v. Dougherty*, 18 S. Car. 486.

The provision in 64 *Ohio* Laws 75, —limiting the lien of an assessment for certain improvements to two years, unless "a proper action" to enforce the lien be brought within that period—construed not to imply an action wherein the owner of the premises was not made a party nor served with process until the two years had expired.

A judgment rendered on a petition which shows that the term had expired, will be reversed, notwithstanding a failure to demur or answer. *Bonte v. Taylor*, 24 Ohio St. 628.

Compare *Mellinger v. Houston*, 68 Tex. 37; *Davenport v. Chicago, etc., R. Co.*, 38 Iowa 633; *Jefferson v. Whipple*, 71 Mo. 521.

Sale Upon Assessment.—The legislature may authorize a sale of the land specially benefited to pay the assessment, but in all such cases the authority must be clear and the statute must be strictly pursued. *Burroughs on Taxation* 489, § 150; 2 *Dillon's Munic. Corp.*, §§ 818, 819. See also *Goring v. McTaggart*, 92 Ind. 200; *Himmelman v. Townsend*, 49 Cal. 150.

The right to redeem from such sales is favorably regarded by the courts, and statutes giving or extending it are liberally construed. 2 *Dillon's Munic. Corp.*, § 822. See also *Gault's Appeal*, 33 Pa. St. 95.

Enjoining Sale and Collection.—Injunction will sometimes lie to restrain the collection of an assessment or prevent a sale thereunder. *Goring v. McTaggart*, 92 Ind. 200; *Wilson v. Poole*, 33 Ind. 443; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153; *Marvin v. Town*, 56 Hun (N. Y.) 510; *Stone v. Viele*, 38 Ohio St. 314.

Thus, a fraudulent assessment may be enjoined. *Merrill v. Humphrey*, 24 Mich. 170; *Chicago, etc., R. Co. v. Cole*, 75 Ill. 591; *Wright v. Southwestern R. Co.*, 64 Ga. 783.

So, where there is no jurisdiction or property assessed which is not subject to assessment, an injunction will lie.

Balfe v. Lammers, 109 Ind. 347; *Temple Grove Seminary v. Cramer*, 98 N. Y. 121; *Teegarden v. Davis*, 36 Ohio St. 601; *Fremont v. Boling*, 11 Cal. 380.

It will not lie where there is an adequate remedy at law. *Indianapolis v. Gilmore*, 30 Ind. 414; *Heywood v. Buffalo*, 14 N. Y. 541; *Kennedy v. Troy*, 77 N. Y. 493; *Old Colony R. Co. v. Fall River*, 147 Mass. 455; *Byram v. Detroit*, 50 Mich. 56; *Ricketts v. Spraker*, 77 Ind. 371; *Pittsburg's Appeal*, 118 Pa. St. 458; *Bloomington v. Blodgett*, 24 Ill. App. 650. Nor for mere irregularities, especially if the work has already been done. *Elliott on Roads and Streets* 442; *Sunderland v. Martin*, 113 Ind. 411; *McDonald v. Payne*, 114 Ind. 359; *Byram v. Detroit*, 50 Mich. 56; *Dusenbury v. Mayor, etc., of Newark*, 25 N. J. Eq. 295; *State v. Mayor, etc., of Jersey City*, 52 N. J. L. 490.

An owner of city lots, sold by the corporation to pay an assessment, may maintain an action in equity to set aside the assessment, and for an injunction, on the ground that the assessment was illegal; that no demand was made of him, or upon the premises; that no warrant was issued for the collection of the assessment, and that the recitals in the lease are untrue. *Masterson v. Hoyt*, 55 Barb. (N. Y.) 520.

The rule that a person, through whose lands an improvement has been laid out and constructed, cannot, after it has been completed, have an injunction to restrain the collection of the tax or assessment to pay for the same, is not applicable to a landowner who had no actual notice that the improvement was being made, and was not guilty of any want of diligence in asserting his rights before the work was completed. [Applying *Kellogg v. Ely*, 15 Ohio St. 64.] *Teegarden v. Davis*, 36 Ohio St. 601.

Equity will not enjoin the enforcement of a municipal lien and decree its cancellation on the ground that the illegal foot-front rule of assessment was adopted, where the work was done, the property benefited, and the plaintiff has made no offer to contribute to the cost. In such a case he will be left to his defenses at law. *Pittsburg's Appeal*, 118 Pa. St. 458.

Injunction to restrain the collection of a paving tax will not issue where the parties seeking it have unreasonably delayed to ask relief, and are presumably benefited by the work done,

the statute prescribes the mode it must be substantially followed, or no title will pass to the purchaser at the sale upon the assessment.¹ The assessment can be collected only from the fund or property which the law makes liable; it is not a general claim against either the property owner or the corporation.²

i. VACATION OF ASSESSMENT.—In some of the states, proceedings to vacate assessments may be had before special boards or tribunals; in others, an action may be instituted in the regular courts. But in some states the only remedy is by appeal or *certiorari*.³

and where a re-assessment can be ordered, and a remedy exists at law against the tax, if void. *Byram v. Detroit*, 50 Mich. 56.

The charter of Milwaukee provides that "no error or informality in the proceedings of any of the officers intrusted with the same, not affecting the substantial justice of the tax itself, shall affect the validity of the tax or assessment." A complaint to enjoin the issuing of tax deeds upon certain tax certificates issued upon the sale of plaintiff's lots for non-payment of assessments made thereon for paving the street in front of said lots, showed that a contract for laying a block pavement was not let within the time fixed by law, and that no "plan" or "profile" of the work was filed before the contract was let; but it stated no facts showing that plaintiff was injured by these omissions, and it did not deny that "specifications" for the work were on file before proposals were advertised for. *Held*, on demurrer, that no ground was shown to restrain the sale of plaintiff's lots for non-payment of the special tax assessed for the pavement. *Warner v. Knox*, 50 Wis. 429.

See also *Beaumont v. Wilkes-Barre*, 142 Pa. St. 198; *McVerry v. Boyd* (Cal.), 26 Pac. Rep. 885; *Wilson v. Auburn*, 27 Neb. 435; *Marvin v. Town*, 56 Hun (N. Y.) 510; *Wilkins v. Detroit*, 46 Mich. 120; *Lawrence v. Killam*, 11 Kan. 499; *Ottawa v. Barney*, 10 Kan. 270; *Cohn v. Parcels*, 72 Cal. 367.

1. *Goring v. McTaggart*, 92 Ind. 200; *Wilson v. Poole*, 33 Ind. 443; *Himmelman v. Townsend*, 49 Cal. 150; *Hancock v. Bowman*, 49 Cal. 413; *Simons v. Kern*, 92 Pa. St. 455.

But the fact that the statutory requirements as to the collection of the assessment have not been complied with will not necessarily invalidate the

assessment. *Elliott on Roads and Streets* 435.

2. *Chicago v. People*, 48 Ill. 416; *Whalen v. La Crosse*, 16 Wis. 271; *Cracraft v. Selvage*, 10 Bush (Ky.) 696; *Ruppert v. Mayor, etc., of Baltimore*, 23 Md. 184; *Leavenworth v. Rankin*, 2 Kan. 357; *Johnson v. Common Council*, 16 Ind. 227; *Lucas v. San Francisco*, 7 Cal. 463; *Goodrich v. Detroit*, 12 Mich. 279; *Hunt v. Utica*, 18 N. Y. 442; *Beard v. Brooklyn*, 31 Barb. (N. Y.) 142. Compare *Morgan v. Dubuque*, 28 Iowa 575; *Cronan v. Municipality No. One*, 5 La. Ann. 537; *Chicago v. People*, 56 Ill. 327; *Chicago v. People*, 48 Ill. 416; *Lansing v. Van Gorder*, 24 Mich. 456; *Leavenworth v. Mills*, 6 Kan. 288.

3. This branch of the subject is treated under IMPROVEMENTS, vol. 10, p. 310. It is sufficient, therefore, to refer to the following additional cases:

In *New York*, it is held that the law of 1882, giving a special commission power to vacate assessments, does not deprive the courts of jurisdiction over such matters. *In re Livingston*, 121 N. Y. 94.

The proceeding must be instituted by the "party aggrieved." *In re Burke*, 62 N. Y. 224; *In re Phillips*, 60 N. Y. 16; *In re Gantz*, 85 N. Y. 536; *In re Moore*, 8 Hun (N. Y.) 513.

Permitting extravagant or fictitious items to be included in the cost of an improvement amounts to a fraud, which, under the *New York* statutes, entitles a property owner to have the assessment vacated or reduced. *In re Livingston*, 121 N. Y. 94.

But the law forbidding the vacating of an assessment on account of certain specified irregularities and omissions, "except only in the cases in which fraud shall be shown," does not affect a case in which there had been no advertisement and no competition. *In re Rosenbaum*, 119 N. Y. 24.

"In a proceeding to vacate or reduce an assessment for improvements, on the ground that the city paid therefor a sum greatly in excess of its fair value, a petition alleging 'that certain frauds and substantial errors have been committed in the proceedings,' in the absence of a motion to make more definite, or of objection to the evidence thereunder, is sufficient on appeal, especially where it alleges that the city and its officers neglected to cause the work to be done in a careful and economical manner, and at its fair value, and have included charges not justly chargeable." *In re Livingston*, 121 N. Y. 94.

An action cannot be maintained to vacate an assessment for omission to advertise, or irregularity in advertising, ordinance authorizing the improvement, where fraud is not alleged; but complainant is limited to statutory application to the supreme court. *Eno v. Mayor, etc., of N. Y.*, 68 N. Y. 214.

In an application to vacate an assessment under the act in relation to frauds in assessments for local improvements in the city of New York (*New York Laws*, 1858, ch. 338), the burden of establishing the alleged fraud or irregularity is upon the applicant, and he must make it appear that such fraud or irregularity exists before he is entitled to the relief sought. *In re Bassford*, 50 N. Y. 509.

Proceedings instituted to vacate an assessment, under the act in relation to frauds in assessments for local improvements in the city of New York, are applicable only to the lands described in the proceedings; and the vacation of the assessment as to those lands does not operate to render the assessment for the whole improvement invalid. *In re Delancey*, 52 N. Y. 81. See also *In re Rosenbaum*, 119 N. Y. 24.

Upon an application to vacate an assessment for paving a street, only objections stated in the petition can be considered. *In re Clark*, 31 Hun (N. Y.) 198.

In proceedings to vacate an assessment for a local improvement in the city of New York, the petitioner has no right to relief beyond the amount of his legal injury. If it appears that before the proceedings were instituted, he paid voluntarily a portion of the assessment, it can be vacated only so far as it remains an incumbrance up-

on his property. *In re Hughes*, 93 N. Y. 512.

The court will not vacate an assessment for paving a street because the ordinance was void under which the work was done. The remedy is to apply for the prevention of the execution of the work. *In re Smith*, 67 How. Pr. (N. Y.) 501.

An omission to publish the resolution and report of a committee of either board of the common council, recommending an improvement, as required by the New York City charter of 1857, is a "substantial error" within the meaning of those words in the provision of Laws 1874, ch. 312, amending Laws 1858, ch. 338, § 1, which authorizes assessments to be vacated for substantial error in the proceedings. *In re Anderson*, 60 N. Y. 457. See also *In re Pennie*, 45 Hun (N. Y.) 391.

"A motion to vacate an assessment will be denied when made after the lapse of eight years, intervening rights having been acquired within that time as to much of the property on which the assessment had been paid." *In re Brady*, 47 N. Y. Super. Ct. 36.

In *New Jersey* the statute authorizes the vacation of void assessments as an entirety, and is not restricted to such as are unpaid. *Jersey City v. Green*, 42 N. J. L. 627.

Great delay in completing work and improvements on a street, authorized by statute, is not good ground for vacating an assessment made to pay the expenses. The remedy of the property-owners against delay is by mandamus, compelling the authorities to expedite the work. *Whiting v. Boston*, 106 Mass. 89.

Proceedings by the city authorities in letting out work, are proceedings "relative to any assessment," within the meaning of the provision of the charter authorizing the court to vacate assessments for errors committed therein. *In re Pennie*, 108 N. Y. 364. So an assessment for reflagging a street is an assessment for "repaving" within the meaning of the *New York* statute authorizing the vacation of assessments for repaving because of irregularities. *In re Phillips*, 60 N. Y. 16.

Appeal and Certiorari.—See *supra*, this title, *Proceedings Under Legislative Authority, Appeal and Certiorari*. See also *Ross v. Stackhouse*, 114 Ind. 200; *Sims v. Hines*, 121 Ind. 534; *Boyd v. Murphy*, 127 Ind. 174; 32 Am. &

j. REASSESSMENT.—Where the original assessment proves insufficient, the legislature may, unless prohibited by the constitution, authorize a reassessment upon the property benefited,¹ and such reassessment does not impair vested rights.² But where retrospective laws are forbidden by the constitution, it has been held that the legislature cannot compel property owners by a subsequent act, to pay for a local improvement made under a void ordinance.³ A municipal corporation cannot, in ordinary cases, make a reassessment without legislative authority to that effect.⁴

4. Consequential Damages.⁵—A municipal corporation, “when it confines itself within the limits of its power and jurisdiction, is not liable to an action for consequential damages to private property or persons (unless it be given by special constitutional provision or by statute), where the act complained of was done by it or its officers under and pursuant to authority conferred by a valid act of the legislature, and there has been no want of reasonable care or reasonable skill in the execution of the power, although the same act, if done without legislative sanction, would be actionable.”⁶ But under constitutions providing

Eng. Corp. Cas. 277; *Moberry v. Jeffersonville*, 38 Ind. 198; *First Presbyterian Church v. Lafayette*, 42 Ind. 115; *Crandell v. Taunton*, 110 Mass. 421; *People v. Lohnas* (Supreme Ct.), 8 N. Y. Supp. 104; *Brown v. Grand Rapids*, 83 Mich. 101; *Burroughs on Taxation*, §§ 102, 141, 149; *Bensinger v. District of Columbia*, 6 Mackey, (D. C.) 285; *State v. Hennepin Co.*, 42 Minn. 247; *State v. Trenton*, 36 N. J. L. 499; *Brookbank v. Jeffersonville*, 41 Ind. 406; *Ball v. Balfe*, 41 Ind. 221; *Bowdich v. New Haven*, 40 Conn. 503; *People v. Cheritree*, 4 Thomp. & C. (N. Y.) 289.

1. *State v. Newark*, 34 N. J. L. 236; *Emporia v. Bates*, 16 Kan. 495.

In *Illinois*, it is held that the statute which directs that in certain cases the board of trustees may direct a new assessment to be made, does not apply to a case where the original assessment has not been confirmed. *Pardridge v. Park*, 131 Ill. 537.

It is also held that where a special assessment is held invalid on account of the ordinance under which it is made, it being illegal, the defect cannot be cured or remedied by making a new assessment and report under the invalid ordinance. *Chicago v. Wright*, 80 Ill. 579. See also *Bowen v. Chicago*, 61 Ill. 268; *Union Building Assoc. v. Chicago*, 61 Ill. 439.

2. *Butler v. Toledo*, 5 Ohio St. 225;

Brown v. Mayor, 63 N. Y. 239; *Howell v. Buffalo*, 37 N. Y. 267; *Whitley v. Lansing*, 27 Mich. 131; *Mills v. Charleton*, 29 Wis. 400; 9 Am. Rep. 578; *Dill v. Roberts*, 30 Wis. 178.

3. *St. Louis v. Clemens*, 52 Mo. 133.

4. *Tingue v. Port Chester*, 101 N. Y. 302. See also *Budge v. Grand Forks* (N. Dak. 1890), 47 N. W. Rep. 390; *Pardridge v. Hyde Park*, 131 Ill. 537. Compare *Dyer v. Scalmanini*, 69 Cal. 637; *State v. South Orange*, 49 N. J. L. 104.

Nearly a year after an assessment roll for street improvements was completed and deposited in the register's office as required by law, an interlineation was made in the roll opposite certain lots, against which no charge had up to that time been made, as follows: “Entered November 17, 1870. This work was done at this date, but, by request of the owner, not entered until November —, 1871.” In the meantime the lots had been sold to a *bona fide* purchaser. Held, that the interlineation was not a reassessment or an amendment of the original assessment, but was simply an unwarranted alteration, and created no lien as against the purchaser's title. *Lyon v. Alley*, 130 U. S. 177; 27 Am. & Eng. Corp. Cas. 97.

5. See also, *infra*, this title, *Change of Grade*.

6. 2 Dillon's Munic. Corp., § 987.

citing Callender v. Marsh, 1 Pick. (Mass.) 418; Transportation Co. v. Chicago, 99 U. S. 635; Bellinger v. New York Cent., etc., R. Co., 23 N. Y. 42; Pontiac v. Carter, 32 Mich. 164; Detroit v. Beckman, 34 Mich. 125; 22 Am. Rep. 507; Cumberland v. Willison, 50 Md. 138; Rounds v. Mumford, 2 R. I. 154; Bennett v. New Orleans, 14 La. Ann. 120; Mayor, etc., of Americus v. Eldridge, 64 Ga. 524; Snyder v. Rockport, 6 Ind. 237; British Cast Plate Glass Mfg. v. Meredith, 4 T. R. 794; Whitehouse v. Fellowes, 10 C. B. N. S. 779; 100 E. C. L. 765; Mersey Docks Cases, 11 H. L. Cas. 713; 2 Thomp. Neg. 743.

Cases in Which Damages Have Been Held Recoverable.—Injury to the business of a shopkeeper from prevention of his receiving and delivering goods, and of attendance of customers, caused by obstruction of the street in which his shop stands, is not an injury common to the public, but one peculiar to himself, such as enables him to maintain an action. Williams v. Tripp, 11 R. I. 447.

In laying out a street at a grade higher than the adjoining land, the city is liable in tort for placing part of the embankment necessary to support the street on the land of an adjoining owner. Mayo v. Springfield, 136 Mass. 10; 6 Am. & Eng. Corp. Cas. 127.

Where plaintiff had built and improved his residence outside a city on a turnpike road, and afterwards the city included his lot in its limits, and in improving the road and making a street of it permanently damaged his property without compensation—held, that he was entitled to recover damages by an action on the case. Hutchinson v. Parkersburg, 25 W. Va. 226.

One may maintain an action in the ordinary form against a city for special damage from the negligent and unskillful erection of public works. Werth v. Springfield, 78 Mo. 107; 6 Am. & Eng. Corp. Cas. 123. See, also, Martinsville v. Shirley, 84 Ind. 546; Keating v. Cincinnati, 38 Ohio St. 141; 43 Am. Rep. 421.

If by an excess of the powers granted by law to a city to construct sewers, or by negligence in the mode of carrying out the system legally adopted, or by omitting to take due precautions to guard against consequences of its operation, a nuisance is created, the city may be liable to indictment in behalf

of the public, or to suit by individuals suffering special damage. Brayton v. Fall River, 113 Mass. 218; 18 Am. Rep. 470; Washburn, etc., Mfg. Co. v. Worcester, 116 Mass. 458; Boston Rolling Mills v. Cambridge, 117 Mass. 396.

The plaintiff sued the city of Racine for damages to his property caused by a street improvement, alleging that he was the owner of a lot on a certain street; that said city had cut down, graded, and improved without any condemnation proceedings, without the making of any estimate of the cost of the work, without any petition having been presented to the city council, or any resolution having been passed and entered on the journal, or any attempt to ascertain the amounts chargeable against the lots fronting on said street or the benefits to accrue to the owners, and without any lawful assessment of the same, or any notice of such assessment to the parties interested, as required by the city charter. *Held*, on demurrer, that the petition stated a cause of action. Meinzer v. Racine (Wis.) 32 N. W. Rep. 139.

As to liability for surface water cast on premises, see DRAINS AND SEWERS, vol. 6 pp. 22–28.

See generally, Hendershott v. Ottumwa, 46 Iowa 658; Hutchinson v. Parkersburg, 25 W. Va. 226; Elgin v. Kimball, 90 Ill. 356; Dorman v. Jacksonville, 13 Fla. 538; 7 Am. Rep. 253 and note; Waldon v. Haverhill, 143 Mass. 582; Platter v. Seymour, 86 Ind. 323.

Cases in Which Damages Are Not Recoverable.—An action will not lie for consequential damages to lots contiguous to a street or sidewalk which has been graded in a careful manner pursuant to legal authority, by the owners of such lots, unless such damages are expressly given by statute; and when thus given, compensation must be sought in the manner prescribed by the statute. Terre Haute v. Turner, 36 Ind. 522.

Where the corporation of a city, in excavating and grading a street, with a view to its improvement, slightly injured the property of individuals by reducing the level of the street below the doors of their building—held, that this was *damnum absque injuria*, and that the city were not responsible for the injury. Humes v. Mayor, etc., of Knoxville, 1 Humph. (Tenn.) 403; 34 Am. Dec. 657.

A city, having the right to construct

that "private property shall not be taken or damaged for public use without compensation," the courts have held that compensation must be made in many cases in which there is no actual "taking" of the property and in which the damages might otherwise be regarded as merely consequential.¹

5. Change of Grade.—Cities generally have authority to change the grade of their streets,² and, if they keep within the limits of their authority and exercise reasonable care and skill in performing the work, they are not liable for consequential damages incident thereto, in the absence of a constitutional or statutory provision creating such liability.³ In many of the states, however,

sewers in its streets, is not liable for all damages that may be caused by the blasting of rocks, necessary in such construction, but only for such damages as are occasioned by the carelessness or unskillfulness of its agents. *Murphy v. Lowell*, 128 Mass. 396; 35 Am. Rep. 381.

Where the city of Chicago, under the *Illinois* act of 1865 constructed a river tunnel in one of the streets, in a proper manner and without unreasonable delay, it was held that no action would lie against the city in favor of an adjoining lot owner, whose property has received no physical injury. *Chicago v. Rumsey*, 87 Ill. 348.

A city council, by building a plank road, and allowing a railway to be constructed, on the highway, flowed and damaged R.'s premises, and prevented free access to them by permitting mule cars to be run on the railway. *Held*, that R. had no cause of action against the council. *Roll v. City Council*, 34 Ga. 326.

In an action by a lot owner against a city to recover damages sustained in consequence of the building of approaches to a bridge, it was held that evidence was not admissible to prove injury to the property, occasioned by the employes of the bridge company throwing dirt and dust from the bridge in baskets, and by the diversion of trade and travel, resulting from the opening of the bridge. *East St. Louis v. Wiggins Ferry Co.*, 11 Ill. App. 254.

See also *Fellowes v. New Haven*, 44 Conn. 240; 26 Am. Rep. 447, and note 457; *Elliott on Roads and Streets*, 203, 204, 206; *infra*, this title, *Change of Grade*.

1. *Rigney v. Chicago*, 102 Ill. 64; *Chicago v. Taylor*, 125 U. S. 161; 22 Am. & Eng. Corp. Cas. 384; *Cohen v. Cleveland*, 43 Ohio St. 190; 9 Am. &

Eng. Corp. Cas. 405; *Reardon v. San Francisco*, 66 Cal. 492; 7 Am. & Eng. Corp. Cas. 454; 56 Am. Rep. 109; *Mollandin v. Union Pac. R. Co.*, 14 Fed. Rep. 394; *Montgomery v. Townsend*, 80 Ala. 489; *Hot Springs R. Co. v. Williamson*, 45 Ark. 427; *Atlanta v. Green*, 67 Ga. 386. Compare *Pennsylvania R. Co. v. Marchant*, 119 Pa. St. 541; 4 Am. St. Rep. 659; *Pennsylvania R. Co. v. Lippincott*, 116 Pa. St. 472. See 27 Am. L. Reg. 1, where this subject is discussed in a leading article.

2. See *Lafayette v. Fowler*, 34 Ind. 140; *Mattingly v. Plymouth*, 100 Ind. 545; *Goszler v. Georgetown*, 6 Wheat. (U. S.) 597; *Kelly v. Mayor, etc., of Baltimore*, 65 Md. 171; *State v. Mayor, etc., of Rutherford*, 52 N. J. L. 499; *State v. Mayor, etc., of Jersey City*, 52 N. J. L. 490; *Elliott on Roads and Streets* 334, 335; 2 *Dillon's Munic. Corp.*, §§ 686, 989; *infra*, this title, *Municipal Control*.

But in *New Jersey*, it has been held that an alteration in the grade of a street is a judicial and not a ministerial act. Hence reasonable notice should be given of a city ordinance, directing such change of grade, so that persons affected thereby may have an opportunity to be heard. *State v. Mayor, etc., of Morristown*, 34 N. J. L. 445.

And in *Massachusetts* it is held that the statute of 1870, ch. 337, § 2, does not authorize the board of street commissioners of the city of Boston to change the grade of an existing street; and a petition to assess damage caused by such change, made pursuant to their order, cannot be maintained. *Murphy v. Boston*, 120 Mass. 419.

3. *Broadwell v. Kansas City*, 75 Mo. 213; 42 Am. Rep. 406; *Smith v. City Council*, 33 Gratt. (Va.) 208; 36 Am. Rep. 788; *Wallich v. Manitowoc*, 75 Wis. 9; *Methodist Episcopal Church v.*

there are now constitutional provisions or legislative enactments changing the common-law rule and making cities liable, especially where the change is made in a grade already established.¹ But

Wyandotte, 31 Kan. 721; Pontiac v. Carter, 32 Mich. 164; Callender v. Marsh, 1 Pick. (Mass.) 418; Denver v. Vernia, 8 Colo. 399; Smith v. Eau Claire, 78 Wis. 458; Mattingly v. Plymouth, 100 Ind. 545; Fellowes v. New Haven, 44 Conn. 240; 26 Am. Rep. 447; Kehrner v. Richmond, 81 Va. 745; Green v. Reading, 9 Watts (Pa.) 382; O'Connor v. Pittsburgh, 18 Pa. St. 187; Snyder v. Rockport, 6 Ind. 237; Henderson v. Minneapolis, 32 Minn. 319; 6 Am. & Eng. Corp. Cas. 4; Radcliffe v. Mayor, etc., of Brooklyn, 4 N. Y. 195; 53 Am. Dec. 366, note; EMINENT DOMAIN, vol. 6, p. 548; IMPROVEMENTS, vol. 10, p. 316.

An action will not lie against a city for consequential injuries to property adjacent to a public street caused by a change of grade lawfully and properly made, even though the property had been improved with reference to the existing grade, and even though access to the property from the street cannot be had after the change of grade; nor is there anything in the charter of Minneapolis changing the rule. Henderson v. Minneapolis, 32 Minn. 319. Compare Keil v. City, 47 Minn. 288.

That a person has been obliged to raise a building because of the raising of the grade of the street, and thereby lost the rent of it during such operation, does not entitle him to maintain an action, under Iowa Code, against the city. Meyer v. Burlington, 52 Iowa 560.

1. See Lafayette v. Wortman, 107 Ind. 404; 15 Am. & Eng. Corp. Cas. 88; Van Riper v. Essex Public Road Board, 38 N. J. L. 23; State v. Syre, 41 N. J. L. 158; Harmon v. Omaha, 17 Neb. 548; 7 Am. & Eng. Corp. Cas. 474; 52 Am. Rep. 420; Anness v. Providence, 13 R. I. 17; Aldrich v. Board of Providence, 12 R. I. 241; Woodbury v. Beverly, 153 Mass. 243; Atlanta v. Green, 67 Ga. 386; Elgin v. Eaton, 83 Ill. 535; 25 Am. Rep. 412; Chicago v. Taylor, 125 U. S. 161; 22 Am. & Eng. Corp. Cas. 384; People v. Green, 64 N. Y. 606; Nashville v. Nicol, 3 Baxt. (Tenn.) 338; Sheehy v. Kansas City Cable R. Co., 94 Mo. 574; 32 Am. & Eng. R. Cas. 233; Blanchard v. Kansas, 16 Fed. Rep. 444; Dalzell v. Davenport, 12 Iowa 437; Conklin v.

Keokuk, 73 Iowa 343; Reardon v. San Francisco, 66 Cal. 492; 7 Am. & Eng. Corp. Cas. 454; 56 Am. Rep. 109; Healey v. New Haven, 49 Conn. 394; 2 Am. & Eng. Corp. Cas. 450, and note 456.

Under the New York Law, providing that villages shall be liable to property owners for damages occasioned by changing the grade of the streets, the liability of the village is the same, whether the existing grade was established by formal proceeding or only by general use. *In re Church of Our Lady of Mercy*, 57 Hun (N. Y.) 590.

The New York law applies to a change of grade which was the same as the natural surface of the land. McCall v. Saratoga Springs, 56 Hun (N. Y.) 639.

A statute giving damages for change of grade may apply even where the change is not of the full width of the street. Stickford v. St. Louis, 75 Mo. 309.

The fact that one signed a petition to the common council to change the grade of a street, held not to release his claim for damages to his land caused by the adoption of a new grade lower than that petitioned for. Luscombe v. Milwaukee, 36 Wis. 511.

In Pennsylvania, a purchaser of land abutting on a street where some work has been done toward altering the natural grade, but no specific grade has been fixed by the town, may recover damages for further changes made after his purchase. New Brighton v. Peirsol, 107 Pa. St. 280.

The claim for damages to property by reason of changes in the street is a personal claim of the owner of the property at the time of the injury, and does not run with the land. Keith v. Bingham, 100 Mo. 300.

In Missouri, it has been held that in an action against a municipal corporation to recover for an injury to property caused by changing the grade of a street, one who owns the fee in one lot, and a leasehold with rent of another, may sue in one count for the damage to both. Stickford v. St. Louis, 75 Mo. 309.

In Ohio, it is held that "where a city, in making a street improvement,

if the statute provides a specific remedy that remedy must ordinarily be pursued to the exclusion of all others.¹

VIII. DEFECTS AND NEGLECT TO REPAIR²—1. Duty to Repair.—In most of the states the duty to maintain and repair streets is held to rest upon municipal corporations proper, such as cities, by implication, where they are given exclusive control over the streets, with power to raise means for that purpose.³

changes the established grade of the street, and damages are thereby sustained by an abutting owner, who in good faith has erected buildings with a view to the established grade, and the city, before commencing and after the completion of the improvement, fails to assess the damages, such owner, in an action against the city to recover compensation for the injury to his property by reason of the improvement, is entitled to interest on the amount of compensation awarded from and after the actual change of the established grade." *Cincinnati v. Whetstone*, 47 Ohio St. 196.

And in the same state it was held that the property owner might give in evidence, statements made to him by the city engineer inducing him not to file any claim for damages. *Youngstown v. Moore*, 30 Ohio St. 133.

As to measure of damages, see *Hempstead v. Des Moines*, 52 Iowa 303; *Elgin v. Eaton*, 83 Ill. 535; 25 Am. Rep. 412; *French v. Milwaukee*, 49 Wis. 584; *Chouteau v. St. Louis*, 8 Mo. App. 48; *City Council v. Maddox*, 89 Ala. 181; *Parker v. Atchison* (Kan. 1891), 26 Pac. Rep. 435.

1. *Heiser v. Mayor, etc., of N. Y.*, 104 N. Y. 68; *Hovey v. Mayo*, 43 Me. 322; *Ernst v. Kunkle*, 5 Ohio St. 520; *Andover v. Gould*, 6 Mass. 40; 4 Am. Dec. 80; *Boston v. Shaw*, 1 Met. (Mass.) 130; *Cole v. Muscatine*, 14 Iowa 296; *Dorman v. Jacksonville*, 13 Fla. 538; 7 Am. Rep. 253; *Flagg v. Worcester*, 13 Gray (Mass.) 601; *Reock v. Mayor, etc., of Newark*, 33 N. J. L. 129; *Philadelphia v. Wright*, 100 Pa. St. 235; *Beltzhoover v. Gollings*, 101 Pa. St. 293; *Owens v. Milwaukee*, 47 Wis. 461.

"A municipal corporation is not liable, except by statute, for injuries resulting from an authorized change in the grade of a street, made with reasonable skill and care. If a statute requires compensation for such injuries, and provides specific means for recovering it, other than an ordinary

civil action, the statutory remedy is exclusive. But in case of injuries to a city lot from the alteration of the grade of a street, made pursuant to an unauthorized or illegal order of the city council, the city is liable in an ordinary civil action for damages." *Dore v. Milwaukee*, 42 Wis. 108.

The *Connecticut* statute making cities liable for damages in changing the grade of a highway, "to be ascertained in the manner provided for ascertaining damages done by laying out or altering highways," has been held simply to point out a method for ascertaining damages, and not to exclude a common-law action. *Healey v. New Haven*, 49 Conn. 395; 2 Am. & Eng. Corp. Cas. 450.

2. See *HIGHWAYS*, vol. 9, p. 376; *MUNICIPAL CORPORATIONS*, vol. 15, p. 1141.

3. *Elliott on Roads and Streets* 445; *Clarke v. Richmond*, 83 Va. 355; 20 Am. & Eng. Corp. Cas. 320; 5 Am. St. Rep. 281; *Noble v. Richmond*, 31 Gratt. (Va.) 271; 31 Am. Rep. 726; *Denver v. Dunsmore*, 7 Colo. 328; 4 Am. & Eng. Corp. Cas. 568; *Denver v. Deane*, 10 Colo. 375; 20 Am. & Eng. Corp. Cas. 336; 3 Am. St. Rep. 594; *Saulsbury v. Ithaca*, 94 N. Y. 27; 4 Am. & Eng. Corp. Cas. 591; 46 Am. Rep. 122; *Nelson v. Canisteo*, 100 N. Y. 89; *Grove v. Fort Wayne*, 45 Ind. 429; 15 Am. Rep. 262; *Albrittin v. Huntsville*, 60 Ala. 486; 31 Am. Rep. 46; *Cline v. Crescent City R. Co.*, 41 La. Ann. 1031; *Kellogg v. Janesville*, 34 Minn. 132; *Byerly v. Anamosa*, 79 Iowa 204; *Larson v. Grand Forks*, 3 Dak. 307; *Delger v. St. Paul*, 14 Fed. Rep. 567; *Farquhar v. Roseburg*, 18 Oregon 271; 31 Am. & Eng. Corp. Cas. 1; *Galveston v. Barbour*, 62 Tex. 172; 8 Am. & Eng. Corp. Cas. 577; 50 Am. Rep. 519; *Austin v. Ritz* (Tex. 1888), 9 S. W. Rep. 884; *Bangus v. Atlanta City*, 74 Tex. 629; *Hiner v. Fond du Lac*, 71 Wis. 74; *Browning v. Springfield*, 17 Ill. 143; 63 Am. Dec. 345 and note; *Cleveland v. King*, 132

In the *New England* States and in some others, however, it is held that the duty is a public one resting upon the corporation merely as an agency of the State, and that there is, therefore, no liability for damages caused by failure to perform it, in the absence of a statute creating such liability.¹ But in many, if not all, of the States in which this doctrine obtains, there are now statutes making the cities liable for injuries caused by the negligent failure to keep their streets in repair.²

In most of the States, a distinction is made between municipal corporations proper and *quasi* corporations, such as counties and townships; and it is held that there is no implied liability in the case of counties and townships.³ There seems, however, to be

U. S. 295; 28 Am. & Eng. Corp. Cas. 174; Cooley on Torts 625.

See also MUNICIPAL CORPORATIONS, vol. 15, pp. 1143, 1144, and numerous authorities there cited.

In the leading case of *Barnes v. Dist. of Columbia*, 91 U. S. 540, the court, by Hunt, J., says that the authorities establishing the doctrine that cities are responsible for negligence in failing to repair "are so numerous and so well considered that the law must be deemed to be settled in accordance with them."

Lack of Funds.—As to where a lack of funds will constitute a defense, see *Hines v. Lockport*, 50 N. Y. 236; *Weed v. Ballston Spa*, 76 N. Y. 335; *Whitfield v. Meridian*, 66 Miss. 570; 31 Am. & Eng. Corp. Cas. 15 and note; 14 Am. St. Rep. 596. No excuse where it has means to raise them. *Erie v. Schwingle*, 22 Pa. St. 384; 60 Am. Dec. 87; *Evanston v. Gurm*, 99 U. S. 660; *Shelby v. Clagget*, 46 Ohio St. 549; 31 Am. & Eng. Corp. Cas. 66; *Shartle v. Minneapolis*, 17 Minn. 308; *Albrittin v. Huntsville*, 60 Ala. 486; 31 Am. Rep. 46; *New Albany v. McCulloch*, 127 Ind. 500; *Moon v. Ionia* (Mich. 1890), 46 N. W. Rep. 25.

1. *Hill v. Boston*, 122 Mass. 344; *Oliver v. Worcester*, 102 Mass. 489; 3 Am. Rep. 485; *Chidsey v. Canton*, 17 Conn. 478; *Farnum v. Concord*, 2 N. H. 392; *Eastman v. Meredith*, 36 N. H. 284; 72 Am. Dec. 302; *Reed v. Belfast*, 20 Me. 248; *Parker v. Rutland*, 56 Vt. 224; *Hyde v. Jamaica*, 27 Vt. 457; *Weisenberg v. Winneconne*, 56 Wis. 667; *Pray v. Mayor, etc., of Jersey City*, 32 N. J. L. 394; *Condict v. Mayor, etc., of Jersey City*, 46 N. J. L. 157; 4 Am. & Eng. Corp. Cas. 645; *Detroit v. Blackeby*, 21 Mich. 84; 4 Am. Rep. 450; *Young v. Charleston*,

20 S. Car. 116; 6 Am. & Eng. Corp. Cas. 54; 47 Am. Rep. 827; *Arkadelphia v. Windham*, 49 Ark. 139; 18 Am. & Eng. Corp. Cas. 347; *Winbigler v. Los Angeles*, 45 Cal. 36; *Arnold v. San José*, 81 Cal. 618.

The *United States* courts within the state are bound by the local law. *Detroit v. Osborne*, 135 U. S. 492; 31 Am. & Eng. Corp. Cas. 6.

2. See *Post v. Boston*, 141 Mass. 189; 15 Am. & Eng. Corp. Cas. 259; *Rooney v. Randolph*, 128 Mass. 580; *Bliss v. South Hadley*, 145 Mass. 91; 18 Am. & Eng. Corp. Cas. 338; *Hayes v. Cambridge*, 138 Mass. 461; 9 Am. & Eng. Corp. Cas. 664; *Providence v. Clapp*, 17 How. (U. S.) 161; *Willard v. Sherborne*, 59 Vt. 361; *Hardy v. Keene*, 52 N. H. 370; *Campbell v. Kalamazoo*, 80 Mich. 655; *McKellar v. Detroit*, 57 Mich. 158; *Agnew v. Corunna*, 55 Mich. 428; 7 Am. & Eng. Corp. Cas. 44; 54 Am. Rep. 383; *Hixon v. Lowell*, 13 Gray (Mass.) 59; *Barber v. Roxbury*, 11 Allen (Mass.) 318. A synopsis of the statutes will be found in 2 Dillon's *Munic. Corp.*, § 1000, note 2. See, also, the following cases showing when such statutes are applicable: *Kitteredge v. Milwaukee*, 26 Wis. 46; *Parker v. Rutland*, 56 Vt. 224; *Hand v. Brookline*, 126 Mass. 324; *Sheridan v. Salem*, 14 Oregon 328; *Detroit v. Putnam*, 45 Mich. 263; *Grand Rapids v. Wyman*, 46 Mich. 516; *Kowalka v. St. Joseph*, 73 Mich. 322; *Southwell v. Detroit*, 74 Mich. 438; 25 Am. & Eng. Corp. Cas. 76; *Sebert v. Alpena*, 78 Mich. 165; *Cromarty v. Boston*, 127 Mass. 329; 34 Am. Rep. 381.

3. *Waltham v. Kemper*, 55 Ill. 346; 8 Am. Rep. 652; *Hedges v. Madison Co.*, 6 Ill. 306; *Altnow v. Sibley*, 30 Minn. 186; 44 Am. Rep. 191; *Sutton v.*

little reason for any such distinction, where they are required by statute to keep their highways in repair, and some of the courts have refused to make it.¹

The duty to keep streets in repair generally begins when they are opened for travel;² but it seems that they need not always be kept in good repair throughout their entire width.³ It has also been held that less care may suffice where the street is in a sparsely settled neighborhood and seldom used,⁴ but it would seem that ordinary and reasonable care ought to be exercised under the circumstances of each case, and it is probable that all

Board of Police, 41 Miss. 236; *Soper v. Henry Co.*, 26 Iowa 264; *Askew v. Hale Co.*, 54 Ala. 639; 25 Am. Rep. 730; *Ensign v. Livingston Co.*, 25 Hun (N. Y.) 20; *Huffman v. San Joaquin Co.*, 21 Cal. 426; *Larkin v. Saginaw Co.*, 11 Mich. 88; *Eikenberry v. Bazaar Tp.*, 22 Kan. 556; 31 Am. Rep. 198; *Cooley v. Essex Co.*, 27 N. J. L. 415; 2 Dillon's Munic. Corp., § 996. See COUNTIES, vol. 4, p. 364; BRIDGES, vol. 2, p. 558; HIGHWAYS, vol. 9, p. 377; MUNICIPAL CORPORATIONS, vol. 15, p. 1143.

1. *House v. Montgomery Co.*, 60 Ind. 580; 7 Cent. L. Jour. 127; *Morgan Co. v. Pritchett*, 85 Ind. 68; *Shelby Co. v. Deprez*, 87 Ind. 509; *Howard Co. v. Legg*, 93 Ind. 523; *Anne Arundel Co. v. Duckett*, 20 Md. 468; 83 Am. Dec. 557; *Calvert Co. v. Gibson*, 36 Md. 229; 1 Thomp. Neg. 618.

See, under special statutes, *Rigony v. Schuylkill Co.*, 103 Pa. St. 382; *Hartford Co. v. Hamilton*, 60 Md. 340; 45 Am. Rep. 739; *McCalla v. Multonomah Co.*, 3 Oregon 424; *Eastman v. Clackamas Co.*, 32 Fed. Rep. 24; *Granger v. Pulaski Co.*, 26 Ark. 37.

2. *Murphy v. Indianapolis*, 83 Ind. 76; *Lindholm v. St. Paul*, 19 Minn. 245; *Treise v. St. Paul*, 36 Minn. 526; 18 Am. & Eng. Corp. Cas. 301; *Blaisdell v. Portland*, 39 Me. 113; *Bradbury v. Benton*, 69 Me. 194; *Hutson v. Mayor, etc., of N. Y.*, 5 Sandf. (N. Y.) 302; *Sewall v. Cohoes*, 75 N. Y. 45; 31 Am. Rep. 418. See also *Brennan v. St. Louis*, 92 Mo. 482; 16 Am. & Eng. Corp. Cas. 486.

A city is also liable where it adopts a street and permits it to be used as such, although it was not originally laid out by the city. *Gallagher v. St. Paul*, 28 Fed. Rep. 305; *Requa v. Rochester*, 45 N. Y. 129; 6 Am. Rep. 52; *Ponca v. Crawford*, 23 Neb. 662; 20 Am. & Eng. Corp. Cas. 293; 8 Am.

Rep. 147; *Mansfield v. Moore*, 21 Ill. App. 326; *Barton v. Montpelier*, 30 Vt. 650; *Steubenville v. King*, 23 Ohio St. 610. Compare *Bishop v. Centralia*, 49 Wis. 669; *Kelly v. Columbus*, 41 Ohio St. 263; 7 Am. & Eng. Corp. Cas. 35. And see *O'Neill v. West Branch (Mich. 1890)*, 45 N. W. Rep. 1023; *Kennedy v. Mayor, etc., of Cumberland*, 65 Md. 514; 57 Am. Rep. 346; *Schomer v. Rochester*, 15 Abb. N. Cas. (N. Y.) 57; *Champaign v. McInnis*, 26 Ill. App. 338; *Phelps v. Mankato*, 23 Minn. 276; *Eudora v. Miller*, 30 Kan. 494; 2 Am. & Eng. Corp. Cas. 633; *Lafayette v. Larson*, 73 Ind. 367.

3. *Fitzgerald v. Berlin*, 64 Wis. 203; *Hay v. Weber*, 79 Wis. 487; *Kelly v. Columbus*, 41 Ohio St. 263; 7 Am. & Eng. Corp. Cas. 635; *Morse v. Belfast*, 77 Me. 44; *Sykes v. Pawlet*, 43 Vt. 446; 5 Am. Rep. 595; *Tisdale v. Norton*, 8 Met. (Mass.) 388; *Coggsell v. Lexington*, 4 Cush. (Mass.) 307; *Rowell v. Lowell*, 7 Gray (Mass.) 100; *Bassett v. St. Joseph*, 53 Mo. 290; 11 Am. Rep. 446; *Tritz v. Kansas City*, 184 Mo. 632; *Wellington v. Gregson*, 31 Kan. 99; 6 Am. & Eng. Corp. Cas. 215; 47 Am. Rep. 482; *Perkins v. Lafayette*, 68 Me. 152; *Fulliam v. Muscatine*, 70 Iowa 436. Compare *Crystal v. Des Moines*, 65 Iowa 502; *Stafford v. Oskaloosa*, 64 Iowa 251; *Montgomery v. Wright*, 72 Ala. 411; 5 Am. & Eng. Corp. Cas. 642; *Indianapolis v. Gaston*, 58 Ind. 224; *Biggs v. Huntington*, 32 W. Va. 55; 25 Am. & Eng. Corp. Cas. 63; *Roe v. Kansas City*, 100 Mo. 190. See HIGHWAYS, vol. 9, p. 385.

4. *Whitfield v. Meridian*, 66 Miss. 570; 31 Am. & Eng. Corp. Cas. 15; 14 Am. St. Rep. 597; *Monongahela v. Fischer*, 111 Pa. St. 9; 56 Am. Rep. 241; *Keyes v. Marcellus*, 50 Mich. 439; 45 Am. Rep. 52; *Henderson v. Sandefur*, 11 Bush (Ky.) 550.

that the courts meant in the cases cited was that the particular circumstances called for less care than might be required under other circumstances to constitute ordinary and reasonable care.¹

The duty of the city to repair generally continues until the street is lawfully discontinued² or brought within the control of some other corporation or person upon whom the entire duty to repair is cast,³ and the city must exercise ordinary and reasonable care while engaged in making the repairs.⁴ If the street becomes impassable or dangerous to travel, fences or barriers should be erected, or other means used to warn travelers of the danger.⁵

2. Liability of Municipality—*a*. GENERALLY.—Cities are not insurers of the safety of their streets; but they must use reasonable care to keep them in a safe condition for travel in the ordinary modes by day and by night, and for the negligent failure so to do they are liable to one who, while so traveling and exercising reasonable care, is injured by reason of their negligence.⁶

1. See *Rockford v. Hollenbeck*, 34 Ill. App. 40.

2. *Tinker v. Russell*, 14 Pick. (Mass.) 279. Compare *Williams v. Tripp*, 11 R. I. 447.

3. *Davis v. Lamoille Co. Plank Road Co.*, 27 Vt. 602.

4. *Southwell v. Detroit*, 74 Mich. 438; 25 Am. & Eng. Corp. Cas. 91; *Buffalo v. Holloway*, 7 N. Y. 493; 57 Am. Dec. 550; *Kimball v. Bath*, 38 Me. 219; 61 Am. Dec. 243; *Lloyd v. Mayor, etc., of N. Y.*, 5 N. Y. 369; 55 Am. Dec. 347; *Kelsey v. Glover*, 15 Vt. 708; *Aurora v. Seidelman*, 34 Ill. App. 285.

5. *Prideaux v. Mineral Point*, 43 Wis. 513; 28 Am. Rep. 558; *Chicago v. Johnson*, 53 Ill. 91; *Covington v. Bryant*, 7 Bush (Ky.) 248; *Bunch v. Edenton*, 90 N. Car. 431; 7 Am. & Eng. Corp. Cas. 30; *Carlisle v. Brisbane*, 113 Pa. St. 544; 57 Am. Rep. 483; *Storrs v. Utica*, 17 N. Y. 104; 72 Am. Dec. 437; *Omaha v. Randolph*, 30 Neb. 699; *Haniford v. Kansas City*, 103 Mo. 172; *Indianapolis v. Emmelman*, 108 Ind. 530; 58 Am. Rep. 65.

6. *Indianapolis v. Cook*, 99 Ind. 15; 7 Am. & Eng. Corp. Cas. 81; *Centerville v. Woods*, 57 Ind. 192; *Ring v. Cohoes*, 77 N. Y. 83; 33 Am. Rep. 574; *Macomber v. Taunton*, 100 Mass. 255; *Raymond v. Lowell*, 6 Cush. (Mass.) 524; *Furnell v. St. Paul*, 20 Minn. 117; *Blake v. St. Louis*, 40 Mo. 571; *Aurora v. Pulfer*, 56 Ill. 270; *Emporia v. Schmidling*, 33 Kan. 485; 7 Am. & Eng. Corp. Cas. 86; *Atchison v. Jan-*

sen, 21 Kan. 560; *Massey v. Mayor, etc., of Columbus*, 75 Ga. 658; *McCarthy v. Syracuse*, 46 N. Y. 194; *Hunt v. Mayor, etc., of N. Y.*, 109 N. Y. 134; 20 Am. & Eng. Corp. Cas. 380; *Turner v. Newburgh*, 109 N. Y. 301; *Richmond v. Courtney*, 32 Gratt. (Va.) 792; *Seward v. Milford*, 21 Wis. 485; *Atchison v. Jansen*, 21 Kan. 560; *Leicester v. Pittsford*, 6 Vt. 245; *Johnson v. Haverhill*, 35 N. H. 74; *Williams v. Clinton*, 28 Conn. 264; *Manderschid v. Dubuque*, 29 Iowa 73; 4 Am. Rep. 196; *Michigan City v. Boeckling*, 122 Ind. 40; *Warsaw v. Dunlap*, 112 Ind. 576; 18 Am. & Eng. Corp. Cas. 263; *Selma v. Perkins*, 68 Ala. 145; *Wilson v. Wheeling*, 19 W. Va. 324; 42 Am. Rep. 780; *Lincoln v. Gillian*, 18 Neb. 114; *Easton v. Neff*, 102 Pa. St. 474; 43 Am. Rep. 213; *Denver v. Deane*, 10 Colo. 375; 20 Am. & Eng. Corp. Cas. 336; 3 Am. St. Rep. 594; *Yearance v. Salt Lake City (Utah)*, 31 Am. & Eng. Corp. Cas. 10, and note.

Although a sidewalk be not reasonably safe, no liability arises if the village trustees have bestowed ordinary care and diligence. *Warren v. Wright*, 3 Ill. App. 602.

"A city, bound to keep its sidewalks in repair, and empowered to compel abutters to perform the duty, cannot escape liability by merely serving a notice to repair on an abutter. *Russell v. Canastota*, 98 N. Y. 496; *Smalley v. Appleton*, 75 Wis. 18.

Whether due care has been exercised or not is generally a question of fact for

The ground of their liability is either positive misfeasance or neglect.¹

b. DEFECTS AND OBSTRUCTIONS.—Reasonable care must be exercised to keep the streets safe from obstructions and holes or other defects in the traveled part, or so near thereto and of such a character as to render travel upon the street unsafe and hazardous to travelers exercising due care.²

the jury. *Lee v. Barkhamstead*, 46 Conn. 213; *Harris v. Newbury*, 128 Mass. 321; *Michigan City v. Boeckling*, 122 Ind. 39; *Drew v. Sutton*, 55 Vt. 586; 4 Am. & Eng. Corp. Cas. 607; 45 Am. Rep. 644. But see *Prideaux v. Mineral Point*, 43 Wis. 513; 28 Am. Rep. 558; *Baker v. Madison*, 56 Wis. 374.

A cover, made partly of glass and partly of iron, forming a portion of the surface of a sidewalk in a city, and so worn as to become smooth and slippery, on which a traveler, using due care, slips and falls solely by reason of its smoothness, cannot be held, as matter of law, not to be a defect in a highway, under *Massachusetts Gen. St.*, ch. 44, § 22. *Cromarty v. Boston*, 127 Mass. 329; 34 Am. Rep. 381.

1. 2 Dillon's Munic. Corp., § 1020.

Municipal corporations are not liable for consequential damages for loss of business by an abutter or by the proprietors of an omnibus line resulting from failure to repair. *Gold v. Philadelphia*, 115 Pa. St. 184; *Prosser v. Ottumwa*, 42 Iowa 509; *Farrelly v. Cincinnati*, 2 Disney (Ohio) 516.

2. *Michigan City v. Boeckling*, 122 Ind. 39; *Goodfellow v. Mayor, etc., of N. Y.* 100 N. Y. 15; *Glantz v. South Bend*, 106 Ind. 305; *Indianapolis v. Cook*, 99 Ind. 10; 7 Am. & Eng. Corp. Cas. 81; *Schroth v. Prescott*, 63 Wis. 652; *Mayor, etc., of N. Y. v. Sheffield*, 4 Wall. (U. S.) 189; *Chicago v. Robbins*, 2 Black (U. S.) 418; *Ehrgott v. Mayor, etc., of N. Y.*, 96 N. Y. 264; 6 Am. & Eng. Corp. Cas. 31; 48 Am. Rep. 622; *Brusso v. Buffalo*, 90 N. Y. 679; *Walsh v. Mayor, etc., of N. Y.*, 107 N. Y. 222; *Pettingill v. Yonkers*, 116 N. Y. 558; 15 Am. St. Rep. 442; *O'Neill v. New Orleans*, 30 La. Ann. 220; 31 Am. Rep. 221; *Cromarty v. Boston*, 127 Mass. 329; 34 Am. Rep. 381; *Arey v. Newton*, 148 Mass. 598; 12 Am. St. Rep. 604; *Hinckley v. Somerset*, 145 Mass. 326; 18 Am. & Eng. Corp. Cas. 294; *Fritsch v. Allegheny*, 91 Pa. St. 226;

Olson v. Chippewa Falls, 71 Wis. 558; 20 Am. & Eng. Corp. Cas. 300; *Ray v. St. Paul*, 40 Minn. 458; 25 Am. & Eng. Corp. Cas. 132; *Fairgrieve v. Moberly*, 39 Mo. App. 31; *Kemper v. Burlington (Iowa, 1890)*, 47 N. W. Rep. 72; *Mayor, etc., of Birmingham v. Lewis (Ala. 1891)*, 9 So. Rep. 243.

Where a city deposits, and permits others to deposit, refuse material in a river, close to and adjoining the end of a graded public street, so that the deposit appears to be a prolongation and part of the street, and the same is dangerous to any one stepping thereon, the city may be guilty of such negligence as to render it liable to any one injured by stepping on the deposit. *Ray v. St. Paul*, 44 Minn. 340. See also *Aurora v. Colshire*, 55 Ind. 484.

Obstructions and Defects in Streets.—

A stone wall at the side of a way, too low for a barrier, may be a defect for which the municipality will be liable to one whose horse runs against it. *Hinckley v. Somerset*, 145 Mass. 326; 18 Am. & Eng. Corp. Cas. 294.

A city may be liable for an injury caused by an obstruction in a traveled path between a street and a sidewalk, if such path is generally used as a path of convenience, with the knowledge and implied consent of the city. *Aston v. Newton*, 134 Mass. 507; 2 Am. & Eng. Corp. Cas. 600; 45 Am. Rep. 347.

A street is defective when there is a cesspool therein, with an iron grating or cover, having between its bars and rim a space wide enough to receive a horse's foot. *Buck v. Biddeford*, 82 Me. 433.

"Municipal liability for injuries arising from defects in the public ways is the same, so far as concerns innocent persons, whether the condition of the way is due to wear and decay or to the misconduct of individuals in tearing it up; the obligation to repair speedily is the same." *Dotton v. Albion*, 50 Mich. 129; *Aurora v. Bitner*, 100 Ind. 396; 8 A. & E. Corp. Cas. 571.

"A municipal corporation is guilty of

negligence in allowing a high and steep embankment in a street to be left without light, guard, or warning, to prevent accidents to those passing." *Wyandotte v. Gibson*, 25 Kan. 236. See also *Drew v. Sutton*, 55 Vt. 586; 4 Am. & Eng. Corp. Cas. 607; 45 Am. Rep. 649.

Where a traveler, while in the exercise of due care, stepped into a hole left in a sidewalk of which the city had notice, and was thereby unavoidably thrown on a railway track, and in attempting to get up caught his clothes on a spike in the sidewalk, and before he could extricate himself was struck by a passing train and killed, it was held that the city was liable. *Chicago v. Schmidt*, 107 Ill. 186. See also *Brennan v. St. Louis*, 92 Mo. 482; 16 Am. & Eng. Corp. Cas. 486.

But where a person tripped upon a stone improperly upon a highway, and fell into a cellar which he maintained as a nuisance, it was held that the town was liable only for the injury sustained from the tripping, not for that caused by the fall into the cellar. *Lavery v. Manchester*, 58 N. H. 444.

Where the corporate authorities covered a well in a highway, in which there was a public pump, with a wooden platform, and laid on that a brick pavement conforming to the sidewalk, for nine years making no repairs nor examination, and while the plaintiff was using the pump, the platform gave way and he sustained injury, it was held, that the municipality was liable. *Sherwood v. District of Columbia*, 3 Mackey (D. C.) 276; 51 Am. Rep. 776.

Plaintiff was injured by falling through a trap-door in the sidewalk, used by an abutter. It turned on hinges, which were frequently broken, as they were at the time of the accident, and was supported by cleats, which gave way at the time of the accident, in consequence of the abutter stamping upon the door, as was necessary to do to close it. It was on a much frequented street, and should have been known to policemen on the beat, and to the city engineer. *Held*, that there was sufficient evidence upon which to sustain a verdict against the city. *Grove v. Kansas City*, 75 Mo. 672.

A city passed an ordinance to construct a sidewalk on a certain street, where the adjacent landowners had put up a plank walk. Said sidewalk

was not constructed. *Held*, that the city was liable in damages to one who fell by reason of a defect in the plank walk. *Oliver v. Kansas*, 69 Mo. 79.

A person while driving through the streets of an incorporated city, struck a water-plug projecting from the ground in the middle of the street, and he was thrown from his wagon and injured. The plug was placed in the street by a water company that was incorporated prior to the incorporation of the city. As originally placed, it only projected about two inches from the ground; but a few months previous to the accident the street had been lowered, and the plug was thus left to project about six inches. The street commissioners had frequently seen it and knew of its existence at the time of the accident. *Held*, that it made no difference who put the obstruction in the street, the city was liable, provided it had notice of the existence of the obstruction and failed to remove it. *Scranton v. Catterson*, 94 Pa. St. 202.

In an action against a city by one who was overturned in a sleigh by driving over a pile of rubbish in the street, the evidence for plaintiff was that, as he was slowly driving up to the curbstone to alight, after dark, without observing the obstruction, he was upset and seriously injured. The street was a frequented one, and plaintiff had never noticed an obstruction there before. The rubbish was a pile of garbage about two feet high and six or eight feet long, and had been there three weeks. *Held*, sufficient to justify a verdict against the city. *Kane v. Troy* (Supreme Ct.), 1 N. Y. Supp. 536.

In an action for personal injuries caused by an alleged defect in a street, it appeared that on a dark and stormy night the vehicle in which plaintiff was riding collided with a stump, and plaintiff was thrown on the ground, receiving the injuries complained of. The accident occurred on one of the principal thoroughfares of defendant city, and the stump, which was a large one, had been left standing since the construction of the road, a period of about ten years. *Held*, that a verdict in plaintiff's favor would not be disturbed, though the evidence was conflicting as to the particular location of the stump and its proximity to the traveled roadway. *Sebert v. Alpena*, 78 Mich. 165.

A city ordinance directed the repairing of a street. M contracted to do the work, and employed C to superintend it. The street being made impassable, C caused a rope to be stretched across it, and directed a lamp to be suspended from the rope. The lamp was suspended, but was broken and extinguished by boys. The person in charge took it to his home in the vicinity to repair it, but did not replace it that night. During his absence, the plaintiff, in attempting to pass up the street, driving his hack, came in contact with the rope, of which he had no warning, and received injuries. No officer of the city had notice of the rope being stretched across the street, and C had no orders on the subject from any one. *Held*, that the city was liable. *Mayor, etc., of Baltimore v. O'Donnell*, 53 Md. 110; 36 Am. Rep. 395.

Where a ditch is allowed to remain open a long time in or alongside the street, without any barrier or warning, the city will be liable to a traveler, who, while exercising due care, falls into it and is injured. *Russell v. Columbia*, 74 Mo. 480; 41 Am. Rep. 325; *Galveston v. Posnainsky*, 62 Tex. 118; 13 Am. & Eng. Corp. Cas. 484; 50 Am. Rep. 517.

Where a private way dedicated to public use is opened, leading into a public way, the town is liable for a defect between the point of entrance and the part of the public way wrought for travel, unless it has cautioned the public against entering the private way. *Paine v. Brockton*, 138 Mass. 564.

A permanent wooden awning over a sidewalk, supported on the outside by posts, if insecurely supported and dangerous, is a defect which the city is bound to remove; and if the city has notice of the danger, or it has existed so long and is so visible that notice may be inferred, the city is liable for injury occasioned thereby; even if the structure was unauthorized by the city, and put up without the supervision of its officers. *Hume v. Mayor, etc., of N. Y.*, 74 N. Y. 264.

A hitching-post improperly placed in the street may constitute a defect for which the city will be liable. *Arey v. Newton*, 148 Mass. 598; 12 Am. Stat. Rep. 604; *Yeaw v. Williams* (R. I. 1885), 23 Atl. Rep. 33. *Compare Rockford v. Tripp*, 83 Ill. 247; 25 Am. Rep. 381.

So, an inequality in the surface of the way may be of such a character as to

constitute a defect. *Glantz v. South Bend*, 106 Ind. 305. See also *Readdy v. Shamokin*, 137 Pa. St. 98; *Higgins v. Glens Falls*, 57 Hun (N. Y.) 594.

A hydrant may constitute an obstruction or a defect sufficient to render a city liable for injuries caused thereby. *King v. Oshkosh*, 75 Wis. 517. So may a road-scraper left in the street. *Whitney v. Ticonderoga* (N. Y. 1891), 27 N. E. Rep. 403. And a water-box. *Wilkins v. Rutland*, 61 Vt. 336; 25 Am. & Eng. Corp. Cas. 49; or a plank, *Jewhurst v. Syracuse*, 108 N. Y. 303; 20 Am. & Eng. Corp. Cas. 372; or a telegraph wire used by the fire department and left in the street, *Neuert v. Boston*, 120 Mass. 338.

But it has been held that a city is not necessarily negligent in permitting stepping-stones to remain at a muddy street-crossing where they have been placed by persons using it, there being nothing dangerous in the appearance of the stones, and the person complaining of them being familiar with them, and sustaining injury by missing a footing on one of them. *Bullock v. Mayor, etc., of N. Y.*, 51 N. Y. Super. Ct. 36.

And the same view was taken where a stepping-stone or horse-block of ordinary size was placed at the edge of the sidewalk in front of a public building. *Dubois v. Kingston*, 102 N. Y. 219; 12 Am. & Eng. Corp. Cas. 630; 55 Am. Rep. 804. See also *Cushing v. Boston*, 128 Mass. 330; 35 Am. Rep. 383; *Davis v. Mayor, etc., of Jackson*, 61 Mich. 530.

"Where, by order of the judge of a State court, a rope is put across a public street of a city to prevent travel and the resulting noise, which disturbs the court, and a traveler is injured thereby, the city is not liable." *Belvin v. Richmond*, 85 Va. 574; 25 Am. & Eng. Corp. Cas. 57. See also *Simon v. Atlanta*, 67 Ga. 618; 44 Am. Rep. 739.

Failure to light streets is not a defect, and a city is not liable therefor in the absence of a statute. *Lyon v. Cambridge*, 136 Mass. 419; *Macomber v. Taunton*, 100 Mass. 255; *Randall v. Eastern R. Co.*, 106 Mass. 276; 8 Am. Rep. 327. But it may often have an important bearing upon the question of negligence. *Freeport v. Isbell*, 83 Ill. 440; 25 Am. Rep. 407; *Indianapolis v. Scott*, 72 Ind. 196; *Miller v. St. Paul*, 38 Minn. 134; 20 Am. & Eng. Corp. Cas. 349; *Lewis v. Atlanta*, 77 Ga. 756; 4 Am. St. Rep. 108; *Jefferson v. Chapman*, 127 Ill. 438.

c. EXCAVATIONS AND BARRIERS.¹—Fences or barriers are not, ordinarily, required to prevent travelers from straying from the way;² but if there are excavations or dangerous defects in or close to a street rendering its use dangerous to travelers exercising due care, the municipality must erect barriers or take other proper precautions to warn travelers of the danger.³

1. See also HIGHWAY, vol. 9, pp. 380-383.

2. Sparhawk v. Salem, 1 Allen (Mass.) 30; 79 Am. Dec. 700; Murphy v. Gloucester, 105 Mass. 470; Daily v. Worcester, 131 Mass. 452; Chapman v. Cook, 10 R. I. 304; 14 Am. Rep. 686; Keyes v. Marcellus, 50 Mich. 439; 49 Am. Rep. 52; Beardsley v. Hartford, 50 Conn. 529; 4 Am. & Eng. Corp. Cas. 599; 47 Am. Rep. 677; Day v. Mt. Pleasant, 70 Iowa 193; Chicago v. Gallagher, 44 Ill. 295; Green v. Bridge Creek, 38 Wis. 449; 20 Am. Rep. 18; Burr v. Plymouth, 48 Conn. 460; Nebraska City v. Campbell, 2 Black (U. S.) 590; Shearm. & Redf. on Neg., § 356.

3. Orme v. Richmond, 79 Va. 86; 5 Am. & Eng. Corp. Cas. 605; Clarke v. Richmond, 83 Va. 355; 20 Am. & Eng. Corp. Cas. 320; 5 Am. St. Rep. 281; Barnes v. Chicopee, 138 Mass. 67; 7 Am. & Eng. Corp. Cas. 40; 52 Am. Rep. 259; Burnham v. Boston, 10 Allen (Mass.) 290; Woods v. Groton, 111 Mass. 357; Murphy v. Gloucester, 105 Mass. 470; Pittston v. Hart, 89 Pa. St. 389; Hey v. Philadelphia, 81 Pa. St. 44; 22 Am. Rep. 733; Atlanta v. Wilson, 59 Ga. 544; 27 Am. Rep. 296; Zettler v. Atlanta, 66 Ga. 195; Malloy v. Walker, 77 Mich. 448; 31 Am. & Eng. Corp. Cas. 27 and note; Halpin v. Kansas City, 76 Mo. 335; Joliet v. Verley, 35 Ill. 58; 85 Am. Dec. 342; Chicago v. Hesing, 83 Ill. 204; 25 Am. Rep. 378; Delphi v. Lowery, 74 Ind. 520; 39 Am. Rep. 98, and cases there cited; O'Leary v. Mankato, 21 Minn. 65; Kennedy v. Mayor, etc., of N. Y., 73 N. Y. 365; Hubbell v. Yonkers, 104 N. Y. 434; 58 Am. Rep. 522; Olson v. Chippewa Falls, 71 Wis. 558; 20 Am. & Eng. Corp. Cas. 300; Norris v. Litchfield, 35 N. H. 271; 69 Am. Dec. 546; Haskell v. New Gloucester, 70 Me. 305; Mullen v. Rutland, 55 Vt. 77; Indianapolis v. Emmelman, 108 Ind. 530; 58 Am. Rep. 65; Niblett v. Nashville, 12 Heisk. (Tenn.) 684; 27 Am. Rep. 755; Toms v. Corp. of Whitby, 34 U. C., Q. B. 195; Lincoln v. Walker, 18 Neb. 250; 2 Thomp. on Neg. 770-777.

Excavations and Barriers.—Where a city makes street or sidewalk along a ditch without protecting it by barriers or danger signals it will be liable to one who, while using due care, is injured by falling into the ditch. Portland v. Taylor, 125 Ind. 522; Russell v. Columbia, 74 Mo. 480; 41 Am. Rep. 325; Galveston v. Posnainsky, 62 Tex. 118; 13 Am. & Eng. Corp. Cas. 484; 50 Am. Rep. 517.

A tunnel under the Chicago river, in the city of Chicago, is one of its highways, and it is the duty of the city to use all reasonable efforts to keep it in a safe condition for travel; and if that cannot be done without stopping travel for a time, then the approaches should be so guarded as to prevent persons from entering therein, or in some manner warned of the danger. Chicago v. Hislop, 61 Ill. 86.

In *Pennsylvania*, a township is bound to erect walls or barriers along the sides of its roads where they are unsafe. Scott v. Montgomery, 95 Pa. St. 444. See also Cartright v. Belmont, 58 Wis. 370.

The construction of embankments leading to a long trestle-work ten feet high, which, by other embankments at its further end, led to a traveled bridge, is such dangerous work as renders a county, which had contracted for it, liable, because of its failure to provide in its contract for the erection of barriers, or to see to it itself. Van Winter v. Henry, 61 Iowa 684.

Where the excavation is a long distance from the traveled way, the city is not, ordinarily liable for failure to erect barriers along the way. Daily v. Worcester, 131 Mass. 452; Barnes v. Chicopee, 138 Mass. 67; 7 Am. & Eng. Corp. Cas. 40; 52 Am. Rep. 259; Goeltz v. Ashland, 75 Wis. 642; 31 Am. & Eng. Corp. Cas. 44.

In *Iowa* it is held that it is not the duty of a city to provide means of access from private property to its streets, nor is it liable for a failure to guard its streets from approach at points where such approach is dangerous. Goodin v. Des Moines, 55 Iowa 67.

d. ICE AND SNOW.—Where a street or sidewalk is properly constructed, the mere fact that it is rendered slippery by ice or snow will not, ordinarily, make the city liable, if the ice or snow is not suffered to accumulate or remain in such a rounded or uneven condition as to constitute an obstruction or a defect.¹

See generally, *Alexander v. Big Rapids*, 76 Mich. 282; *McAllister v. Albany*, 18 Oregon 426; *Norwich v. Breed*, 30 Conn. 535; *Burnham v. Boston*, 10 Allen (Mass.) 290; *Detroit v. Corey*, 9 Mich. 165; 80 Am. Dec. 78; *Ivory v. Deer Park*, 116 N. Y. 476; *Bly v. Whitehall*, 120 N. Y. 506; 31 Am. & Eng. Corp. Cas. 58 and note; *Forker v. Sandy Lake*, 130 Pa. St. 123; 31 Am. & Eng. Corp. Cas. 61; *McDermett v. Kingston*, 57 How. Pr. (N. Y.) 196; *Smith v. Lowell*, 139 Mass. 336; *Orme v. Richmond*, 79 Va. 86; 5 Am. & Eng. Corp. Cas. 605; *Kelley v. Columbus*, 41 Ohio St. 263; 7 Am. & Eng. Corp. Cas. 35; *Bunch v. Edenton*, 90 N. Car. 431; 7 Am. & Eng. Corp. Cas. 30; *Halpin v. Kansas City*, 76 Mo. 335; *Monmouth v. Sullivan*, 8 Ill. App. 50; *Columbus v. Pearson* (Ga. 1889), 9 S. E. Rep. 1102; *Hull v. Kansas City*, 54 Mo. 598; 14 Am. Rep. 487; *Tallahassee v. Fortune*, 3 Fla. 19; 52 Am. Dec. 358; *Manchester v. Ericsson*, 105 U. S. 347; *Horey v. Harvestram*, 47 Hun (N. Y.) 356.

Basement Areas.—There is some conflict among the authorities as to the liability of municipal corporations for permitting basement areas or cellar ways to open into streets or sidewalks without being protected by railings or barriers. It would seem that the municipality ought in all cases to erect or compel the erection of barriers or railings wherever it is dangerous and unsafe to permit the opening without them. *Niblett v. Nashville*, 11 Heisk. (Tenn.) 684; 27 Am. Rep. 755; *Rowell v. Williams*, 29 Iowa 210; *Grove v. Kansas City*, 75 Mo. 672. See also *Sweeny v. Newport* (N. H. 1889), 18 Atl. Rep. 86. But it has been held that where the area is outside the line of the sidewalk, the city will not be liable for the failure to erect barriers. *Beardsley v. Hartford*, 50 Conn. 529; 4 Am. & Eng. Corp. Cas. 595; 47 Am. Rep. 677; *Witham v. Portland*, 72 Me. 539; *Temperance Hall Assoc. v. Giles*, 33 N. J. L. 260.

In *Wisconsin*, it was held in a recent case that stairways on the street sides of buildings, leading downwards to basements or upwards to the front

entrances of such buildings, and not encroaching upon the sidewalks, are lawful; but the municipality is bound to provide proper safeguards to prevent accidents, from the proximity of such stairways to the sidewalk, to persons traveling thereon with ordinary care. But in the same case it was held sufficient to erect barriers at the side without causing a gate or barrier to be placed at the entrance. *Fitzgerald v. Berlin*, 51 Wis. 81; 37 Am. Rep. 814.

In another recent case a pointed iron fence four feet high erected along an area-way was held a lawful structure, and that one who slipped and fell thereon could not recover for the injury. *Kelly v. Bennett*, 132 Pa. St. 218; 19 Am. St. Rep. 594. But there may be liability where the railing is rotten and insecure. *Hotel Assoc. v. Walter*, 23 Neb. 280. See also *Landru v. Lund*, 38 Minn. 538; *McGill v. District of Columbia*, 4 Mackey 70; 54 Am. Rep. 256.

Whether it is negligence for which a city is liable for the city council to allow cellars under its sidewalks, in front of shops, is generally a question for the jury. *Augusta City Council v. Hafers*, 59 Ga. 151.

1. *Stanton v. Springfield*, 12 Allen (Mass.) 566; *Keith v. Brockton*, 136 Mass. 119; *Nason v. Boston*, 14 Allen (Mass.) 508; *Stone v. Hubbardston*, 100 Mass. 50; *Cook v. Milwaukee*, 24 Wis. 270; 1 Am. Rep. 183; *Chicago v. McGiven*, 78 Ill. 347; *Gibson v. Johnson*, 4 Ill. App. 288; *Broburg v. Des Moines*, 63 Iowa 523; 4 Am. & Eng. Corp. Cas. 627; 50 Am. Rep. 756; *Taylor v. Yonkers*, 105 N. Y. 202; 18 Am. & Eng. Corp. Cas. 266; 59 Am. Rep. 492; *Kinney v. Troy*, 108 N. Y. 567; *Evans v. Utica*, 69 N. Y. 166; 25 Am. Rep. 165; *Harrington v. Buffalo*, 121 N. Y. 147; *Smythe v. Bangor*, 72 Me. 249; *Henkes v. Minneapolis*, 42 Minn. 530; *Mauch Chunk v. Kline*, 100 Pa. St. 119; 45 Am. Rep. 364; *Seeley v. Litchfield*, 49 Conn. 134; 44 Am. Rep. 216; *Chase v. Cleveland*, 44 Ohio St. 505; 38 Am. Rep. 543; *Grossenbach v. Milwaukee*, 65 Wis. 31; 11 Am. & Eng. Corp. Cas. 551; 56 Am. Rep. 614; *Ringland v. Toronto*, 23 U. C. C. P.

So, a city will not be liable, as a rule, where there is an extraordinary fall of snow, until after a reasonable time has elapsed in which it might have been removed.¹ But where a city permits snow and ice to accumulate and remain upon its sidewalks in a rounded, uneven, and dangerous condition for an unreasonable time, the municipality will be liable to a traveler who is injured thereby while exercising ordinary and reasonable care.²

Where there is a defect in the construction of the sidewalk and an injury has been occasioned partly by such defect and partly by the slippery condition of the walk caused by snow and ice, the city will generally be held liable³ if there is no contributory negligence; but it does not always follow that liability attaches merely because there is a defect and snow has fallen or ice formed upon the walk.⁴ Each case must depend largely upon its own peculiar circumstances.⁵

c. FALLING OBJECTS.—The duty of a municipality is not limited to the roadbed or surface of its streets. It must use reasonable and ordinary care to make them safe for travel, and falling objects may render travel just as unsafe as defects in the roadbed. A city is, therefore, liable, as a general rule, for injuries caused to a traveler, who is exercising ordinary and reasonable care, by falling objects, such as awnings, cornices, signboards, rotten poles or trees in the streets, and the like, which the city has negligently permitted to remain in a situation and condition dangerous to travel.⁶

93; *Bleakely v. Prescott*, 12 Ont. App. Rep. 637; 15 Am. & Eng. Corp. Cas. 227. Compare *Cloughessey v. Waterbury*, 51 Conn. 405; 7 Am. & Eng. Corp. Cas. 65; 50 Am. Rep. 38; *Tripp v. Lyman*, 37 Me. 250; *Chicago v. Hislop*, 61 Ill. 86.

1. *Clark v. District of Columbia*, 3 Mackey 79; *Harrington v. Buffalo*, 121 N. Y. 147; *Hayes v. Cambridge*, 136 Mass. 402; 6 Am. & Eng. Corp. Cas. 18; *Betts v. Gloversville*, 56 Hun (N. Y.) 639; *Bell v. York* (Neb. 1891), 48 N. W. Rep. 878; *Blakely v. Troy*, 18 Hun (N. Y.) 167. See *Savage v. Bangor*, 40 Me. 176; 63 Am. Dec. 658; *Cunningham v. St. Louis*, 96 Mo. 53.

2. *Todd v. Troy*, 61 N. Y. 506; *Collins v. Council Bluffs*, 32 Iowa 324; 7 Am. Rep. 200; *McLaughlin v. Corry*, 77 Pa. St. 109; *Luther v. Worcester*, 97 Mass. 268; *Morse v. Boston*, 109 Mass. 446; *Barton v. Montpelier*, 30 Vt. 650; *Savage v. Bangor*, 40 Me. 176; 63 Am. Dec. 658.

3. *Gillrie v. Lockport*, 122 N. Y. 403; *Atchison v. King*, 9 Kan. 550; *Hampson v. Taylor*, 15 R. I. 83; *Adams v. Chicopee*, 147 Mass. 440; 25 Am. & Eng. Corp. Cas. 60; *Haskell v. Des Moines*, 74 Iowa 110; *Lincoln v. Smith*,

28 Neb. 762. See also *Gaylord v. New Britain*, 58 Conn. 398; 31 Am. & Eng. Corp. Cas. 51 and note; *Mauch Chunk v. Kline*, 100 Pa. St. 119; 45 Am. Rep. 364.

4. *Taylor v. Yonkers*, 105 N. Y. 202; 18 Am. & Eng. Corp. Cas. 266; 59 Am. Rep. 492; *Muller v. Newburgh*, 32 Hun (N. Y.) 24; *Slavin v. Mayor, etc., of N. Y.*, 56 N. Y. Super. Ct. 604.

5. *Hill v. Fond du Lac*, 56 Wis. 242. See especially the test suggested by *Cassaday, J.*, in that case. See also 2 *Dillon's Munic. Corp.* (4th ed.), § 1006, p. 1261; *Nebraska City v. Rathbone*, 20 Neb. 288; 15 Am. & Eng. Corp. Cas. 222; *McKellar v. Detroit*, 57 Mich. 158; *HIGHWAYS*, vol. 9, pp. 388, 389 and authorities there cited.

6. This branch of the subject is so fully treated under *HIGHWAYS*, vol. 9, p. 384, that it is only necessary in this connection to refer to the later authorities. See particularly *Chase v. Lowell*, 151 Mass. 422; 31 Am. & Eng. Corp. Cas. 78, and elaborate note on pages 81-86. See also *Gray v. Emporia*, 43 Kan. 704; *Vicksburg v. McLain*, 67 Miss. 4; *Gubasko v. Mayor, etc., of N. Y.*, 14 Daly (N. Y.) 559; *Kunz v.*

It is held in some of the States, however, where the liability is statutory, that an object, such as a sign suspended from a building, or snow and ice falling off of a roof—not attached to the sidewalk nor directly connected with it in any way—is not a “defect” within the meaning of the statute.¹

f. FRIGHTENING HORSES.—The subject of the liability of municipal corporations for injuries caused by obstacles or defects in a street which frighten horses, or into contact with which runaway horses come, is treated elsewhere in this work;² but, as there is some conflict among the authorities, and as the subject is one of importance, it may be well to again consider it briefly in this connection.

Cities are not bound to keep their streets safe for fast and furious driving or racing;³ but where a horse of ordinary gentleness merely shies or swerves to one side so that the driver does not lose control of him, and injury is caused without fault or negligence on the part of the driver, by his thus coming in contact with a defect or an obstacle negligently left in the street by the municipality, the latter will be liable therefor.⁴ So, where a horse of ordinary gentleness becomes frightened at an object naturally calculated to frighten horses, which the municipality has negligently placed or permitted to remain in the highway, and injury results, without contributory negligence, the corporation will, as a general rule, be liable therefor.⁵

Troy (Supreme Ct.), 1 N. Y. Supp. 596; *Bieling v. Brooklyn*, 120 N. Y. 98; 31 Am. & Eng. Corp. Cas. 111; *Duffy v. Dubuque*, 63 Iowa 171; 4 Am. & Eng. Corp. Cas. 634; 50 Am. Rep. 743; *Bohen v. Waseca*, 32 Minn. 176; 4 Am. & Eng. Corp. Cas. 631.

As to when a city is liable for injuries caused by falling walls, see *Kiley v. Kansas*, 69 Mo. 102; 33 Am. Rep. 491; 87 Mo. 103; 13 Am. & Eng. Corp. Cas. 446; 56 Am. Rep. 443; *Cain v. Syracuse*, 29 Hun (N. Y.) 105; *Anderson v. East*, 117 Ind. 126; 25 Am. & Eng. Corp. Cas. 206; *Parker v. Macon*, 39 Ga. 725; *Howe v. New Orleans*, 12 La. Ann. 481.

In an interesting *New York* case the following facts appeared:

Private individuals erected a bridge ten feet above a strip of land which the authorities of a city had appropriated, graded, and used as a public street. S, undertaking to drive thereunder a six-horse wagon of unusual height, containing circus lions, while looking to see if the hind wheels cleared a street corner, did not perceive the bridge, and was thereby struck. In an action by S to recover for the injury—held, that the questions of negligence on the part of the city, and of con-

tributory negligence on the part of S, were of fact for the jury. *Sewall v. Cohoes*, 75 N. Y. 45; 31 Am. Rep. 418.

1. *Jones v. Boston*, 104 Mass. 75; *Hixon v. Lowell*, 13 Gray (Mass.) 59; *Hewison v. New Haven*, 34 Conn. 136; 91 Am. Dec. 718; *Taylor v. Peckham*, 8 R. I. 349; 5 Am. Rep. 578. Compare *Langan v. Atchison*, 35 Kan. 318; 12 Am. & Eng. Corp. Cas. 650; *Hardy v. Keene*, 52 N. H. 370.

2. HIGHWAYS, vol. 9, pp. 387, 388.

3. *McCarthy v. Portland*, 67 Me. 167.

4. *Aldrich v. Gorham*, 77 Me. 287; *Baltimore, etc., Turnpike Co. v. Bateman*, 68 Md. 389; 6 Am. St. Rep. 449; *Stone v. Hubbardston*, 100 Mass. 49; *Cushing v. Bedford*, 125 Mass. 526.

5. *Rushville v. Adams*, 107 Ind. 476; 15 Am. & Eng. Corp. Cas. 259; 57 Am. Rep. 124; *Bartlett v. Hooksett*, 48 N. H. 18; *Morse v. Richmond*, 41 Vt. 435; 98 Am. Dec. 600; *Chicago v. Hoy*, 75 Ill. 530; *Stanley v. Davenport*, 54 Iowa 463; 37 Am. Rep. 216; *Bennett v. Fifield*, 13 R. I. 139; 43 Am. Rep. 17; *North Manheim Tp. v. Arnold*, 119 Pa. St. 380; 4 Am. St. Rep. 653; *Card v. Ellsworth*, 65 Me. 547; 20 Am. Rep. 722. Compare *Keith v. Easton*, 2 Allen (Mass.) 552; *Cook v. Charlestown*,

According to the weight of authority a city is also liable, in the absence of contributory negligence, where a horse becomes frightened at something for which the corporation is not responsible, and, getting beyond the control of his driver, runs away, and injury results from his coming in contact with some object or defect which the city has negligently left in the street, provided the injury would not have been sustained but for such obstruction or defect.¹ In *Maine*, *Massachusetts*, *Missouri*, and *Wisconsin*, however, it is held that a city is not liable in such a case.²

g. COASTING.—It is a general rule that municipal corporations are not liable for the failure to exercise duties of a legislative and discretionary character;³ hence they are not liable for failing to pass or enforce ordinances against coasting upon their streets.⁴

98 Mass. 80; *Agnew v. Corunna*, 55 Mich. 428; 7 Am. & Eng. Corp. Cas. 44; 54 Am. Rep. 383; *Hughes v. Fond du Lac*, 73 Wis. 380; 25 Am. & Eng. Corp. Cas. 231.

This rule holds good even where the object is not in the traveled path, but is on the margin of the way. *Morse v. Richmond*, 41 Vt. 435; 98 Am. Dec. 600; *Foshay v. Glen Haven*, 25 Wis. 288; 3 Am. Rep. 73; *Rushville v. Adams*, 107 Ind. 475; 15 Am. & Eng. Corp. Cas. 259; 57 Am. Rep. 124. But there may be cases where an object would constitute a defect if placed in the traveled path while it would not do so if placed outside the traveled way. *Nichols v. Athens*, 66 Me. 404.

Whether an object is such as is calculated to frighten a horse or not is generally a question of fact for the jury to determine under the circumstances of the particular case. *Lawrence v. Mt. Vernon*, 35 Me. 100; *Cleveland, etc., R. Co. v. Wynant*, 114 Ind. 525; 35 Am. & Eng. Corp. Cas. 328; *Chamberlain v. Enfield*, 43 N. H. 356; *Ayer v. Norwich*, 39 Conn. 376; 12 Am. Rep. 396; *Fritsch v. Allegheny*, 91 Pa. St. 226; 2 Thomp. Neg. 778. See also and compare *Darling v. Westmoreland*, 52 N. H. 401; 13 Am. Rep. 55; *Crocker v. McGregor*, 76 Me. 282; 49 Am. Rep. 611; *Bloor v. Delafield*, 69 Wis. 273; 18 Am. & Eng. Corp. Cas. 289.

Examples of what have and have not been held calculated to frighten horses will be found in the article on HIGHWAYS, vol. 9, p. 362.

1. *Ring v. Cohoes*, 77 N. Y. 83; 33 Am. Rep. 574; *Campbell v. Stillwater*, 32 Minn. 308; 6 Am. & Eng. Corp. Cas. 62; 50 Am. Rep. 567; *Hunt v.*

Pownall, 9 Vt. 411; *Winship v. Enfield*, 42 N. H. 197; *Hey v. Philadelphia*, 81 Pa. St. 44; 22 Am. Rep. 733; *Crawfordsville v. Smith*, 79 Ind. 308; 41 Am. Rep. 612; *Plymouth Tp. v. Graver*, 125 Pa. St. 24; 25 Am. & Eng. Corp. Cas. 101; *Rockford v. Russell*, 9 Ill. App. 229; *Ward v. North Haven*, 43 Conn. 148; *Sherwood v. Hamilton*, 37 U. C. Q. B. 410; 2 Shearm. & Redf. Neg. (4th ed.), § 346. See also *Carterville v. Cook*, 129 Ill. 152; 16 Am. St. Rep. 248 and note; *Baldwin v. Greenwoods Turnpike Co.*, 40 Conn. 238.

2. *Moulton v. Sanford*, 51 Me. 127; *Spaulding v. Winslow*, 74 Me. 528; *Perkins v. Fayette*, 68 Me. 152; *Higgins v. Boston*, 148 Mass. 484; *Davis v. Dudley*, 4 Allen (Mass.) 557; *Titus v. Northbridge*, 97 Mass. 258; 93 Am. Dec. 91; *Brown v. Mayor*, 57 Mo. 156; *Dreher v. Fitchburg*, 22 Wis. 675; 99 Am. Dec. 91; *Houfe v. Fulton*, 29 Wis. 296; 9 Am. Rep. 568. But compare *Olson v. Chippewa Falls*, 71 Wis. 558; 20 Am. & Eng. Corp. Cas. 300; *Hull v. Kansas City*, 54 Mo. 601; 14 Am. Rep. 487. And see *Moss v. Burlington*, 60 Iowa 438; 46 Am. Rep. 82.

These cases proceed upon the theory that the conduct of the horse is the primary cause of the accident, and that it is impossible to say that the accident would have happened but for that cause for which the city is not responsible.

3. MUNICIPAL CORPORATIONS, vol. 15, pp. 1145, 1154, and authorities there cited.

4. The authorities are cited in HIGHWAYS, vol. 9, p. 395. See also *Elliott on Roads and Streets* 465; 2 *Dillon's Munic. Corp.*, §§ 949, 951, 980, note.

4. INDEPENDENT CONTRACTORS AND LICENSEES.—As a general rule, a city is not liable for the negligence of an independent contractor employed by it to perform a work lawful in itself and not intrinsically dangerous,¹ and the same rule applies to the acts of licensees where the city is not negligent with respect to some duty of its own.² But where the work is intrinsically dangerous to travel, the city will generally be liable for injuries resulting directly from the acts which the contractor was employed to perform, or for which the license was given.³

i. NOTICE.—In order to render a city liable for an injury caused by a defective street, there must not only be a defect or

1. *Dooley v. Sullivan*, 112 Ind. 451; *Leeds v. Richmond*, 102 Ind. 372; 14 Am. & Eng. Corp. Cas. 532; *Davie v. Levy*, 39 La. Ann. 551; 4 Am. St. Rep. 225; *Fink v. Missouri, etc., R. Co.*, 82 Mo. 283; 52 Am. Rep. 376; *Erie v. Caulkins*, 85 Pa. St. 247; 27 Am. Rep. 642; *Brown v. Werner*, 40 Md. 15; *Herrington v. Lansingburgh*, 110 N. Y. 145; *Dorlon v. Brooklyn*, 46 Barb. (N. Y.) 604; *Callahan v. Burlington, etc., R. Co.*, 23 Iowa 562. See *HIGHWAYS*, vol. 9, p. 391.

As to who are independent contractors, see *Cooley on Torts* 558; *Shearm. & Redf. on Neg.* (2d ed.) 73; 2 *Thomp. Neg.* 899; *Charlock v. Freel*, 125 N. Y. 357; *McGuire v. Grant*, 25 N. J. L. 356; 67 Am. Dec. 49; *Hale v. Johnson*, 80 Ill. 185; *Harrison v. Collins*, 86 Pa. St. 153; 27 Am. Rep. 699; *Rourke v. White Moss Colliery Co., L. R.*, 1 C. P. Div. 556; *Robbins v. Chicago*, 4 Wall. (U. S.) 679; *Denver v. Rhodes*, 9 Colo. 554; 20 Am. & Eng. Corp. Cas. 411.

Where a city knowingly allows the work to remain in a dangerous condition it may be liable, notwithstanding it was done by an independent contractor. *Welsh v. St. Louis*, 73 Mo. 71; *St. Paul v. Seitz*, 3 Minn. 297; 74 Am. Dec. 753. See also *Pettingill v. Yonkers*, 116 N. Y. 558; 15 Am. St. Rep. 442; *Jefferson v. Chapman*, 127 Ill. 438; 11 Am. St. Rep. 136; *Bauer v. Rochester*, 59 Hun (N. Y.) 616. Compare *Painter v. Mayor, etc., of Pittsburgh*, 46 Pa. St. 213; *Barry v. St. Louis*, 17 Mo. 121.

And a stipulation in the contract that the city shall not be liable or that the contractor shall take all proper precautions makes no difference. *Storrs v. Utica*, 17 N. Y. 104; 72 Am. Dec. 437; *Mayor, etc., of Baltimore v. O'Donnell*, 53 Md. 110; 36 Am. Rep. 395; *Blake v. Ferris*, 5 N. Y. 48; 55 Am. Dec. 304; *Kelly v. Mayor, etc., of N. Y.*, 11 N.

Y. 432; *Wilson v. Wheeling*, 19 W. Va. 323; 42 Am. Rep. 780; *McAllister v. Albany*, 18 Oregon 426.

2. *Susquehanna v. Simmons*, 112 Pa. St. 384; 13 Am. & Eng. Corp. Cas. 449; 56 Am. Rep. 317; *West Chester v. Apple*, 35 Pa. St. 284; *Warsaw v. Dunlap*, 112 Ind. 576; 18 Am. & Eng. Corp. Cas. 263; *Hunt v. Mayor, etc., of N. Y.*, 109 N. Y. 134; 20 Am. & Eng. Corp. Cas. 380; *Macomber v. Taunton*, 100 Mass. 255; *King v. Cleveland*, 28 Fed. Rep. 835.

3. *Robbins v. Chicago*, 4 Wall. (U. S.) 657; *Van Winter v. Henry Co.*, 61 Iowa 685; 2 Am. & Eng. Corp. Cas. 512; *Joliet v. Harwood*, 86 Ill. 110; 29 Am. Rep. 17; *Caswell v. Cross*, 120 Mass. 545; *Russell v. Columbia*, 74 Mo. 480; 41 Am. Rep. 325; *Stephens v. Macon*, 83 Mo. 345; *Indianapolis v. Doherty*, 71 Ind. 5; *Mayor, etc., of Savannah v. Donnelly*, 71 Ga. 258; *Cohen v. Mayor, etc., of N. Y.*, 113 N. Y. 532; 10 Am. St. Rep. 506; 25 Am. & Eng. Corp. Cas. 33; *Jefferson v. Chapman*, 127 Ill. 438; 11 Am. St. Rep. 136.

So, where the work is negligently done and the city accepts it with notice. *Vogel v. Mayor, etc., of N. Y.*, 92 N. Y. 10; 2 Am. & Eng. Corp. Cas. 537; 44 Am. Rep. 349; *Crawfordsville v. Bond*, 96 Ind. 236; 7 Am. & Eng. Corp. Cas. 488.

A municipal corporation is bound to see that a platform which it permits a private person to construct in a public street, and which is used as part of the street, is in a safe condition, though it be not in the usually traveled part of the street. *Estelle v. Lake Crystal*, 27 Minn. 243.

It is not relieved from responsibility for the condition of a street, merely by permitting a railway company to lay its track thereon. *Campbell v. Stillwater*, 32 Minn. 308; 6 Am. & Eng. Corp. Cas. 62; 50 Am. Rep. 567. See

obstruction causing the injury, but it must also have due notice of such defect, or the circumstances must be such that it ought to have had notice, in which case the law will imply notice; but, as this topic is fully treated in another portion of this work, it is sufficient here to call attention to the matter and cite the later authorities.¹

also *Watson v. Tripp*, 11 R. I. 98; 33 Am. Rep. 420.

An instruction that "when the city issues a building permit to use and obstruct a street, it is the duty of the corporate authorities to see to it that the persons whom she authorizes to use her streets shall properly guard and protect such obstructions; and, if she negligently fails to perform this duty, she is responsible to one who is injured while properly using such streets, and who is at the time exercising due care," is correct, as it must have been understood by the jury as if the words "by means of such obstructions" had been inserted after the word "injured." *Indianapolis v. Doherty*, 71 Ind. 5.

A town cannot escape liability on the ground that its streets were put in an unsafe condition by the road supervisor. *Clark v. Epworth*, 56 Iowa 462.

A city cannot escape responsibility for injuries caused by defective streets upon the plea that it had entered into a contract with another party to repair such streets. *Jacksonville v. Drew*, 19 Fla. 106; 45 Am. Rep. 5. See also *Wilson v. Wheeling*, 19 W. Va. 323; 42 Am. Rep. 780.

Where a city that contracted for the construction of a large cistern in one of its streets, although it reserved no control over the manner of doing the work except to see that it was according to contract specifications, it was held liable for the loss of a horse which fell in through lack of sufficient guards around and over the cistern. *Circleville v. Neuding*, 41 Ohio St. 465; 9 Am. & Eng. Corp. Cas. 656. See also *Dressell v. Kingston*, 32 Hun (N. Y.) 533; *Mayor, etc., of Savannah v. Donnelly*, 71 Ga. 258; *Joslyn v. Detroit* (Mich. 1889), 42 N. W. Rep. 50; 25 Am. & Eng. Corp. Cas. 41; *Welsh v. St. Louis*, 73 Mo. 71.

So, where a member of the police force of a city painted and propped open trap doors of a cellarway in the sidewalk of a police station, and plaintiff fell upon the doors thus propped open, and was injured, it was held that the city was liable. *Carrington v. St. Louis*, 89 Mo. 208; 14 Am. & Eng.

Corp. Cas. 471; 58 Am. Rep. 108. And it has also been held in several cases that a city is liable for the negligence of its street commissioner under its control, although not appointed by it. *Denver v. Williams*, 12 Colo. 475; *Kittredge v. Milwaukee*, 26 Wis. 46; *Osborne v. Detroit*, 32 Fed. Rep. 36; 18 Am. & Eng. Corp. Cas. 230. See also *Biehing v. Brooklyn*, 120 N. Y. 98; 31 Am. & Eng. Corp. Cas. 111. Compare *Sinclair v. Mayor, etc., of Baltimore*, 59 Md. 592. See, on this subject, the note to *Southwell v. Detroit*, 74 Mich. 438; 25 Am. & Eng. Corp. Cas. 91 *et seq.*

1. See HIGHWAYS, vol. 9, pp. 401-407. See also as to what constitutes notice and when it will be implied, *Maus v. Springfield*, 101 Mo. 613; 20 Am. St. Rep. 634; *Barr v. Kansas City* (Mo. 1891), 16 S. W. Rep. 483; *Aurora v. Hillman*, 90 Ill. 61; *Mayor, etc., of Griffin v. Johnson*, 84 Ga. 279; *Tice v. Bay City*, 78 Mich. 209; *Delger v. St. Paul*, 14 Fed. Rep. 567; *McNally v. Cohoes* (N. Y. 1891), 27 N. E. Rep. 1043; *Hoey v. Natick*, 153 Mass. 528; *Murphysboro v. O'Riley*, 36 Ill. App. 157; *Smith v. St. Joseph*, 42 Mo. App. 392; *Stoddard v. Winchester*, 154 Mass. 145; *Corts v. District of Columbia*, 7 Mackev (D. C.) 277; *Philadelphia v. Smith* (Pa. 1889), 16 Atl. Rep. 493; *Kansas City v. Bradbury* (Kan. 1891), 25 Pac. Rep. 889; *Elliott on Roads and Streets* 460-461; *Whitney v. Lowell*, 151 Mass. 212; 31 Am. & Eng. Corp. Cas. 73 and note; *District of Columbia v. Woodbury*, 136 U. S. 450; 31 Am. & Eng. Corp. Cas. 96.

As to when notice to an officer is notice to the city, see *Columbus v. Strassner*, 124 Ind. 482; *Fuller v. Jackson*, 82 Mich. 480; *McSherry v. Canandaigua*, 59 Hun (N. Y.) 616; *McKeigue v. Janesville* (Wis.), 31 N. W. Rep. 298; *Dundas v. Lansing*, 75 Mich. 499; 25 Am. & Eng. Corp. Cas. 239. Compare *McNally v. Cohoes*, 53 Hun (N. Y.) 202; *Hoyt v. Des Moines*, 76 Iowa 430; *Foster v. Boston*, 127 Mass. 290.

The municipality must take notice of the tendency of timber to decay. How-

ard Co. v. Legg, 110 Ind. 479; Sherwood v. District of Columbia, 3 Mackey (D. C.) 276; 51 Am. Rep. 776; Fort Wayne v. Coombs, 107 Ind. 77; 13 Am. & Eng. Corp. Cas. 469; 57 Am. Rep. 82. And where the defect is patent and is caused by the act of the municipality itself, it is generally unnecessary to prove notice. Fort Wayne v. Patterson (Ind. 1891), 29 N. E. Rep. 167; Elliott on Roads and Streets 644.

In *New York*, it has been held that to render the city liable for injuries occasioned by one's falling into an unguarded pipe excavation left by a company authorized to lay the pipe, it must appear not only that the accident resulted from the dangerous manner in which the same was made and left, but also that the city had notice thereof. The fact that an alderman saw the same being made was not, *per se*, evidence that the city was negligent. *McDermott v. Kingston*, 19 Hun (N. Y.) 198.

So, where a building on Broadway, New York, had been destroyed by fire, and a temporary planking was put up in place of the sidewalk within four days before the time when plaintiff fell into a small hole beyond the line of the street, under the sill of the building, which sill answered all the purposes of a railing, and there was no evidence of the notorious existence of the hole as a nuisance, and none of neglect on the part of any one concerned, and the hole presented no dangerous appearance, it was held that no recovery for injuries sustained by plaintiff could be had against the city. *McKenna v. Mayor, etc., of New York*, 47 N. Y. Super. Ct. 541.

So, where injuries are received from the misplacement of the cover to a manhole in a street, plaintiff cannot recover if the only evidence of notice to the city is that workmen were seen cleaning a sewer through the manhole two days before the accident. *Whitney v. Lowell*, 115 Mass. 212; 31 Am. & Eng. Corp. Cas. 73. See also *Whitehead v. Lowell*, 124 Mass. 281.

Notice to a municipal corporation of the defective condition of a sidewalk constructed by the property-owner is requisite to charge such corporation with liability for an injury occasioned thereby. *Warren v. Wright*, 3 Ill. App. 602.

"An adjacent landowner ran a gas-pipe under the highway so that it was exposed and broken by a passing team;

and shortly after a person passing thereby with a light was injured by an explosion. *Held*, that, in the absence of evidence that the town knew of the existence of the pipe, it was not liable for the injury. *Otto Tp. v. Wolf*, 106 Pa. St. 608.

A city let certain street repairs to a contractor. The contractor put up a barrier at the point in question, which remained there at 4 o'clock, P. M., but it was removed by some stranger; and about 9 o'clock of the evening of the same day, the plaintiff, in driving at that point, was injured by the defective condition of the street. Neither the contractor nor the city knew or had any notice of the removal of the barrier. *Held*, that no action would lie against the city. *Klatt v. Milwaukee*, 53 Wis. 196; 40 Am. Rep. 759. So, where the workmen left a plank across a sidewalk at night and the plaintiff fell over it within one hour and forty-five minutes thereafter, it was held that no sufficient time had elapsed to charge the city with notice. *Warsaw v. Burdick*, 112 Ind. 576; 18 Am. & Eng. Corp. Cas. 263.

On the other hand, it has been held that, although there is no presumption of knowledge by the city of the defective condition of a walk, which had been repaired only three days before the accident, yet, where numerous witnesses noticed the defect during these three days while casually passing over the walk, a finding by the jury that the city's street commissioner was chargeable with actual notice of the defect will not be disturbed where he admits that he passed over the walk during each of these three days. *Moon v. Ionia*, 81 Mich. 635.

So, where a defect existed for several weeks it was held sufficient to charge the city with notice. *Studley v. Oshkosh*, 45 Wis. 380; *Johnson v. Milwaukee*, 46 Wis. 568; *Pomfrey v. Saratoga Springs*, 104 N. Y. 409; 20 Am. & Eng. Corp. Cas. 346. See also *Chicago v. Crooker*, 2 Ill. App. 279; *Evansville v. Wilter*, 86 Ind. 414; *Purple v. Greenfield*, 138 Mass. 1; 14 Am. & Eng. Corp. Cas. 476; *Moore v. Minneapolis*, 19 Minn. 300; *Pettingill v. Yonkers*, 116 N. Y. 558; 15 Am. St. Rep. 442.

As to the evidence, see *Troxel v. Vinton*, 79 Iowa 90; *Varnham v. Council Bluffs*, 52 Iowa 698; *Chase v. Lowell*, 151 Mass. 422; 31 Am. & Eng. Corp. Cas. 78; *Blake v. Lowell*, 143 Mass. 296.

3. Contributory Negligence.—In an action against a city for damages on account of injuries alleged to have been caused by a defective street, as in other cases of negligence, there can be no recovery, if the plaintiff was guilty of contributory negligence.¹ The general rules in regard to contributory negligence are elaborately treated in the article upon that subject,² and their particular application to persons who have received injuries upon defective streets is fully shown in the article on highways.³ It is sufficient, therefore, in this connection, to refer to the cases decided since that article was written.⁴

The question as to whether or not the obstruction or defect is of such a character and has existed for so long a time as to charge the city with notice, is generally one of fact for the jury. *Magee v. Troy*, 48 Hun (N. Y.) 383; *Troxel v. Vinton*, 77 Iowa 90; *Ronn v. Des Moines*, 78 Iowa 63; *Kunz v. Troy*, 104 N. Y. 344; *Klein v. Dallas*, 71 Tex. 280. But see *Sioy City, etc., R. Co. v. Stout*, 17 Wall. (U. S.) 657.

1. *Elliot on Roads and Streets* 469; *Beach on Contrib. Neg.*, § 77; 2 *Shearm. & Reed on Neg.* (4th ed.), § 375; 2 *Dillon's Munic. Corp.*, § 1026.

2. CONTRIBUTORY NEGLIGENCE, vol. 4, p. 15.

3. HIGHWAYS, vol. 9, pp. 396-400.

4. **General Rule.**—*Mulvane v. South Topeka*, 45 Kan. 45; *Robb v. Connells-ville*, 137 Pa. St. 42; *Hesser v. Grafton*, 33 W. Va. 548; 31 Am. & Eng. Corp. Cas. 117; *Arey v. Newton*, 148 Mass. 598; 12 Am. St. Rep. 604; *Moore v. Huntington*, 31 W. Va. 842; *Plymouth v. Miller*, 117 Ind. 324; *Dale v. Webster Co.*, 76 Iowa 370; 25 Am. & Eng. Corp. Cas. 25; *Allegheny Co. v. Broadwaters*, 69 Md. 533; *Mathews v. Cedar Rapids*, 80 Iowa 459; 31 Am. & Eng. Corp. Cas. 126 and note.

Degree of Care Required.—*Prince George's Co. v. Burgess*, 61 Md. 29; *Sleeper v. Sandown*, 52 N. H. 244; *McKenzie v. Northfield*, 30 Minn. 456; *Gosport v. Evans*, 112 Ind. 133; 18 Am. & Eng. Corp. Cas. 275; *Lowell v. Wattertown*, 58 Mich. 568; 14 Am. & Eng. Corp. Cas. 459; *Altoona v. Lotz*, 114 Pa. St. 238; 60 Am. Rep. 346; *District of Columbia v. McElligott*, 117 U. S. 621; *Pettingill v. Yonkers*, 116 N. Y. 558; 15 Am. St. Rep. 442; *Peoria v. Simpson*, 110 Ill. 294; 5 Am. & Eng. Corp. Cas. 616; 51 Am. Rep. 683; *Wright v. Templeton*, 132 Mass. 49; *Wilson v. Atlanta*, 63 Ga. 291; *Robb v. Connells-ville*, 137 Pa. St. 42; *Flora v. Naney* (Ill. 1891), 26 N. E. Rep. 645; *Columbus v. Strassner*, 124

Ind. 482; *Minick v. Troy*, 83 N. Y. 514; *Massey v. Mayor, etc., of Columbus*, 75 Ga. 658; *Sandwich v. Dolan*, 133 Ill. 177; 31 Am. & Eng. Corp. Cas. 122 and note; *Brennan v. St. Louis*, 92 Mo. 482; 16 Am. & Eng. Corp. Cas. 486; *Coates v. Canaan*, 51 Vt. 131; *Turner v. Newburgh*, 109 N. Y. 301; *Holloway v. Lockport*, 54 Hun (N. Y.) 153; *Gordon v. Richmond*, 83 Va. 436; 18 Am. & Eng. Corp. Cas. 251.

Question for Jury.—Whether the plaintiff is guilty of contributory negligence or not is generally a question of fact for the jury to determine from the circumstances of the particular case. *Daniels v. Lebanon*, 58 N. H. 284; *Brush Electric Lighting Co. v. Kelley*, 126 Ind. 220, *approving* *Elliot on Roads and Streets* 471; *Byerly v. Anamosa*, 79 Iowa 204; *Dundas v. Lansing*, 75 Mich. 499; 25 Am. & Eng. Corp. Cas. 239; *Chicago v. McLean*, 133 Ill. 148; *Sandwich v. Dolan*, 133 Ill. 177; 31 Am. & Eng. Corp. Cas. 122; *Forker v. Sandy Lake*, 130 Pa. St. 123; 31 Am. & Eng. Corp. Cas. 61; *Holloway v. Lockport*, 54 Hun (N. Y.) 153; *Jung v. Stevens' Point*, 74 Wis. 547; *Galveston v. Hemmis* (Tex. 1889), 11 S. W. Rep. 29; *Scranton v. Gore*, 124 Pa. St. 595; *Hampson v. Taylor*, 15 R. I. 83; *Brackenridge v. Fitchburg*, 145 Mass. 160; 18 Am. & Eng. Corp. Cas. 287; *Orleans v. Perry*, 24 Neb. 831; *O'Reilly v. Sing Sing* (Supreme Ct.), 1 N. Y. Supp. 582; *Shenandoah v. Erdman* (Pa.), 12 Atl. Rep. 814; *Shook v. Cohoes*, 108 N. Y. 648; *Mayor, etc., of Birmingham v. McCary*, 84 Ala. 469.

But, where the facts are undisputed and but one reasonable inference can be drawn from them, the question is generally one of law for the court. *Cooley on Torts* 670, 671; *Indianapolis v. Cook*, 99 Ind. 10; 7 Am. & Eng. Corp. Cas. 81; *Conner v. Citizens' R. Co.*, 105 Ind. 62; 26 Am. & Eng. R. Cas. 210; 55 Am. Rep. 177; *Montgomery v. Wright*, 72 Ala. 411; 5 Am. & Eng. Corp. Cas.

4. Pleading and Practice.—In some of the States, notice is required by statute to be given to the city or to some designated officer before an action for damages can be maintained. Such a statute is constitutional,¹ and compliance with its provisions is usually regarded as a condition precedent to the right to maintain an action.² It is not necessary that the notice should minutely describe the place where the injury was received,³ but the

642; *Stackus v. New York Cent., etc., R. Co.*, 79 N. Y. 464; 2 *Thomp. Neg.* 1236, 1237; *Hesser v. Grafton*, 33 W. Va. 548; 31 *Am. & Eng. Corp. Cas.* 117.

Effect of Violation of Sunday Laws.—See *Illinois Cent. R. Co. v. Dick* (Ky. 1891), 15 S. W. Rep. 664; *Buck v. Bideford*, 82 Me. 433; 31 *Am. & Eng. Corp. Cas.* 42; *Platz v. Cohoes*, 89 N. Y. 219; 42 *Am. Rep.* 286; *Piollet v. Simmers*, 106 Pa. St. 95; 51 *Am. Rep.* 496; *White v. Lang*, 128 Mass. 598; 35 *Am. Rep.* 402; *Cooley on Torts* 157. And compare *Johnson v. Irasburgh*, 47 Vt. 28; 19 *Am. Rep.* 111; *Bosworth v. Swansey*, 10 Met. (Mass.) 363; 43 *Am. Dec.* 441; *Hinckley v. Penobscot*, 42 Me. 89. See also note to *Ormsby v. Louisville*, 79 Ky. 197; 4 *Am. & Eng. Corp. Cas.* 348.

Effect of Violation of Ordinances.—See *Steele v. Burkhart*, 104 Mass. 59; 6 *Am. Rep.* 191; *McVoy v. Knoxville*, 85 Tenn. 19; *Pennsylvania Co. v. Stegemeer*, 118 Ind. 305; *Hall v. Ripley*, 119 Mass. 135; *Morse v. Sweeney*, 15 Ill. App. 486. And compare *Jetter v. New York, etc., R. Co.*, 2 Abb. App. Dec. (N. Y.) 458; *Atlanta, etc., R. Co. v. Wyly*, 65 Ga. 120; *Fernbach v. Waterloo* (Iowa, 1887), 34 N. W. Rep. 610.

See NEGLIGENCE, vol. 16, p. 420; CONTRIBUTORY NEGLIGENCE, vol. 4, p. 50.

Effect of Knowledge by Plaintiff of Defect.—*Byerly v. Anamosa*, 79 Iowa 204; *Dundas v. Lansing*, 75 Mich. 499; 25 *Am. & Eng. Corp. Cas.* 239; *Maultby v. Leavenworth*, 28 Kan. 745; *Columbus v. Strassner*, 124 Ind. 482; *Gosport v. Evans*, 112 Ind. 133; 18 *Am. & Eng. Corp. Cas.* 275; *Huntington v. Breen*, 77 Ind. 29; *Richmond v. Mulholland*, 116 Ind. 173; *Estelle v. Lake* {Crystal, 27 Minn. 243; *Shook v. Cohoes*, 108 N. Y. 648; *Cantwell v. Appleton*, 71 Wis. 463; *Orleans v. Perry*, 24 Neb. 831; *Lyman v. Amherst*, 107 Mass. 339; *Argus v. Sturgis* (Mich. 1891), 48 N. W. Rep. 1085. Compare *Bruker v. Covington*, 69 Ind. 33; 35 *Am. Rep.* 202; *Sandwich v. Dolan*, 133 Ill. 177; 31 *Am. & Eng. Corp. Cas.* 122; *Forker v. Sandy Lake*, 130 Pa. St. 123; 31 *Am. & Eng. Corp. Cas.* 61;

Gaughan v. Philadelphia, 119 Pa. St. 503; *Parkhill v. Brighton*, 61 Iowa 103; *Richmond v. Courtney*, 32 Gratt. (Va.) 792.

Effect of Blindness.—*Davenport v. Ruckman*, 10 Bosw. (N. Y.) 20; *Salem v. Goller*, 76 Ind. 291; *Sleeper v. Sandoun*, 52 N. H. 244; *Austin v. Ritz* (Tex. 1888), 9 S. W. Rep. 884.

Driving a blind horse is not necessarily contributory negligence. *Brackenridge v. Fitchburg*, 145 Mass. 160; 18 *Am. & Eng. Corp. Cas.* 287.

Effect of Intoxication.—*Monk v. New Utrecht*, 104 N. Y. 552; *Fitzgerald v. Weston*, 52 Wis. 354; *McCracken v. Markesan* (Wis.), 45 N. W. Rep. 323; *Alger v. Lowell*, 3 Allen (Mass.) 402; *Hubbard v. Mason City*, 60 Iowa 400; *Cassidy v. Stockbridge*, 21 Vt. 391; *Tompkins v. Oswego* (Supreme Ct.), 15 N. Y. Supp. 371.

1. *Reining v. Buffalo*, 102 N. Y. 308; *Nichols v. Minneapolis*, 30 Minn. 545; 2 *Am. & Eng. Corp. Cas.* 562.

2. *Reining v. Buffalo*, 102 N. Y. 308; *Minich v. Troy*, 83 N. Y. 516; *Benware v. Pine Valley*, 53 Wis. 527; *Jones v. Minneapolis*, 31 Minn. 230; *Marshall Co. v. Jackson Co.*, 36 Ala. 613; *Gay v. Cambridge*, 128 Mass. 387. See also *Ray v. St. Paul*, 44 Minn. 340.

An action against a town for personal injuries caused by a defect in a highway, since *Massachusetts St.*, 1877, ch. 234, is not prematurely begun, although brought within thirty days after the injury, and notice thereof to the town. *Harris v. Newbury*, 128 Mass. 321.

Where a traveler injured from a defect in a highway has lost his right to recover, by his failure to give notice within the statutory time, a vote of the town to pay him is without consideration, and no action can be predicated upon it. *Gregg v. Weathersfield*, 55 Vt. 385.

3. *Cloughessey v. Waterbury*, 51 Conn. 405; 7 *Am. & Eng. Corp. Cas.* 65; 50 *Am. Rep.* 38; *McCabe v. Cambridge*, 134 Mass. 484; *Sargent v. Lynn*, 138 Mass. 599; *Pendergast v. Clinton*, 147 Mass. 402; *Liffin v. Beverly*, 145

description should be sufficient to identify the locality,¹ and the notice should show an intention to claim damages for the injury.² In *Maine*, the notice must be in writing, and its sufficiency is held to be a matter of law for the court to decide.³ It is generally sufficient if the provisions of the statute as to the service of the notice are substantially complied with, so that it reaches the proper officer in due time, although it may first pass through the hands of other officers.⁴

The basis of the action is negligence, or, in other words, a breach of legal duty owing to the plaintiff at the time and place of the injury, and he must state facts in his complaint sufficient to show such duty and the negligent breach thereof, or he cannot recover;⁵ and in some jurisdictions he must also show that he himself was free from contributory negligence.⁶

Mass. 549; *Wall v. Highland*, 72 Wis. 435; *Fassett v. Roxbury*, 55 Vt. 552.

1. *Rogers v. Shirley*, 74 Me. 144; *Shaw v. Waterbury*, 46 Conn. 263.

An instruction that, in giving notice of an injury received on a highway, it was not necessary to point out the place, with all possible, but with reasonable, particularity, which the court described, has been held erroneous, as omitting the fact of the duty and right of giving and receiving notice of the place, by which the party sought to be held liable might readily find it. *Holcomb v. Danby*, 51 Vt. 428.

2. *Kenady v. Lawrence*, 128 Mass. 318.

Although a party, having sustained a personal injury, for which he claims that a city is liable, presents his bill therefor to the city council for allowance, which is by such council disallowed, he may thereafter sue for and recover all the damages sustained, including costs of the action, though such damages exceed the amount claimed in the bill. *Wyandotte v. White*, 13 Kan. 191.

3. *Chapman v. Nobleboro*, 76 Me. 427; 5 Am. & Eng. Corp. Cas. 636.

A notice to the selectmen of a town by the husband of the person injured by a defect in a road, which does not purport to come from the plaintiff, or set forth her claim for damages, or specify the nature of the defect, is not sufficient under *Maine Acts*, 1876, ch. 97. *Hubbard v. Fayette*, 70 Me. 121.

A notice reading: "You are hereby notified that . . . my buggy was damaged by running against a log in the highway . . . I shall claim damage for the said injury. The reaches and rocker and iron were broken, three gripes broken, wheels injured,

and other damage to wagon done; also, an injury was done to my knee—" held, insufficient as a notice of injuries to the plaintiff's person. *Nourse v. Victory*, 51 Vt. 275. But see *Bradbury v. Benton*, 69 Me. 194.

See further as to sufficiency of notice, *McDonald v. Ashland*, 78 Wis. 251; *Paddock v. Syracuse* (Supreme Ct.), 15 N. Y. Supp. 387.

4. *Wormwood v. Waltham*, 144 Mass. 184; *McCabe v. Cambridge*, 134 Mass. 484; *McDonald v. Troy*, 59 Hun (N. Y.) 618.

But a statement by a selectman and town agent, immediately after an accident caused by a defective highway, of willingness to do what was right about it, and a request to the injured party to make no expense about it, has been held not to constitute a waiver of the written notice required by *Connecticut Gen. St.*, tit. 16, ch. 7, part 1, § 10, to be given to one of the selectmen within sixty days. *Hoyle v. Putnam*, 46 Conn. 56.

5. *Murphy v. Brooklyn*, 118 N. Y. 575; *Freck v. Philadelphia*, etc., R. Co., 39 Md. 574; *Anderson v. East*, 117 Ind. 126; 10 Am. St. Rep. 35. See also *Biggs v. Huntington*, 32 W. Va. 55; 25 Am. & Eng. Corp. Cas. 63; *Armstrong v. Ackley*, 71 Iowa 76; *Young v. District of Columbia*, 3 MacArthur (D. C.) 137.

6. *Elliott on Roads and Streets* 643.

In many of the states the burden of proving want of contributory negligence is upon the plaintiff, but in a majority of the states, perhaps, the rule is the other way. The authorities are collected and cited by states in the note to *Toledo*, etc., Co. v. *Branagan*, 75 Ind. 490; 5 Am. & Eng. R. Cas. 634. See also *Fort Wayne*

The plaintiff has a right to prove all the relevant and material circumstances of the accident;¹ and, for the purpose of showing the existence of the defect, he may introduce evidence of the condition of the place where he was injured, where it remains unchanged, for some time both before and after the accident.² But evidence that other sidewalks or streets in the neighborhood were out of repair is generally inadmissible.³ Evidence is admissible to show that the place where the accident occurred was a highway, and, according to common reputation and tradition, had been such for many years.⁴ According to the weight of authority, evidence is also admissible to prove that other persons had received injuries at the same place from the same defect, in order to charge the municipality with notice,⁵ but not to

v. Coombs, 107 Ind. 75; 13 Am. & Eng. Corp. Cas. 469; 57 Am. Rep. 82; *Merrill v. North Yarmouth*, 13 Am. & Eng. Corp. Cas. 663, holding that the burden is on the plaintiff; and *Seymer v. Lake*, 66 Wis. 651; 15 Am. & Eng. Corp. Cas. 206; *Ford v. Umatilla Co.*, 15 Oregon 313; 20 Am. & Eng. Corp. Cas. 357; *Gordon v. Richmond*, 83 Va. 436; 18 Am. & Eng. Corp. Cas. 251, holding that the burden is on the defendant.

1. *Hallahan v. New York, etc., R. Co.*, 102 N. Y. 194; 26 Am. & Eng. R. Cas. 169; *Clayton v. Brooks*, 31 Ill. App. 62.

But it has been held that in an action for injuries caused by a defective street crossing, declarations made by a companion of plaintiff, on driving away from the scene of the accident, that he urged plaintiff not to attempt to drive over the crossing, but that plaintiff insisted on doing so, are not admissible as part of the *res gestæ*. *Austin v. Ritz* (Tex. 1888), 9 S. W. Rep. 884.

2. *Chicago v. Dalle*, 115 Ill. 386; *Berrenberg v. Boston*, 137 Mass. 231; *Indianapolis v. Scott*, 72 Ind. 196; *De Forest v. Utica*, 69 N. Y. 614; *Abilene v. Hendricks*, 36 Kan. 196; *Shippy v. Au Sable*, 85 Mich. 280; *Langworthy v. Green* (Mich. 1891), 50 N. W. Rep. 130. In the last case just cited, evidence of the condition of the way and nature of the obstruction four weeks after the accident was held admissible. But to render such evidence admissible it must be shown that the condition of the way remained the same. *Hoyt v. Des Moines*, 76 Iowa 430.

3. *Ruggles v. Nevada*, 63 Iowa 185; *Dundas v. Lansing*, 75 Mich. 499; 25 Am. & Eng. Corp. Cas. 239. See also

Schoonmaker v. Willbraham, 110 Mass. 134.

But there may be cases where defects in the same street or sidewalk may be shown when in close proximity to the one complained of. *O'Neil v. West Branch* (Mich. 1890), 45 N. W. Rep. 1023. See also *Campbell v. Kalamazoo*, 80 Mich. 655; *Cox v. Westchester Turnp. Co.*, 33 Barb. (N. Y.) 414; *Spearbracker v. Larrabee*, 64 Wis. 573; *Plattsmouth v. Mitchell*, 20 Neb. 228. And see *Wilson v. Granby*, 47 Conn. 59; 36 Am. Rep. 51.

4. *Hampson v. Taylor*, 15 R. I. 83. So, the fact that the street is within the city limits may be shown by the records of the council. *Huntington v. Mendenhall*, 73 Ind. 460.

Evidence that the witness had seen work done on the street after the accident, while not admissible to show negligence, may be received for the purpose of showing that the defect was one which the city was bound to repair, and as tending to show an acceptance of the highway as previously dedicated. *Brennan v. St. Louis* (Mo.), 2 S. W. Rep. 481.

In an action against a city for damages for injuries sustained in consequence of a defective cross-walk, evidence that it was on a common thoroughfare in the city, and was repaired by successive road supervisors, has been held sufficient to charge the city with its maintenance. *Sheridan v. Salem*, 14 Oregon 328.

5. *Delphi v. Lowery*, 74 Ind. 520; 39 Am. Rep. 98; *Goshen v. England*, 119 Ind. 368; *Darling v. Westmoreland*, 52 N. H. 401; 13 Am. Rep. 55; *Chicago v. Powers*, 42 Ill. 169; 89 Am. Dec. 422; *Quinlan v. Utica*, 74 N. Y. 603; *Masters v. Troy*, 50 Hun (N. Y.) 485; *Pomfrey v. Saratoga Springs*, 104

prove that the defect was of such a character as to necessarily render the city liable.¹ Evidence of repairs made after the injury was received is not admissible to show antecedent negligence.² For the purpose of proving actual notice, an entry in a book of the corporation containing information in regard to the condition of the street may be competent evidence,³ and so may the report of the street commissioner.⁴ Where the character or situation of the obstruction or defect is such that a witness cannot accurately or intelligently describe it to the jury, it would seem that he ought to be permitted to state whether or not it is dangerous or unsafe,⁵ but some of the courts have held such evidence incompetent.⁶ Where the condition of the weather or the

N. Y. 459; 20 Am. & Eng. Corp. Cas. 346; *Augusta v. Hafers*, 61 Ga. 48; 34 Am. Rep. 95; *District of Columbia v. Armes*, 107 U. S. 519; *Kent v. Lincoln*, 32 Vt. 591; *Lombar v. East Tawas* (Mich. 1891), 48 N. W. Rep. 947; *Smith v. Sherwood*, 62 Mich. 159; 15 Am. & Eng. Corp. Cas. 276. *Contra*, *Collins v. Dorchester*, 6 Cush. (Mass.) 396; *Blair v. Pelham*, 118 Mass. 420. See also *Gillrie v. Lockport*, 122 N. Y. 403. And compare *Matthews v. Cedar Rapids*, 80 Iowa 459; 31 Am. & Eng. Corp. Cas. 126; *Moore v. Richmond*, 85 Va. 538; *O'Hagan v. Dillon*, 76 N. Y. 170.

So, in a suit against a city to recover for personal injuries caused at night by lumber piled in the street in the form of steps, evidence that a like accident had happened from a previous piling was held to be admissible, as importing the city's knowledge of the danger. *Moore v. Burlington*, 49 Iowa 136.

1. *Dubois v. Kingston*, 102 N. Y. 219; 12 Am. & Eng. Corp. Cas. 636; 55 Am. Rep. 804. See also *Mathews v. Cedar Rapids*, 80 Iowa 459; 31 Am. & Eng. Corp. Cas. 126; *Moore v. Richmond*, 85 Va. 538.

2. *Terre Haute, etc., R. Co. v. Clem*, 123 Ind. 15; 42 Am. & Eng. R. Cas. 229; *Morse v. Minneapolis, etc., R. Co.*, 30 Minn. 465; *Hodges v. Percival*, 132 Ill. 53; *Nalley v. Hartford Carpet Co.*, 51 Conn. 524; 50 Am. Rep. 47; *Ely v. St. Louis, etc., R. Co.*, 77 Mo. 34; 16 Am. & Eng. R. Cas. 342; *Dale v. Delaware, etc., R. Co.*, 73 N. Y. 468; *Sherman v. Oneonta*, 59 Hun (N. Y.) 294; *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1; *Baird v. Daly*, 68 N. Y. 547; 15 Am. Rep. 488; *Salters v. Delaware, etc., Canal Co.*, 3 Hun (N. Y.) 338; *Fulton Iron, etc., Works v. Kimball*, 52 Mich. 146; 2 Am. & Eng. Corp. Cas. 673; *Cramer v. Burlington*, 45 Iowa 627; *Kansas Pac. R. Co. v. Miller*, 2

Colo. 442. *Contra*, *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Westchester, etc., R. Co. v. McElwee*, 67 Pa. St. 311; *McKee v. Bidwell*, 74 Pa. St. 218; *Martin v. Towle*, 59 N. H. 31; *Galveston, etc., R. Co. v. Evansich*, 63 Tex. 54.

So, evidence that after plaintiff had fallen into a certain excavation, within the limits of a village, a person living near the excavation had placed a fence about it sufficient to protect the public, is inadmissible. *Corcoran v. Peekskill*, 108 N. Y. 151.

But there may be cases in which such evidence will be admissible for other purposes. *Elliot on Roads and Streets* 649, 650; *Lafayette v. Weaver*, 92 Ind. 477; *Sherman v. Oneonta*, 59 Hun (N. Y.) 294; *Mitchell v. Plattsburg*, 33 Mo. App. 555.

3. *Blake v. Lowell*, 143 Mass. 206.

4. *Bond v. Biddeford*, 75 Me. 538.

5. *Clark Civil Tp. v. Brookshire*, 114 Ind. 444; *Bennett v. Meehan*, 83 Ind. 566; 43 Am. Rep. 78; *Indianapolis v. Huffer*, 30 Ind. 235; *Alexander v. Mt. Sterling*, 71 Ill. 366; *Kelleher v. Keokuk*, 60 Iowa 473; *Clinton v. Howard*, 42 Conn. 294; *Laughlin v. Street R. Co.*, 62 Mich. 220; *Hartford Co. v. Wise*, 71 Md. 43; *Baltimore, etc., Turnpike Co. v. Cassell*, 66 Md. 419; 59 Am. Rep. 175 and note. See EXPERT AND OPINION EVIDENCE, vol. 7, pp. 492, 496, 511.

In a suit against a city for injuries sustained by tripping upon a loose board in a sidewalk built twelve years before, where the evidence tends to show that the sills were too rotten to hold the nails, testimony of experts as to the durability of the kind of lumber used is admissible. *McConnell v. Osage*, 80 Iowa 293.

6. *Parsons v. Lindsay*, 26 Kan. 426; *Benedict v. Fond du Lac*, 44 Wis. 495;

quantity of snow or rainfall is properly in question, the Weather Record of the United States Signal Service is competent evidence.¹

Compensatory damages alone are recoverable in an action against a municipal corporation for personal injuries.² The rules as to the measure of damages in such an action are, in the main at least, the same as those applicable generally in all actions to recover damages for personal injuries; and for this reason, it is sufficient to here refer to the article in which that subject is treated.³

5. Remedy Over.—A municipal corporation which has been compelled to pay damages for injuries sustained by reason of the wrongful acts of a third person rendering a street unsafe, has a remedy over against such third person, unless as to him the corporation is itself a wrongdoer.⁴ When such a remedy exists the

Montgomery v. Scott, 34 Wis. 338; *Brown v. Cape Girardeau, etc.*, Road Co., 89 Mo. 152; *Magee v. Troy*, 48 Hun (N. Y.) 383; *King v. Missouri, etc.*, R. Co., 98 Mo. 235; *Kolb v. Sandwich, etc.*, Co., 36 Ill. App. 419; *Chicago v. McGiven*, 78 Ill. 347; 2 *Thomp. Neg.* 799; *Lawson's Exp. Ev.* 95, 508.

It is error to permit a witness to give his opinion that a sidewalk is dangerous; but where, immediately before, he had described it at length, and from such description no other inference could have reasonably been drawn than that it was dangerous, such evidence will be presumed harmless. *Topeka v. Sherwood*, 39 Kan. 690.

1. *Evanston v. Gunn*, 99 U. S. 660.

2. *Elliott on Roads and Streets* 652; *Chicago v. Langlass*, 52 Ill. 256; 4 *Am. Rep.* 603; *Wilson v. Wheeling*, 19 W. Va. 323; 42 *Am. Rep.* 780; *McGary v. Lafayette*, 12 Rob. (La.) 674; 43 *Am. Dec.* 239.

3. *DAMAGES*, vol. 5, pp. 40-61.

4. *Woods v. Groton*, 111 Mass. 357; *Milford v. Holbrook*, 9 Allen (Mass.) 17; 85 *Am. Dec.* 735; *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475; *Rochester v. Montgomery*, 72 N. Y. 67; *Catterlin v. Frankfort*, 79 Ind. 547; 41 *Am. Rep.* 627; *Elkhart v. Wickwire*, 87 Ind. 77; *McNaughton v. Elkhart*, 85 Ind. 384; *Brookville v. Arthurs*, 130 Pa. St. 501; 31 *Am. & Eng. Corp. Cas.* 143. *Compare Keokuk v. Independent Dist. of Keokuk*, 53 Iowa 352; 36 *Am. Rep.* 226; *Jansen v. Atchison*, 16 Kan. 358. And see notes in 25 *Am. & Eng. Corp. Cas.* 224, and 31 *Am. & Eng. Corp. Cas.* 143, 147.

In *Wisconsin* a city charter which

provided that in case of injuries from defects in any highway, for which the city would be liable, if such defect was produced by the default or negligence of any person, such person should be primarily liable; and legal remedies be exhausted against him before the city should be liable, was held valid, but not applicable to the negligence of persons making public improvements under contract with the city. Another provision in the same charter which exempted the city from liability for injuries incurred where work was being done on streets or sidewalks, in consequence of defects arising from the work, and declared the contractors liable for such injuries, was held invalid, as granting to the city a special immunity. *Hincks v. Milwaukee*, 46 Wis. 559; 32 *Am. Rep.* 735. *Compare Amos v. Fond du Lac*, 46 Wis. 695. And see *Raymond v. Sheboygan*, 70 Wis. 318; *McFarlane v. Milwaukee*, 51 Wis. 691.

If, because of the negligence of a lot owner in permitting water to leak from a defective pipe to the sidewalk, the city is compelled to pay a judgment, the town may sue the lot owner. *Mayor, etc., of N. Y. v. Dimick*, 20 Abb. N. Cas. (N. Y.) 15.

A city or town may maintain an action of debt upon the promise of a railroad company to repay the damages recovered against the former by a person injured through a defective railroad crossing. *Portland v. Atlantic, etc., R. Co.*, 66 Me. 485.

Under a contract with a municipal corporation, by which the contracting party undertakes to keep a street in repair, the damages recoverable on a

corporation may notify such wrongdoer of the pendency of the action against it and request him to come in and defend; he will then be concluded by the judgment as to the existence of the defect, the liability of the city, and the amount of damages;¹ but he will not be estopped from showing that he was himself free from fault.² The omission to give such notice will not prejudice the right of the city to maintain an action against the wrongdoer, but it leaves the corporation with the burden of again litigating such matters and establishing the actionable facts.³ The notice need not be in writing, unless the statute so requires.⁴

"If, after notice and request to defend, the person who wrongfully created the obstruction which caused the injury fails to make any defense to the action against the city, and the city defends it for him, it may, if guilty of no misfeasance itself, recover from him not only the amount of the judgment recovered from it, but also all reasonable and necessary expenses incurred in defending the action, including reasonable attorney fees."⁵

IX. OBSTRUCTIONS AND ENCROACHMENTS.⁶—"The public are entitled, not only to a free passage along the highway, but to a

breach are not restricted to the expense of repairing; the corporation may recover, in addition thereto, an amount for which it has been adjudged liable to a third person, for injuries sustained by him, by reason of the non-repair. *Brooklyn v. Brooklyn City R. Co.*, 8 Abb. Pr. N. S. (N. Y.) 356.

The mere failure of an abutter to clean snow from the sidewalk as required by a city ordinance does not render him liable to one who is injured by falling thereon, nor can the city recover from him damages which it has been compelled to pay the injured person. *St. Louis v. Connecticut Mut. L. Ins. Co.* (Mo. 1891), 17 S. W. Rep. 637; 2 Shearm. & Redf. Neg., § 343. See also to same effect *Kirby v. Boylston Market Assoc.*, 14 Gray (Mass.) 249; 74 Am. Dec. 682; *Keeney v. Sprague*, 11 R. I. 456; 23 Am. Rep. 502; *Moore v. Gadsden*, 93 N. Y. 12; *Flynn v. Canton Co.*, 40 Md. 312; 17 Am. Rep. 603; *Hartford v. Talcott*, 48 Conn. 526; 40 Am. Rep. 189.

1. *Boston v. Worthington*, 10 Gray (Mass.) 496; *Portland v. Richardson*, 54 Me. 46; 89 Am. Dec. 720; *Seneca Falls v. Zalinski*, 8 Hun (N. Y.) 571; *Mayor, etc., of N. Y. v. Troy, etc., R. Co.*, 49 N. Y. 657; *Rochester v. Montgomery*, 72 N. Y. 65. See also *Morgan v. Muldoon*, 82 Ind. 347; *Bever v. North*, 107 Ind. 544.

Where the negligent obstruction of a

street by a railroad company causes an accident for which judgment has been recovered against the city, the city, unless it concurred in the wrong, has its remedy against the company. And, in the suit over, the record of the suit against the city is admissible in evidence, if the company had notice of its tendency and was requested to defend. *Western, etc., R. Co. v. Atlanta*, 74 Ga. 774; 19 Am. & Eng. R. Cas. 233.

2. *Robbins v. Chicago*, 2 Black (U. S.) 418; 4 Wall. (U. S.) 657.

3. *Port Jarvis v. First Nat. Bank*, 96 N. Y. 550; 6 Am. & Eng. Corp. Cas. 233; *Binsse v. Wood*, 37 N. Y. 530; *Aberdeen v. Blackmar*, 6 Hill (N. Y.) 324.

4. *Robbins v. Chicago*, 4 Wall. (U. S.) 657; *Barney v. Dewy*, 13 Johns. (N. Y.) 225; 7 Am. Dec. 372; *Beers v. Pinney*, 12 Wend. (N. Y.) 309; *Port Jarvis v. First Nat. Bank*, 96 N. Y. 550; 6 Am. & Eng. Corp. Cas. 233; *Morgan v. Muldoon*, 82 Ind. 347.

5. *Elliott on Roads and Streets* 657, citing *Westfield v. Mayo*, 122 Mass. 100; 23 Am. Rep. 292; *Veazie v. Penobscot R. Co.*, 49 Me. 119. See also *Chesapeake, etc., Canal Co. v. Allegany Co.*, 57 Md. 201; 40 Am. Rep. 430; *Baxendale v. London, etc., R. Co.*, L. R., 10 Ex. 35, *contra*, *Littleton v. Richardson*, 32 N. H. 59.

6. See also *NUISANCES*, vol. 16, p. 922.

free passage along any portion of it not in the actual use of some other traveler,"¹ and "any unauthorized obstruction which unnecessarily impedes or incommodes the lawful use of a highway is a public nuisance at common law."² So, it has been held, any permanent structure or purpresture which materially encroaches upon a street and impedes travel, is a nuisance, *per se*, notwithstanding space is left for passage by the public.³

An obstruction may be a nuisance, although it is not of a permanent character,⁴ and although it is not upon the surface of the

1. 1 Hawk. P. C., ch. 32, § 11; Johnson *v.* Whitefield, 18 Me. 286; 36 Am. Dec. 721; Com. *v.* King, 13 Met. (Mass.) 115; Hart *v.* Mayor, etc., of Albany, 9 Wend. (N. Y.) 571; 24 Am. Dec. 165; Harrower *v.* Ritson, 37 Barb. (N. Y.) 301; State *v.* Berdetta, 73 Ind. 185, 193; 38 Am. Rep. 117.

2. Elliott on Roads and Streets 477, citing Yates *v.* Warrenton, 84 Va. 337; 10 Am. St. Rep. 860; Cohen *v.* Mayor, etc., of N. Y., 113 N. Y. 532; 25 Am. & Eng. Corp. Cas. 33; 10 Am. St. Rep. 506; Callanan *v.* Gilman, 107 N. Y. 360; 23 Am. & Eng. Corp. Cas. 59; 1 Am. St. Rep. 831, and note; Clifford *v.* Dam, 81 N. Y. 52; People *v.* Cunningham, 1 Den. (N. Y.) 524; 43 Am. Dec. 709; State *v.* Merrit, 35 Conn. 314; State *v.* Mayor, etc., of Mobile, 5 Port. (Ala.) 279; 30 Am. Dec. 564; Wood on Nuisances, § 248; Laing *v.* Mayor, etc., of Americus, 86 Ga. 756; 33 Am. & Eng. Corp. Cas. 480, 481.

3. State *v.* Berdetta, 73 Ind. 185; 38 Am. Rep. 117; Pettis *v.* Johnson, 56 Ind. 139; Com. *v.* Wentworth, 1 Bright. N. P. (Pa.) 318; Com. *v.* Blaisdell, 107 Mass. 234; People *v.* Vanderbilt, 28 N. Y. 396; 84 Am. Dec. 351; State *v.* Woodward, 23 Vt. 92; Harrow *v.* State, 1 Greene (Iowa) 439; Marine Ins. Co. *v.* St. Louis, etc., R. Co., 41 Fed. Rep. 650; 43 Am. & Eng. R. Cas. 79. But compare People *v.* Carpenter, 1 Mich. 273; Barling *v.* West, 29 Wis. 307; 9 Am. Rep. 576; Dubois *v.* Kingston, 102 N. Y. 219; 12 Am. & Eng. Corp. Cas. 630; 55 Am. Rep. 804; Smith *v.* Simmons, 103 Pa. St. 32; 49 Am. Rep. 113; Harrison Co. Ct. *v.* Wall (Ky. 1889), 12 S. W. Rep. 130. And see NUISANCES, vol. 16, p. 936.

A permanent occupation of a street in the city of Washington by a booth or building is prohibited by the laws and ordinances; but not a mere temporary obstruction by goods in front of a store. District of Columbia *v.* Monroe, 4 MacArthur (D. C.) 348.

In *Kansas*, it is held that a post maintained at the corner of city streets to protect a shade tree is not necessarily a negligent obstruction, although partly concealed by grass and weeds. Wellington *v.* Gregson, 31 Kan. 99; 6 Am. & Eng. Corp. Cas. 215; 47 Am. Rep. 482.

4. Cohen *v.* Mayor, etc., of N. Y., 113 N. Y. 532; 25 Am. & Eng. Corp. Cas. 33; 10 Am. St. Rep. 506; Osage City *v.* Larkin, 40 Kan. 206; 10 Am. St. Rep. 186; Jochem *v.* Robinson, 66 Wis. 638; 57 Am. Rep. 298; Rex *v.* Russell, 6 East 427; Fritz *v.* Hobson, 42 L. T. 225; Palmer *v.* Silverthorn, 32 Pa. St. 65; Marine Ins. Co. *v.* St. Louis, etc., R. Co., 41 Fed. Rep. 650; 43 Am. & Eng. R. Cas. 79; Com. *v.* Passmore, 1 S. & R. (Pa.) 219; Lavery *v.* Hannigan, 52 N. Y. Super. Ct. 463; Rex *v.* Cross, 3 Campb. 226.

A lot owner has no right to erect hay scales in the street in front of his premises. Emerson *v.* Babcock, 66 Iowa 257; 55 Am. Rep. 273. Teamsters have no right to block the way and impede travel by remaining in one place an unreasonable and unnecessary time. Turner *v.* Holtzman, 54 Md. 148; 39 Am. Rep. 361; Branahan *v.* Hotel Co., 39 Ohio St. 333; 2 Am. & Eng. Corp. Cas. 1; 48 Am. Rep. 457; State *v.* Edens, 85 N. Car. 522; Rex *v.* Cross, 3 Campb. 226. And a railroad company has no right to obstruct a street by letting its cars unnecessarily stand across the way an unreasonable time. Rauch *v.* Lloyd, 31 Pa. St. 358; 72 Am. Dec. 747; Murray *v.* South Carolina R. Co., 10 Rich. (S. Car.) 227; 70 Am. Dec. 219; Brownell *v.* Troy, etc., R. Co., 55 Vt. 218; 15 Am. & Eng. R. Cas. 498; Gahagan *v.* Boston, etc., R. Co., 1 Allen (Mass.) 187; 79 Am. Dec. 724; Vars *v.* Grand Trunk, etc., R. Co., 23 U. C. C. P. 143.

A sleigh standing for ten or fifteen minutes in a village is not an obstruc-

street.¹ And, as a general rule, any unauthorized interference with a highway, such as putting a gate or fence across it² or changing its grade or course, is a nuisance.³

That which the State has legally authorized cannot be a public nuisance;⁴ and many obstructions which would otherwise constitute nuisances may be legalized by legislative enactment;⁵ but such enactments do not affect the claims of private persons for damages on account of special injuries not suffered by the general public.⁶

This power to authorize obstructions may be delegated to municipal corporations,⁷ but the nature and extent of their control has been considered elsewhere in this article.⁸

tion for which the town is liable. *Sikes v. Manchester*, 59 Iowa 65.

1. *Bybee v. State*, 94 Ind. 443; 6 Am. & Eng. Corp. Cas. 149; 48 Am. Rep. 175 (covered way above street); *Reimers' Appeal*, 100 Pa. St. 182; 45 Am. Rep. 373 (bay window case); *Grove v. Fort Wayne*, 45 Ind. 429; 15 Am. Rep. 262 (cornice); *Salisbury v. Herchenroder*, 106 Mass. 458; 8 Am. Rep. 354; *Jones v. Housatonic R. Co.*, 107 Mass. 261.

2. *Greasley v. Codling*, 2 Bing. 263; 9 E. C. L. 407; *Smith v. State*, 23 N. J. L. 712; *Adams v. Beach*, 6 Hill (N. Y.) 271; *Bateman v. Burge*, 6 C. & P. 391; 25 E. C. L. 454; *Kelley v. Com.*, 11 S. & R. (Pa.) 345; *Gregory v. Com.*, 2 Dana (Ky.) 417.

3. *Hunt v. Rich*, 38 Me. 195; *Bateman v. Burge*, 6 C. & P. 391; 25 E. C. L. 454; *Dygert v. Schenck*, 23 Wend. (N. Y.) 445; 35 Am. Dec. 575; *Venard v. Cross*, 8 Kan. 248; *West Bend v. Mann*, 59 Wis. 69; *Burton Tp. v. Tuttle*, 30 Ohio St. 62; *Irvine v. Wood*, 51 N. Y. 224; 10 Am. Rep. 603; *Congreve v. Morgan*, 18 N. Y. 84; 72 Am. Dec. 495; *Galvin v. Mayor, etc., of N. Y.*, 112 N. Y. 223; *Severin v. Eddy*, 52 Ill. 189; *Temperance Hall Assoc. v. Giles*, 33 N. J. L. 260; *Weathered v. Bray*, 7 Ind. 706.

4. *Mt. Vernon v. Voegler*, 103 Ind. 327; *Cushing v. Boston*, 128 Mass. 330; 35 Am. Rep. 383; *Miller v. New York*, 109 U. S. 385; *Perry v. New Orleans, etc., R. Co.*, 55 Ala. 413; 28 Am. Rep. 740; *Com. v. Capp*, 48 Pa. St. 53; *Cooley on Torts* 615.

5. *Danville, etc., R. Co. v. Com.*, 73 Pa. St. 29; *Com. v. Old Colony, etc., R. Co.*, 14 Gray (Mass.) 93; *State v. Louisville, etc., R. Co.*, 86 Ind. 116; 10 Am. & Eng. R. Cas. 286; *Pittsburg, etc., R. Co. v. Brown*, 67 Ind. 45;

Randle v. Pacific R. Co., 65 Mo. 325; *South Carolina, etc., R. Co. v. Steiner*, 44 Ga. 546; *Cushing v. Boston*, 122 Mass. 173; 128 Mass. 330; 35 Am. Rep. 383; *Quincy v. Bull*, 106 Ill. 337; 4 Am. & Eng. Corp. Cas. 554.

6. *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317; 11 Am. & Eng. R. Cas. 15; *Sullivan v. Royer*, 72 Cal. 248; 1 Am. St. Rep. 51; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316; 56 Am. Rep. 5.

7. *Northern Transp. Co. v. Chicago*, 99 U. S. 635; *Clarke v. Blackmar*, 47 N. Y. 150; *Brown v. Duplessis*, 14 La. Ann. 854; *Mercer v. Pittsburgh, etc., R. Co.*, 36 Pa. St. 99.

But it has no power to legalize a nuisance unless it is given by the legislature. *Pettis v. Johnson*, 56 Ind. 139; *People v. Vanderbilt*, 26 N. Y. 287; 84 Am. Dec. 351; *Columbus v. Jaques*, 30 Ga. 506; *Edmondson v. Moberley*, 98 Mo. 523; 28 Am. & Eng. Corp. Cas. 345; *Hartford Co. v. Wise*, 71 Md. 43; *Morrison v. Hinkson*, 87 Ill. 587; *State v. Dover*, 46 N. H. 452; *Hutchinson v. Trenton*, 39 N. J. Eq. 569; 8 Am. & Eng. Corp. Cas. 345.

8. See *infra*, this title, *Municipal Control*; MUNICIPAL CORPORATIONS, vol. 15, pp. 1166-1186.

A city may direct the removal of obstructions in its highways which prevent free access to river fords. *Compton v. Waco Bridge Co.*, 62 Tex. 715; 8 Am. & Eng. Corp. Cas. 388.

A license to a railroad company to use certain streets so far as the company may require in crossing them, in the construction of its track, switches, turn-tables, etc., but that such occupation shall be with as little inconvenience to the public as possible, does not preclude the passage of an ordinance by the city prohibiting the ob-

struction of such streets. And a municipal corporation is not estopped from bringing an action against a railroad company for the violation of an ordinance relative to the obstruction of streets by the fact that a committee of the city council had agreed that the defendant should have the use of the obstructed street for its yard; and that a deed of land in exchange for such street was given to the city attorney, who had no power to accept it in behalf of the city, and which was never presented to the city council. *St. Louis, etc., R. Co. v. Belleville*, 122 Ill. 376; 32 Am. & Eng. R. Cas. 278.

Under a charter which gives to the aldermen of the city ample power to remove, in a summary manner, any nuisance, obstruction, or encroachments on the streets of the city, permanent and valuable improvements, made in good faith, and where the right is doubtful, are not subject to this power; but it is otherwise where a man maintains his fence intentionally and willfully, after he knows that it is an encroachment. *Childs v. Nelson*, 69 Wis. 125.

An inclosed porch, projecting less than nine feet into a street, has been held to fall within the terms "portico, steps, or other ornamental structure," the erection of which was permissible under a city ordinance. *Garrett v. Janes*, 65 Md. 260; 13 Am. & Eng. Corp. Cas. 124.

Where the common council of a city were directed by law to prevent "the construction of any encroachment upon or obstructions in the bed" of a certain stream, within the limits of the city—held, that it was the intention of the legislature to enable the city to prohibit absolutely the erection of any encroachment or obstruction whatever in the bed of the stream, regardless altogether of the question whether such encroachments might or might not retard the flow of the water through the arches of a bridge below. *Rochester v. Osborn*, 5 Lans. (N. Y.) 37.

The charter of Jersey City gives the board of aldermen ample authority, not only to remove obstructions from their streets, but, as far as practicable, to guard against and prevent whatever obstructions may materially interfere with the free use of the street by the public. *State v. Mayor, etc., of Jersey City*, 37 N. J. L. 348.

The *Pennsylvania* act, 1855, p. 265,

requires that all new buildings fronting on a court of less width than twenty feet shall recede so that the court shall be of that width. *Held*, to be constitutional, but the owner is entitled to compensation. *In re Perry's Court*, 10 Phila. (Pa.) 27.

A city has power to abate, as a nuisance, the cornice of a building which projects over a sidewalk, and which is being constructed in such a manner as to be dangerous to persons using the sidewalk. *Grove v. Fort Wayne*, 45 Ind. 429. See also *Weed v. Greenwich Borough*, 45 Conn. 170.

The mayor and the common council of the city of Newark, being charged with the duty of keeping the streets of the city in a condition fit for safe and convenient use, are the proper persons to file a bill to prevent either the obstruction or destruction of a street. *Newark v. Delaware, etc., R. Co.*, 42 N. J. Eq. 196.

A municipal corporation cannot, however, give a valid permission to any one to occupy the streets or sidewalks with continuing erections, or other obstructions, without express power conferred by statute. *Ely v. Campbell*, 59 How. Pr. (N. Y.) 333; *Trenor v. Jackson*, 15 Abb. Pr. N. S. (N. Y.) 115; *Mayor, etc., of N. Y. v. Heft*, 13 Daly (N. Y.) 301.

Under the act incorporating the city of Columbus, as construed by this court, the fee in the streets is in the state, and the use in the public; and the municipal authorities have no power to authorize any obstructions to be placed in the streets, legislative action being necessary for that purpose. The act of 1857 authorized the connection of the Muscogee Railroad with the Opelika Branch Railroad and the Mobile & Girard Railroad at Columbus, by extending their roads through the city commons and streets, with such side tracks, turnouts, and sheds as might be necessary for the convenience of freights and passengers, provided they first obtained the consent of the people of the city upon such terms as might be agreed on and should be satisfactory to them. But where the municipal authorities, by resolution, proposed to the people to vote "connection" or "no connection," only submitting the question of allowing a connection by a single track, and the vote was in favor of "connection," this action, without more, did not authorize the laying of side tracks in

"There can be no rightful private possession of a public street,"¹ and no length of time will render a public nuisance, such as the unlawful obstruction of a street, legal, or give the person who maintains it any right to continue it to the detriment of the public.² Upon principle, it is therefore correctly held in many cases that, as a municipal corporation acts in its public capacity as a governmental agency in the control of its streets, the Statute of Limitations will not run against it so as to give a private individual the right to a street by adverse possession.³

the street. Nor could the mayor and council, without further authority, grant such power. *Kavanagh v. Mobile, etc., R. Co.*, 78 Ga. 271.

In *Michigan* it has been held that a city charter which gives authority to prevent the obstruction or incumbering of streets or alleys, does not thereby confer upon the common council authority to require the removal of fences so built as to encroach upon a street. *Stockton v. Freeman*, 1 Mich. N. P. 232. But see *Kennedy v. Phelps*, 10 La. Ann. 227; *Baker v. Boston*, 12 Pick. (Mass.) 184; 22 Am. Dec. 421; *Hart v. Mayor, etc., of Albany*, 9 Wend. (N. Y.) 571.

One who places an obstruction in a city street cannot demand that it shall be removed at the city's expense, though the city has knowledge thereof, nor escape liability to indemnify the city for damages, which it is obliged to pay in consequence thereof. *Sioux City v. Weare*, 59 Iowa 95.

1. *Sims v. Frankfort*, 79 Ind. 451.

2. *People v. Cunningham*, 1 Den. (N. Y.) 524; 43 Am. Dec. 709, and note; *Rung v. Shoneberger*, 2 Watts (Pa.) 23; 26 Am. Dec. 95; *Rhodes v. Whitehead*, 27 Tex. 304; 84 Am. Dec. 631; *State v. Phipps*, 4 Ind. 515; *Rex v. Cross*, 3 Campb. 227; *Weld v. Hornby*, 7 East 199; *Reg. v. Brewster*, 8 U. C. C. P. 208; *Cross v. Mayor, etc., of Morristown*, 18 N. J. Eq. 305; *Reed v. Mayor of Birmingham (Ala.)*, 33 Am. & Eng. Corp. Cas. 477.

3. **Statute of Limitations.**—There is a sharp conflict among the authorities upon this question, but the rule stated in the text is supported by the decisions of the highest courts in *Alabama, California, Indiana, Louisiana, Mississippi, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, Tennessee* and *Virginia*. *Reed v. Mayor, etc., of Birmingham (Ala.)*, 33 Am. & Eng. Corp. Cas. 469; *Visalia v. Jacob*, 65 Cal. 434; 6 Am. & Eng.

Corp. Cas. 115; 52 Am. Dec. 303; *People v. Pope*, 53 Cal. 437; *Sims v. Frankfort*, 79 Ind. 446; *Mayor, etc., v. Magnon*, 4 Martin (La.) 1; *Vicksburgh v. Marshall*, 59 Miss. 563; *Cross v. Mayor of Morristown*, 18 N. J. Eq. 305; *Mayor, etc., of Jersey City v. State*, 30 N. J. L. 521; *St. Vincent's Female Orphan Asylum v. Troy*, 76 N. Y. 108; 32 Am. Rep. 286; *Walker v. Caywood*, 31 N. Y. 51; *Driggs v. Phillips*, 103 N. Y. 77; *Moose v. Carson*, 104 N. Car. 431; *Com. v. McDonald*, 16 S. & R. (Pa.) 401; *Com. v. Moorhead*, 118 Pa. St. 344; 19 Am. & Eng. Corp. Cas. 621; 4 Am. St. Rep. 599; *Philadelphia v. Philadelphia, etc., R. Co.*, 58 Pa. St. 263; *Simmons v. Cornell*, 1 R. I. 519; *Memphis v. Lenore*, 6 Coldw. (Tenn.) 412; *Sims v. Chattanooga*, 2 Lea (Tenn.) 694; *Yates v. Warrenton*, 84 Va. 337; 10 Am. St. Rep. 860. See also *Simplot v. Chicago, etc., R. Co.*, 16 Fed. Rep. 350; *Grogan v. Hayward*, 4 Fed. Rep. 161; *Logan Co. v. Lincoln*, 81 Ill. 156; *Quincy v. Jones*, 76 Ill. 231; 20 Am. Rep. 251. But compare *Richmond v. Poe*, 24 Gratt. (Va.) 149; *Levasser v. Washburn*, 11 Gratt. (Va.) 572; *Armstrong v. Dalton*, 4 Dev. (N. Car.) 568. In *Texas* it was held that the Statute of Limitations would run against a city as to its streets. *Mayor, etc., of Galveston v. Menard*, 23 Tex. 349; but in a later case it is said that this rule ought not to be extended, and the court refused to apply it to a country road.

On the other hand, the courts of *Arkansas, Connecticut, Iowa, Kentucky, Michigan, Ohio, South Carolina, Vermont*, and *West Virginia* have expressly held that the Statute of Limitations will run against a city as to its streets. *Fort Smith v. McKibbin*, 41 Ark. 45; 5 Am. & Eng. Corp. Cas. 453; 48 Am. Rep. 19; *Litchfield v. Wilmot*, 2 Root (Conn.) 288; *Beardslee v. French*, 7 Conn. 125; 18 Am. Dec. 86; *Black v. O'Hara*, 54 Conn. 17;

The remedies which may be resorted to as against those who create or maintain nuisances and unlawful obstructions in a highway are fully treated elsewhere.¹

X. STREETS AS BOUNDARIES.²

XI. STREETS AS INCUMBRANCES.³

Pella v. Scholte, 24 Iowa 283; 95 Am. Dec. 729; *Burlington v. Burlington*, etc., R. Co., 41 Iowa 134; *Gregory v. Knight*, 50 Mich. 61; *Coleman v. Flint*, etc., R. Co., 64 Mich. 160; 29 Am. & Eng. R. Cas. 247; *Cincinnati v. Evans*, 5 Ohio St. 594; *Knight v. Heaton*, 22 Vt. 481; *Bowen v. Team*, 6 Rich. (S. Car.) 298; 60 Am. Dec. 127; *Wheeling v. Campbell*, 12 W. Va. 36. See also *Kelly v. Greenfield*, 2 Har. & McH. (Md.) 138; *St. Charles Co. v. Powell*, 22 Mo. 525; 66 Am. Dec. 637; *School Direction v. Goerges*, 50 Mo. 194.

In some of the states the doctrine of equitable estoppel has been applied in particular cases so as to bar the city. *Piatt v. Goodell*, 97 Ill. 84; *Chicago, etc., R. Co. v. Elgin*, 91 Ill. 251; *Hamilton v. State*, 106 Ind. 361; *Lane v. Kennedy*, 13 Ohio St. 49; *Simplot v. Chicago, etc., R. Co.*, 16 Fed. Rep. 350.

But it is held in a late case in *Iowa* that "where, by the continued use of a street after dedication, the public has established a right thereto, the mere fact that an obstruction, not inconsistent with the use of the street as the wants of the public demanded, had been allowed to remain therein for more than ten years, will not, in the absence of any fraud, operate as an estoppel upon the city, in an action for an abatement of the nuisance, even though the obstruction may have been originally built under claim of right." *Waterloo v. Union Mill Co.*, 72 Iowa 437; 19 Am. & Eng. Corp. Cas. 595.

1. See NUISANCES, vol. 16, pp. 961-994; HIGHWAYS, vol. 9, p. 413.

As to the civil liability of abutters and others for injuries caused to travelers by such nuisances or obstructions created or maintained by them, see also, *Jochem v. Robinson*, 66 Wis. 638; 57 Am. Rep. 298; *Ottumwa v. Parks*, 43 Iowa 119; *Garland v. Towne*, 55 N. H. 55; 20 Am. Rep. 164; *Sexton v. Zett*, 44 N. Y. 430; *Barry v. Terkildsen*, 72 Cal. 254; 1 Am. St. Rep. 55; *Congreve v. Morgan*, 18 N. Y. 847; 2 Am. Dec. 495; *Hotel Assoc. v. Walter*, 23 Neb. 280; *Landru v. Lund*, 38 Minn. 538; *Sisk v. Crump*, 112 Ind. 504; *Pastene v. Adams*,

49 Cal. 87; *Rector, etc., v. Buckhart*, 3 Hill (N. Y.) 193; *Nagle v. Brown*, 37 Ohio St. 7; *Osage City v. Larkin*, 40 Kan. 206; 10 Am. St. Rep. 186; *Cohen v. Mayor, etc., of New York*, 113 N. Y. 532; 25 Am. & Eng. Corp. Cas. 33; 10 Am. St. Rep. 506; *Smethurst v. Barton Square Church*, 148 Mass. 261; *McDermott v. Conley*, 58 Hun (N. Y.) 602; *Halsey v. Rapid Transit R. Co.*, 47 N. J. Eq. 380; 46 Am. & Eng. R. Cas. 76; 2 Shearm. & Redf. on Neg., § 362.

2. See BOUNDARIES, vol. 2, p. 507. See also the following recent authorities: *Warbritton v. Demorett* (Ind. 1891), 27 N. E. Rep. 730; *Silvey v. McCool*, 86 Ga. 1; *In re Robbins*, 34 Minn. 99; *Peabody Heights Co. v. Sadtler*, 63 Md. 533; 52 Am. Rep. 519; *Dean v. Lowell*, 135 Mass. 55; *Gould v. Eastern R. Co.*, 142 Mass. 85; *Watkins v. Lynch*, 71 Cal. 21; *Oxton v. Groves*, 68 Me. 371; 28 Am. Rep. 75; *Kneeland v. Van Valkenburg*, 46 Wis. 434; 32 Am. Rep. 719; *Jacob v. Woolfolk* (Ky. 1890), 14 S. W. Rep. 415; holding that the fee passed to the center of the way, and *King's Co. F. Ins. Co. v. Stevens*, 87 N. Y. 287; 13 Am. & Eng. Corp. Cas. 454; *Baltimore, etc., R. Co. v. Gould*, 67 Md. 60; *Church v. Stiles*, 59 Vt. 642; *Valley Pulp, etc., Co. v. West*, 58 Wis. 599; *Plumer v. Johnston*, 63 Mich. 165, in which the descriptions or circumstances were such that the fee to the center of the way did not pass.

3. See INCUMBRANCES, vol. 10, p. 368. See, also, *Dunn v. White*, 1 Ala. 645; *Hubbard v. Norton*, 10 Conn. 422; *Beach v. Miller*, 51 Ill. 206; 2 Am. Rep. 290; *Burk v. Hill*, 48 Ind. 52; 17 Am. Rep. 731; *Parish v. Whitney*, 3 Gray (Mass.) 516; *Haynes v. Young*, 36 Me. 557; *Lamb v. Danforth*, 59 Me. 322; 8 Am. Rep. 426; *Kellogg v. Malin*, 50 Mo. 496; 11 Am. Rep. 26; *Prichard v. Atkinson*, 3 N. H. 335; *Butler v. Gale*, 27 Vt. 739, holding that a street is an incumbrance. See also Elliott on Roads and Streets 553-555. But compare *Whitbeck v. Cook*, 15 Johns. (N. Y.) 483; 8 Am. Dec. 272; *Cincinnati v. Brachman*, 35 Ohio

XII. USES OF STREETS.—Streets are intended primarily for public travel; but, as already shown, there are other uses which can be made of them. Gas and water pipes may be laid therein,¹ and drains and sewers constructed to carry off the water from the streets.² So, under proper authority, ordinary commercial railroads and street railways may be laid in the streets, and telegraph and telephone wires and poles erected therein, provided due regard is paid to the rights of abutters and no constitutional provisions are violated.

Where an ordinary commercial steam railroad is constructed in a street it is generally regarded as an additional burden for which the abutting owners are entitled to compensation, especially if they are thereby deprived of their rights of ingress and egress.³ An ordinary horse railroad is not generally regarded as an additional burden and an abutting owner whose right of access is not affected thereby has no right to additional compen-

St. 289; *Wilson v. Cochran*, 46 Pa. St. 232; *Kutz v. McCune*, 22 Wis. 628; 99 Am. Dec. 85. In some of the cases the question of notice or knowledge on the part of the purchaser is held to determine whether or not the existence of the highway is a breach of covenant. *Hymes v. Estey*, 116 N. Y. 501; 15 Am. St. Rep. 421; *Appeal of People's Sav. Bank* (Pa. 1886), 3 Atl. Rep. 821; *Trice v. Kayton*, 84 Va. 217; 10 Am. St. Rep. 836; *Desvergers v. Willis*, 56 Ga. 515; 21 Am. Rep. 289. But compare *Van Wagner v. Van Nostrand*, 19 Iowa 422; *Medler v. Hiatt*, 8 Ind. 171; *Beach v. Miller*, 51 Ill. 206; *Burr v. Lamaster*, 30 Neb. 688.

1. See *supra*, this title, *Rights of the Public*. See also GAS COMPANIES, vol. 8, pp. 1268, 1276.

2. See *supra*, this title, *Rights of the Public*. See also DRAINS AND SEWERS, vol. 6, pp. 2, 19.

3. **Railroads**—(See STREET RAILWAYS).—That a railroad is an additional burden for which abutters are entitled to compensation, see *Theobald v. Louisville, etc., R. Co.*, 66 Miss. 279; 14 Am. St. Rep. 564; *Adams v. Chicago, etc., R. Co.*, 39 Minn. 286; 12 Am. St. Rep. 644; *Laurence R. Co. v. O'Hara* (Ohio, 1891), 28 N. E. Rep. 175; *In re New York El. R. Co.*, 58 Hun (N. Y.) 610; *Gates v. Chicago, etc., R. Co.* (Iowa, 1891), 48 N. W. Rep. 1040; *Ruttles v. Covington* (Ky. 1889), 10 S. W. Rep. 644; *Harrison v. New Orleans, etc., R. Co.*, 34 La. Ann. 462; *Cox v. Louisville, etc., R. Co.*, 48 Ind. 178; *Terre Haute, etc.,*

R. Co. v. Scott, 74 Ind. 29; 3 Am. & Eng. R. Cas. 208; *South Carolina R. Co. v. Steiner*, 44 Ga. 546; *Grand Rapids, etc., R. Co. v. Heisel*, 47 Mich. 393; 10 Am. & Eng. R. Cas. 266; *Indianapolis, etc., R. Co. v. Hartley*, 67 Ill. 439; 16 Am. Rep. 624; *Burlington, etc., R. Co. v. Reinhackle*, 15 Neb. 279; 14 Am. & Eng. R. Cas. 169; 48 Am. Rep. 342; *Daly v. Georgia, etc., R. Co.*, 80 Ga. 793; 12 Am. St. Rep. 286; 1 Hare's Const. Law 362, 370, 375; *Lewis' Em. Dom.*, §§ 113-115; 2 *Dillon's Munic. Corp.*, § 725. Compare *Yates v. West Grafton*, 34 W. Va. 783; *Wichita, etc., R. Co. v. Smith*, 45 Kan. 264; *Struthers v. Dunkirk, etc., R. Co.*, 87 Pa. St. 282; *Peddicord v. Baltimore, etc., R. Co.*, 34 Md. 463; *Morris, etc., R. Co. v. Newark*, 10 N. J. Eq. 352; *Whittier v. Portland, etc., R. Co.*, 38 Me. 26; *Lexington, etc., R. Co. v. Applegate*, 8 Dana (Ky.) 302; 33 Am. Dec. 497; *Pierce on Railroads* 234, 238.

In some of the cases a distinction is made against an abutter who does not own the fee, but the modern tendency is to make no such distinction. See *Elliott on Roads and Streets* 528, 529.

Where an abutter owns the fee merely to center of the street it is held that he is not entitled to compensation from a railroad company whose tracks are on the opposite side of the street and do not interfere with his rights. *Burkham v. Ohio, etc., R. Co.*, 122 Ind. 344; *Indiana, etc., R. Co. v. Eberle*, 110 Ind. 542; 32 Am. & Eng. R. Cas. 220; *Lake Erie, etc., R. Co.*

v. Scott, 32 Ill. App. 292; *Louisville, etc., R. Co. v. Orr* (Ky. 1891), 15 S. W. Rep. 8.

Notwithstanding the abutter may have been compensated by the railroad company for the taking, he may recover damages for a special injury caused him by the wrongful and negligent operation of the railroad. *White v. Chicago, etc., R. Co.* 122 Ind. 317; *Ohio, etc., R. Co. v. Wachter*, 123 Ill. 440; 5 Am. St. Rep. 532 and note. See also *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317; 11 Am. & Eng. R. Cas. 15; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316; 56 Am. Rep. 1.

So far as the public are concerned the legislature, unless specially restricted by the constitution, may authorize railroads to be constructed in streets even against the wishes of the municipality. *Savannah, etc., R. Co. v. Mayor, etc., of Savannah*, 45 Ga. 602; *Hine v. Keokuk, etc., R. Co.*, 42 Iowa 636; *Dubach v. Hannibal, etc., R. Co.*, 89 Mo. 483; 29 Am. & Eng. R. Cas. 699; *Milwaukee v. Milwaukee, etc., R. Co.*, 7 Wis. 85; *People v. Kerr*, 27 N. Y. 188; *Floyd Co. v. Rome Street R. Co.*, 77 Ga. 614. See *Lewis Em. Dom.*, § 115, note. But the legislature may, and usually does, grant to the municipalities the right to determine when and upon what conditions, if at all, their streets shall be so used. *Mercer v. Pittsburg, etc., R. Co.*, 36 Pa. St. 99; *Slatten v. Des Moines, etc., R. Co.*, 29 Iowa 148; *Richmond, etc., R. Co. v. Richmond*, 96 U. S. 521; *Murphy v. Chicago*, 29 Ill. 279; 81 Am. Dec. 307; *Geiger v. Filor*, 8 Fla. 325; *Perry v. New Orleans, etc., R. Co.*, 55 Ala. 413; *Tate v. Ohio, etc., R. Co.*, 7 Ind. 479; *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. (Va.) 83; *Hoyle v. New Orleans, etc., R. Co.*, 23 La. Ann. 535; *Southern Pac. R. Co. v. Reed*, 41 Cal. 256; *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475; *Chicago, etc., R. Co. v. Elgin*, 91 Ill. 251; *Crosby v. Owensboro, etc., R. Co.*, 10 Bush (Ky.) 288; *State v. Mayor, etc., of Hoboken*, 35 N. J. L. 205; 2 Dillon's Munic. Corp., § 705.

The grant by a city of the right to construct and operate a railway through its streets will be presumed to be for such a railway as the city has power to authorize in its streets, and proof that such railway is used by its owners in transporting their own property will not establish the fact

that it is a private road. *O'Neil v. Lamb*, 53 Iowa 725.

But the power granted to a city "to regulate the use of streets," does not authorize an ordinance permitting a private corporation to build a railroad track and run trains across streets of the city for the transaction of its private business. *Glaessner v. Anheuser-Busch Brewing Assoc.*, 100 Mo. 508; 33 Am. & Eng. Corp. Cas. 483; *Heath v. Des Moines, etc., R. Co.*, 61 Iowa 11; 10 Am. & Eng. R. Cas. 313.

A provision of a city charter that council shall have "exclusive control of the streets, sidewalks, lanes, alleys, market places, and other public grounds within the corporate limits, and shall cause the same to be kept clean and in repair," does not confer upon the council power to grant to a railroad the right of way over and along its public streets, as that would be an appropriation or use of the streets for a purpose not contemplated when the charter was granted. *Ruttles v. Covington* (Ky. 1889), 10 S. W. Rep. 644.

Where a city council grants the right to lay railroad tracks in the city streets and the legislature confirms the grant the council cannot afterwards revoke it. *Nash v. Lowry*, 37 Minn. 261; *Harrison v. New Orleans, etc., R. Co.*, 34 La. Ann. 462.

Under the liquidation laws, the city council of New Orleans cannot sell or grant the right of way through any of its streets to a railroad company, unless it is for a consideration in cash or otherwise, which can be realized and turned over to the board of liquidation, and by them applied to the payment of the city debt. *Board of Liquidation v. New Orleans*, 32 La. Ann. 915.

By ordinance of the city of Des Moines, the right was granted to a railway company to construct its road over and across certain streets "on the grade of the city, or such grade as may be agreed upon." Held, that the company were limited to the grade established by the city, unless some other grade had been agreed upon. *Slatten v. Des Moines Valley R. Co.*, 29 Iowa 148; 4 Am. Rep. 205.

The city of Chicago can grant a railroad company the right to run its track along the street only upon petition of landowners, but a petition is unnecessary where the track simply crosses a street. *Chicago, etc., R. Co. v. Dunbar*, 100 Ill. 110. As to requi-

sation.¹ But, where the motive power is steam or electricity, a more difficult question is presented, and a stubborn conflict has arisen among the authorities. If the abutter is thereby deprived of his right of access or his "easement of light and air," it is clear, upon principle, that he is entitled to compensation.² But is such a use in itself a new use and an additional burden? In favor of the right to construct and operate such a street railway

sites of petition, see *Schubert v. Wabash, etc., R. Co.*, 10 Ill. App. 397.

A city which, acting under its charter, grants permission to a railroad company to construct its road along a street, is not liable to the landowners on said street for any interruption of their use of the street, where the road is properly built. *Swenson v. Lexington*, 69 Mo. 157; *Sorenson v. Greeley*, 10 Colo. 369.

So, where a town, owning the fee of its streets, granted to a railway company, legally authorized to construct a railway through the town, the privilege of laying the track through the center of a street, upon condition that the company should grade the street and properly plank the track, and the road was so constructed that injury was caused to the lots of an adjacent owner by raising the street grade and obstructing his view, it was held that the town was not liable. *Olney v. Wharf*, 115 Ill. 519; 56 Am. Rep. 178.

But authority to construct a railroad in a street will not prevent an abutter, who is specially injured, from recovering damages where it is so operated as to constitute a nuisance. *Central Branch Un. Pac. R. Co. v. Twine*, 23 Kan. 585; 33 Am. Rep. 203; *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317; 11 Am. & Eng. R. Cas. 15.

Where a village council and a railway agreed, under the *Ohio* statute, as to the terms upon which the company may use the streets of the village for its road, whereby the company bound itself to grade and gravel the streets so used, in a manner "to the acceptance of the council," held, that a subsequent ordinance repealing the contract ordinance, passed with intent to rescind the entire contract, being inoperative without the assent of the company to rescind the grant of the right of way, is also inoperative to release the company from its obligation to grade and gravel streets. *Cincinnati, etc., R. Co. v. Carthage*, 36 Ohio St. 631.

A city may recover from a railroad company reasonable expenses incurred in restoring streets and sidewalks to their former condition of usefulness, after the company has constructed its road along the same and neglected to make such restoration as required by *Wisconsin Stat.* *Oconto v. Chicago, etc., R. Co.*, 44 Wis. 231.

So, a municipal corporation may, under the "general welfare clause," pass an ordinance requiring all railroads who use its streets to keep their tracks watered so as to lay the dust. *City, etc., R. Co. v. Mayor*, 77 Ga. 731; 4 Am. St. Rep. 106. See also *Horr & Bemis' Munic. Police Ord.*, § 238; *Tiedeman on Police Power*, § 194; *Elliott on Roads and Streets*, 564, 575. MUNICIPAL CORPORATIONS, vol. 15, p. 1167.

1. **Street Railways**—(See STREET RAILWAYS).—In support of the text, see *Eichels v. Evansville St. R. Co.*, 78 Ind. 261; 5 Am. & Eng. R. Cas. 274; 41 Am. Rep. 561; *Finch v. Riverside, etc., R. Co.*, 87 Cal. 597; *Ransom v. Citizens' R. Co.* (Mo. 1891), 16 S. W. Rep. 416; *Detroit City R. Co. v. Mills*, 85 Mich. 634; 46 Am. & Eng. R. Cas. 608; *Elliott v. Fairhaven, etc., R. Co.*, 32 Conn. 579; *Hinchman v. Patterson Horse R. Co.*, 17 N. J. Eq. 75; 86 Am. Dec. 254; *Randall v. Jacksonville St. R. Co.*, 19 Fla. 409; 17 Am. & Eng. R. Cas. 184; *Cincinnati, etc., St. R. Co. v. Cummins ville*, 14 Ohio St. 523; *Hobart v. Milwaukee City R. Co.*, 27 Wis. 194; 9 Am. Rep. 461; *Attorney Genl. v. Metropolitan R. Co.*, 125 Mass. 515; 28 Am. Rep. 264; *Brown v. Duplessis*, 14 La. Ann. 854; *Hiss v. Baltimore, etc., R. Co.*, 52 Md. 242; 36 Am. Rep. 371; *Texas, etc., R. Co. v. Rosedale St. R. Co.*, 64 Tex. 80; 22 Am. & Eng. R. Cas. 160; 53 Am. Rep. 739. Compare *Craig v. Rochester, etc., R. Co.*, 39 N. Y. 404; *People v. Kerr*, 27 N. Y. 188.

2. *Elliott on Roads and Streets* 531; Note in 3 *Abbott's New Cases* (N. Y.) 306 *et seq.*

without paying additional compensation, it may be argued that such a railway does not necessarily interfere with ordinary travel any more than a horse railway; that the use is not different in kind, but is in furtherance of travel and is simply an improved mode of locomotion that must have been contemplated when the street was laid out or dedicated.¹ On the other hand, it may be argued that such a use does interfere with ordinary travel; that the use of steam as a motive power is more likely to frighten horses, and render the dwellings upon the street unpleasant to live in; that electric wires and poles not only obstruct the street but are also dangerous to horses and men, and that, as a matter of fact, no such use was contemplated or even known when most of our streets were dedicated or laid out by legal proceedings.²

The law in regard to legislative and municipal control of street railways is substantially the same as that in regard to the control of ordinary steam railroads in streets.³

1. See *Williams v. City Electric St. R. Co.*, 41 Fed. Rep. 556; 43 Am. & Eng. R. Cas. 215; *Taggart v. Newport St. R. Co.*, 16 R. I. 668; 43 Am. & Eng. R. Cas. 208; *Dubois, etc., R. Co. v. Buffalo, etc., R. Co. (Pa.)*, 11 Railway & Corp. L. J. 6; *Newell v. Minneapolis, etc., R. Co.*, 35 Minn. 112; 59 Am. Rep. 303; *Briggs v. Horse R. Co.*, 79 Me. 363; *Lockhart v. Craig St. R. Co.*, 139 Pa. St. 419; *Halsey v. Rapid Transit R. Co.*, 47 N. J. Eq. 380; 46 Am. & Eng. R. Cas. 76; *Detroit City R. Co. v. Mills*, 85 Mich. 634; 46 Am. & Eng. R. Cas. 608.

2. See *Street R. Co. v. Doyle*, 88 Tenn. 747; 17 Am. St. Rep. 933; *Theobald v. Louisville, etc., R. Co.*, 66 Miss. 279; 14 Am. St. Rep. 569 and note; *Stanley v. Davenport*, 54 Iowa 463; 37 Am. Rep. 216; *North Chicago City R. Co. v. Lake View*, 105 Ill. 207; 2 Am. & Eng. Corp. Cas. 6; 44 Am. Rep. 788. Judge Dillon and Mr. Lewis apparently take this view. See 2 Dillon's Munic. Corp. (4th ed.), § 734c, note on page 893.

3. See *supra*, this title, *Uses of Streets*. See also STREET RAILWAYS, vol. 23, p. 940.

As to the right to compel street railway companies to keep the streets in repair, see *Memphis, etc., R. Co. v. State*, 78 Tenn. 746; 38 Am. & Eng. R. Cas. 429; *Burritt v. New Haven*, 42 Conn. 174; *State v. Minneapolis, etc., R. Co.*, 39 Minn. 219; *State v. St. Paul, etc., R. Co.*, 35 Minn. 131; *Columbus v. Street R. Co.*, 45 Ohio St. 98; 32 Am. & Eng. R. Cas. 292; *Oshkosh v. Milwaukee, etc., R. Co.*, 74 Wis. 534;

Greenup Co. v. Maysville, etc., R. Co. (Ky. 1889), 11 S. W. Rep. 774; *Pittsburgh, etc., R. Co. v. Birmingham*, 51 Pa. St. 41; *District of Columbia v. Washington, etc., R. Co.*, 1 Mackey (D. C.) 379; *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98; *Chicago City R. Co. v. Chicago*, 90 Ill. 573; 32 Am. Rep. 54. Compare *Chicago v. Sheldon*, 9 Wall. (U. S.) 50; *Galveston City R. Co. v. Nolan*, 53 Tex. 139; 3 Am. & Eng. Corp. Cas. 387; *State v. Corrigan, etc., R. Co.*, 85 Mo. 263; *Mayor, etc., of Baltimore v. Scharf*, 54 Md. 499; *Philadelphia v. Empire Pass., etc., R. Co.*, 7 Phila. (Pa.) 321; *Western Paving, etc., Co. v. Citizens' St. R. Co. (Ind. 1891)*, 26 N. E. Rep. 188.

See generally *Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.*, 127 Ind. 369; 43 Am. & Eng. R. Cas. 234; *Atchison St. R. Co. v. Nave*, 38 Kan. 744; 5 Am. St. Rep. 800; *Street R. Co. v. West Side R. Co.*, 48 Mich. 433; 7 Am. & Eng. R. Cas. 95; *Fort Worth, etc., R. Co. v. Rosedale R. Co.*, 68 Tex. 169; 32 Am. & Eng. R. Cas. 283; *Chicago v. Chicago, etc., R. Co.*, 105 Ill. 73; 10 Am. & Eng. R. Cas. 306; *Citizens' Coach Co. v. Camden, etc., R. Co.*, 33 N. J. Eq. 267; 36 Am. Rep. 542; *Cotton v. Guest*, L. R., 6 Q. B. Div. 70; 1 Am. & Eng. R. Cas. 474, note; *Short v. Baltimore, etc., R. Co.*, 50 Md. 73; 33 Am. Rep. 298; *In re Metropolitan, etc., R. Co.*, 111 N. Y. 588; *State v. Newport St. R. Co.*, 16 R. I. 533; *People v. Newton*, 48 Hun (N. Y.) 477; 112 N. Y. 396; *Citizens' St. R. Co. v. Jones*, 34 Fed. Rep. 579;

The erection of telegraph and telephone poles and wires in streets has also given rise to a vexed question of no little importance. Do they constitute an additional burden or servitude for which the abutting owners are entitled to compensation? Upon this question there is even a sharper conflict among the authorities than upon the question of the rights of abutters where streets are used by electric street railways. According to the weight of authority, and upon principle, the question should be answered in the affirmative.¹ In the case of an electric railway it may be plausibly contended that the use is in furtherance of travel, and that the railway furnishes simply an improved means of doing that for which the street was primarily intended; but this cannot be said of telegraph and telephone poles and wires. The use of streets for such a purpose bears a very remote analogy to their use for passage and repassage. In many of our cities, the poles and wires are so thick as to seriously interfere with the easements of access, light and air, and to greatly impair the chances of saving a building in case of fire. Who is to determine how many poles and wires may be placed in front of a man's premises? If one may be placed there, may not any number be so placed? As a matter of fact, in assessing damages for the original taking of land for a street such a use is not taken into consideration; and if it were taken into consideration it would be impossible to tell in advance how extensive the use and the injury would be, for the street might be used for many lines, or for none at all. The abutter may also be benefited by gas and water pipes and by street railways, of all of which he can make use, without disturbing public travel; but this is not true of telegraph and telephone lines, which, so far from facilitating travel, may seriously interfere with the ordinary use of the street and render travel upon it dangerous.

North Chicago City R. Co. v. Lake View, 105 Ill. 207; 2 Am. & Eng. R. Cas. 6; 44 Am. Rep. 788; Dry Dock R. Co. v. Mayor, etc., of N. Y., 47 Hun (N. Y.) 221; Elliott on Roads and Streets, ch. 29.

1. Western Union Tel. Co. v. Williams, 86 Va. 696; 33 Am. & Eng. Corp. Cas. 564; 19 Am. St. Rep. 696; Board of Trade Tel. Co. v. Barnett, 107 Ill. 507; 8 Am. & Eng. Corp. Cas. 77; 47 Am. Rep. 453; American, etc., Tel. Co. v. Smith, 71 Md. 535; Smith v. Central Tel. Co., 2 Ohio Circ. Ct. 259; Stowers v. Postal Tel. Cable Co., 68 Miss. 559; Dusenbury v. Mutual Tel. Co., 11 Abb. N. Cas. (N. Y.) 440; Metropolitan Teleph., etc., Co. v. Colwell Lead Co., 67 How. Pr. (N. Y.) 365; Broome v. New York, etc., Tel. Co., 42 N. J. Eq. 141. See also Ches-

apeake, etc., Tel. Co. v. Mackenzie (Md. 1891), 21 Atl. Rep. 690; Clauser, etc., Co. v. Baltimore, etc., Tel. Co., 17 Chic. Leg. News 22; Atlantic, etc., Tel. Co. v. Chicago, etc., R. Co., 6 Biss. (U. S.) 158; Willis v. Erie Tel. Co., 37 Minn. 347; People v. Squire, 107 N. Y. 593; 1 Am. St. Rep. 893; Southwestern, etc., R. Co. v. Southern, etc., Tel. Co., 46 Ga. 43; 12 Am. Rep. 585; Western Union Tel. Co. v. Rich, 19 Kan. 517; 27 Am. Rep. 159; State v. Newark, 49 N. J. L. 344; Roake v. American Teleph. Co., 41 N. J. Eq. 35; 12 Am. & Eng. Corp. Cas. 340. But the highest courts of *Massachusetts* and *Missouri* have held the contrary. Pierce v. Drew, 136 Mass. 75; 8 Am. & Eng. Corp. Cas. 83; 49 Am. Rep. 7; Julia Building Assoc. v. Bell Teleph. Co., 88 Mo. 258; 57 Am. Rep. 398.

Telegraph and telephone companies are subject to the police power of the municipality, and may be compelled to place their wires underground, notwithstanding the act of Congress permitting the construction of their lines on all post-roads and streets.¹

It has been held that a steam traction engine may be lawfully used upon a country highway, and that it is not a nuisance, *per se*,² but it is questionable if such a use of a city street is one of the ordinary uses which can be made of it without proper authority.³

Bicycles are vehicles, and may be lawfully used upon streets.⁴ Their proper place is in the roadway rather than upon the sidewalk,⁵ and their use may be regulated by the legislature.⁶

There is no common-law right to move a house along the streets of a city, and such a use of the streets is an extraordinary use for which the municipality may require a license.⁷

XIII. ABANDONMENT AND VACATION.—A street may cease to exist either by abandonment or by vacation according to law. Thus, where a highway has ceased to be used and another is acquired in its place, this may operate as an abandonment of the former.⁸ But the mere failure to use a highway for a long time after it is dedicated or laid out according to law will not neces-

1. *American, etc., Tel. Co. v. Hess*, 125 N. Y. 641; *Western Union Tel. Co. v. New York*, 38 Fed. Rep. 552; *People v. Squire*, 107 N. Y. 593; 1 Am. St. Rep. 893; *Mutual Union Tel. Co. v. Chicago*, 16 Fed. Rep. 309; *Western Union Tel. Co. v. Philadelphia (Pa.)*, 21 Am. & Eng. Corp. Cas. 40 and note.

Unless authorized by the legislature or the municipality, under legislative authority, they are nuisances, but if so authorized they are not. *Com. v. Boston*, 97 Mass. 555; *Young v. Yarmouth*, 9 Gray (Mass.) 386; *Irwin v. Great Southern Tel. Co.*, 37 La. Ann. 63.

Electric Lighting.—"The placing of poles necessary for the purpose of bearing the wires which transmit the electricity to the electric lamps for lighting the streets is among the public uses to which a street may properly be devoted." *People v. Thompson*, 65 How. Pr. (N. Y.) 407. See also *Tuttle v. Brush Electric Illuminating Co.*, 50 N. Y. Super. Ct. 464; *Consumers' Gas, etc., Co. v. Congress Spring Co.* (Supreme Ct.), 15 N. Y. Supp. 624; *Johnson v. Thompson Houston Electric Co.*, 54 Hun (N. Y.) 469.

2. *Macomber v. Nichols*, 34 Mich. 212; 22 Am. Rep. 522. See also *Bennett v. Lovell*, 12 R. I. 166; 34 Am. Rep. 628.

3. See *North Chicago City R. Co. v. Lake View*, 105 Ill. 207; 2 Am. & Eng. Corp. Cas. 6; 44 Am. Rep. 788; *Watkins v. Reiddin*, 2 F. & F. 629.

4. *Holland v. Bartch*, 120 Ind. 46; *Mercer v. Corbin*, 117 Ind. 450; *Taylor v. Goodwin*, L. R., 4 Q. B. Div. 228.

5. *Mercer v. Corbin*, 117 Ind. 450; *State v. Collins*, 16 R. I. 371.

6. *State v. Yopp*, 97 N. Car. 477; 18 Am. & Eng. Corp. Cas. 514; 2 Am. St. Rep. 305. See also *State v. Collins*, 16 R. I. 371; *In re Wright*, 63 How. Pr. (N. Y.) 345.

7. *Day v. Green*, 4 Cush. (Mass.) 437; *Toronto, etc. R. Co. v. Dollery*, 12 Ont. App. 679; *Williams v. Citizens' St. R. Co.* (Ind. 1891), 29 N. E. Rep. 408.

It is held in *New Hampshire* that it is a question for the jury to determine, under all the circumstances of the case, whether or not moving a house along a street constitutes a nuisance. *Graves v. Shattuck*, 35 N. H. 257; 69 Am. Dec. 536.

8. *Peoria v. Johnston*, 56 Ill. 45; *Champlin v. Morgan*, 20 Ill. 181; *Galbraith v. Littlech*, 73 Ill. 210; *Warner v. Holyoke*, 112 Mass. 362. See also *Hamilton v. State*, 106 Ind. 361; *Jeffersonville, etc., R. Co. v. O'Connor*, 37 Ind. 95; *Davies v. Huebner*, 45 Iowa 574; *Brockhausen v. Bochland*, 36 Ill. App. 224.

sarily constitute an abandonment.¹ And evidence that a road had been partly fenced in, that it had not been worked by the public for over fifteen years, and that travel had been diverted for over eleven years to a new road in the same vicinity was held insufficient in a recent case to show an abandonment by the public.²

The legislature has the power, except as restricted by the constitution, to vacate streets, and this power it may, and usually does, delegate to the municipal authorities.³ But municipalities have no inherent power to vacate streets. The authority must be conferred in express terms or by necessary implication, and the construction of ambiguous words in the statute "ought to be in favor of the common right of highway."⁴

Where the vacation of a street deprives an abutting property-owner of all access to his premises and thus causes him special injury, he is entitled to compensation.⁵ As one of the general

1. *Reilly v. Racine*, 51 Wis. 526; *Louisiana, etc., R. Co. v. New Orleans*, 43 La. Ann. 217; *Heald v. Moore*, 79 Me. 271; *Henshaw v. Hunting*, 1 Gray (Mass.) 203; *Humphreys v. Woodstown*, 48 N. J. L. 588; *State v. Culver*, 65 Mo. 607; 27 Am. Rep. 295; *Rose v. Bottyer* (Cal.), 22 Pac. Rep. 393. See also *Vanderbeck v. Rochester*, 46 Hun (N. Y.) 87; *Shea v. Ottumwa*, 67 Iowa 39; *Meier v. Portland, etc., R. Co.*, 16 Oregon 500. But compare *State v. Cornville*, 43 Me. 427; *Cohoes v. Delaware, etc., Canal Co.*, 54 Hun (N. Y.) 558; *Woodruff v. Paddock*, 56 Hun (N. Y.) 288; *Lyle v. Lesia*, 64 Mich. 16; *Warner v. Holyoke*, 112 Mass. 362; *Willey v. Norfolk, etc., R. Co.*, 96 N. Car. 408.

2. *Kelly Nail, etc., Co. v. Lawrence Furnace Co.*, 46 Ohio St. 544.

So, the sowing of grain and pasturing of cattle on the side of a road has been held insufficient to show an abandonment. *Watkins v. Lynch*, 71 Cal. 21. See also *Hoboken, etc., Co. v. Mayor*, 6 N. J. L. 540; *Grandville v. Jenison*, 84 Mich. 54.

But it has been held in *Iowa* that a city which has permitted a party, under claim of right, to occupy for thirty years, land granted to it for a street, will be presumed to have abandoned its right thereto. *Simplot v. Dubuque*, 49 Iowa 630.

A city ordinance adopting a part of a public street for present use, is not an abandonment of the rest of it. *Hoboken Land, etc., Co. v. Mayor, etc., of Hoboken*, 36 N. J. L. 540.

3. *Brook v. Horton*, 68 Cal. 554; *Mc-*

Ghee v. Pennsylvania R. Co., 114 Pa. St. 470; *Riggs v. Board*, 27 Mich. 262; *Hinchman v. Detroit*, 9 Mich. 103; *Gray v. Iowa Land Co.*, 26 Iowa 387; *Kimball v. Kenosha*, 4 Wis. 321; *State v. Huggins*, 47 Ind. 586; *Spiegel v. Gansberg*, 44 Ind. 418; *Kellinger v. Forty-second St., etc., R.*, 50 N. Y. 206; *Jersey City v. State*, 30 N. J. L. 521; *Stuber's Road*, 28 Pa. St. 199; *Brandt v. Milwaukee*, 69 Wis. 386; *Stubenbranch v. Neyenesch*, 54 Iowa 567; *People v. Hair*, 29 Hun (N. Y.) 125; *Pillsbury v. Augusta*, 79 Me. 71; *Lindsay v. Omaha*, 30 Neb. 512; 33 Am. & Eng. Corp. Cas. 465.

A municipal corporation authorized "to locate and establish streets and vacate the same," may vacate any street, and the right to vacate is not confined to the streets which the city may "locate and establish," and this power, if discreetly exercised, will not be restrained when no material injury results therefrom. *Gray v. Iowa Land Co.*, 26 Iowa 387.

4. *Jersey City v. New Jersey Cent. R. Co.*, 40 N. J. Eq. 417; *Newark v. Delaware, etc., R. Co.*, 42 N. J. Eq. 196; *Hoboken Land, etc., Co. v. Mayor, etc., of Hoboken*, 36 N. J. L. 540; *Polack v. San Francisco Orphan Asylum*, 48 Cal. 490.

5. *Pearsall v. Eaton*, 74 Mich. 558; 28 Am. & Eng. Corp. Cas. 244 and note; *Bannon v. Rohmission* (Ky.), 33 Am. & Eng. Corp. Cas. 457; *Haynes v. Thomas*, 7 Ind. 38; *Common Council v. Croas*, 7 Ind. 9. See also 1 Hare's Am. Const. Law, 372, 378; *In re John & Cherry Streets*, 19 Wend. (N. Y.)

public merely, he would have no right to compensation for taking away the right to use the street which he had in common with all citizens; but the right of access is a special right, peculiar to the abutter and different from his rights as one of the general public. It is a thing of value; it is property, and it is therefore within the constitutional inhibition against the "taking" of property without compensation.¹ There are some authorities, however, which state, in general terms, that the legislature may authorize the vacation of streets without any compensation to the abutters, but upon examination it will be found that in those particular cases the abutter's right of access was not taken away.² Where such is the case, it may well be held that, as the property owner suffers no injury different in kind from that of the general public, he is entitled to no compensation. Thus, where his property is on a different part of the street from that vacated, and a means of ingress and egress remain, it is generally held that he is not entitled to compensation, notwithstanding the value of his property may be lessened by the vacation.³

659; *Woodruff v. Neal*, 28 Conn. 168; *Moose v. Carson*, 104 N. Car. 431; *Lindsay v. Omaha*, 30 Neb. 512; 33 Am. & Eng. Corp. Cas. 465; *Gargan v. Louisville, etc., R. Co. (Ky.)*, 28 Am. & Eng. Corp. Cas. 255; *Cook v. Quick*, 127 Ind. 477.

Authorities directly in point are not numerous, for the reason, probably, that the fee usually reverts to the abutter after vacation, and he would generally prefer the land to the street. But there are cases in which the street might be much more valuable to him than the land.

1. In view of the many authorities which hold that an abutter has a distinct and peculiar property right in the street and that the legislature cannot authorize an obstruction which deprives him of that right, it is impossible to see upon what ground the legislature can take away the entire street without compensation to the abutter for the loss of his easement or right of access. See *infra*, this title, *Rights and Remedies of Abutters*.

2. *Williams v. Carey*, 73 Iowa 194; *Marshalltown v. Forney*, 61 Iowa 578; *Dempsey v. Burlington*, 66 Iowa 688; *Polack v. San Francisco Orphan Asylum*, 48 Cal. 490; *Gerhard v. Seekonk River Bridge*, 16 R. I. 334; *Clarke v. Providence*, 16 R. I. 337; *McGee's Appeal*, 114 Pa. St. 476; *Paul v. Carver*, 24 Pa. St. 207; 64 Am. Dec. 649; *Fearing v. Irwin*, 55 N. Y. 486; *In re Vacation of Howard*

Street (Pa.), 33 Am. & Eng. Corp. Cas. 453. See also *Hielscher v. Minneapolis*, 46 Minn. 529.

3. *Chicago v. Union Bldg. Assoc.*, 102 Ill. 379; 40 Am. Rep. 598; *Smith v. Boston*, 7 Cush. (Mass.) 254; *Davis v. Hampshire Co.*, 153 Mass. 218; *Coster v. Mayor, etc., of Albany*, 43 N. Y. 414; *King Co. F. Ins. Co. v. Stevens*, 101 N. Y. 411; 13 Am. & Eng. Corp. Cas. 454; *Fearing v. Irwin*, 55 N. Y. 486; *Heller v. Atchison, etc., R. Co.*, 28 Kan. 625; *Kimball v. Homan*, 74 Mich. 699; *East St. Louis v. O'Flynn*, 119 Ill. 200; 59 Am. Rep. 795; *Glasgow v. St. Louis (Mo. 1891)*, 17 S. W. Rep. 743. Compare *Petition of Concord*, 50 N. H. 530.

Estoppel.—Although the owners of lots abutting upon a street cannot be deprived of ingress and egress to the same without compensation, yet, when such street is vacated by the corporate authorities, upon their petition to have the same done, they will be estopped from asserting that an easement remains in the corporation for their benefit, and cannot invoke the principle in defense to an action of ejectment by the owner of such vacated street to recover possession. *Gebhardt v. Reeves*, 75 Ill. 301.

All the lot owners in a block petitioned the city council of a city to vacate a part of an alley running centrally through the block. No claims for damages were made by the petitioners whose lots abutted on the alley. The

The procedure is regulated almost entirely by statute, and differs materially in different jurisdictions.¹ The statute must be substantially followed in all material respects,² and the failure to give notice as required by statute may invalidate the entire proceeding.³ But a landowner outside the city cannot object to the vacation of a street within the city.⁴

Upon the vacation or discontinuance of a street, the land reverts to the owners of the fee,⁵ who are generally the abutting property owners on each side. Unless there is something to take the case out of the general rule, the effect of the lawful vacation of a street, therefore, is to discharge the public easement and leave the fee in the abutter upon each side, presumably to the center of the land which formed the street, free from the burden thereof.⁶ But where the abutter does not own the fee at the time of the vacation, it generally remains in the city or person who did own it before the vacation.⁷

city council granted the petition, but the vacating ordinance did not provide for any damages resulting from the vacation. About a month after the ordinance was passed, the city council attempted by another ordinance to repeal the former. *Held*, that the vacating ordinance was not void because it did not provide for the ascertainment and payment of damages; that the city was estopped from asserting the invalidity of the ordinance, and that the subsequent ordinance did not repeal the former. *Belleville v. Hallowell*, 41 Kan. 192.

1. See note to *Bannon v. Rohmission* (Ky.), 33 Am. & Eng. Corp. Cas. 457, where the subject of proceedings to vacate streets is treated at some length.

2. *Miller v. Corinna*, 42 Minn. 391; *Reg. v. Jones*, 12 A. & E. 684; 40 E. C. L. 163; *Miller v. Schenck*, 78 Iowa 372; *McNair v. State*, 26 Neb. 257; *Furman v. Furman* (Mich. 1891), 49 N. W. Rep. 147.

3. *Lincoln v. Warren*, 150 Mass. 309; *Price v. Stagrav*, 68 Mich. 17; *James v. Darlington*, 71 Wis. 173; *People v. Board of Assessors*, 59 Hun (N. Y.) 407.

4. *House v. Greenburg*, 93 Ind. 533; 6 Am. & Eng. Corp. Cas. 117. See also *Kimball v. Homan*, 74 Mich. 699; *State v. Barton*, 36 Minn. 145.

5. *Dunham v. Williams*, 36 Barb. (N. Y.) 162; *Van Amringe v. Barnett*, 8 Bosw. (N. Y.) 372; *Heard v. Brooklyn*, 60 N. Y. 242; *Harris v. Elliott*, 10 Pet. (U. S.) 26; *Barclay v. Howell*,

6 Pet. (U. S.) 513; *U. S. v. Harris*, 1 Sumn. (U. S.) 21; *Neville Road Case*, 8 Watts (Pa.) 172; *Alden v. Murdock*, 13 Mass. 256; *Fairfield v. Williams*, 4 Mass. 427; *Dovaston v. Payne*, 2 Smith's Lead. Cas. (8th Am. ed.) 180; *Benham v. Potter*, 52 Conn. 248.

6. *Lamm v. Chicago, etc., R. Co.*, 45 Minn. 71; *Challis v. Atchison, etc., R. Co.* (Kan. 1891), 25 Pac. Rep. 894; *Thomsen v. McCormick* (Ill. 1891), 26 N. E. Rep. 373; *Hamilton v. Chicago, etc., R. Co.*, 124 Ill. 235; 19 Am. & Eng. Corp. Cas. 610; *Day v. Schroeder*, 46 Iowa 546; *Weisbrod v. Chicago, etc., R. Co.*, 18 Wis. 43; 86 Am. Dec. 743; *Burbach v. Schweinler*, 56 Wis. 391; *Wallace v. Fee*, 50 N. Y. 694; *West Covington v. Freking*, 8 Bush (Ky.) 121; *Atchison, etc., R. Co. v. Patch*, 28 Kan. 470; *Ott v. Kreiter*, 110 Pa. St. 370; *Banks v. Ogden*, 2 Wall. (U. S.) 69.

7. *Lindsay v. Omaha*, 30 Neb. 512; 33 Am. & Eng. Corp. Cas. 465; *Gebhardt v. Reeves*, 75 Ill. 301; *Wirt v. McEnery*, 21 Fed. Rep. 233; 6 Am. & Eng. Corp. Cas. 105; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447; 8 Am. Dec. 263; *Matthiessen, etc., Zink Co. v. La Salle*, 117 Ill. 411. See also 33 Am. & Eng. Corp. Cas. 465.

Authorities on Streets.—Dillon's *Municipal Corporations*; Elliott on *Roads and Streets*; Angell on *Highways*; Woolrych on *Ways*; Thompson on *Highways*; and notes in *American and English Corporation Cases*, and *American and English Railroad Cases*.

STRIKES.

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I. DEFINITION.—The term strike is applied commonly to a combined effort on the part of a body of workmen employed by the same master to enforce a demand for higher wages, shorter hours, or some other concession, by stopping work in a body at a prearranged time, and refusing to resume work until the demanded concession shall have been granted.¹

II. LEGAL ASPECT; CRIMINAL CONSPIRACY.—The early English cases treated the abandonment of service by workmen by preconcerted arrangement as criminal conspiracies, regardless of the reasons for such abandonment.² In the *United States* the doc-

1. Anderson's L. Dict.; Black's L. Dict.; Bouvier's L. Dict.; Delaware, etc., *R. Co. v. Bowns*, 58 N. Y. 582.

2. *Rex v. Journeymen Tailors*, 8 Mod. 10, held that, while it was not an indictable offense for laborers to quit work for the purpose of securing an increase in their wages, yet a conspiracy to do so was indictable, although the act about which they conspired might have been lawful if it had not been performed as a direct outcome of the conspiracy—that such an offense was a conspiracy at common law. This is thought to be the earliest case on the subject of labor conspiracies.

Reg. v. Duffield, 5 Cox C. C. 404, held that workmen had not the right to conspire to compel an increase of wages by abandoning the service of their master or by inducing others to quit, and that a conspiracy to do anything lawful in an unlawful manner was indictable.

In *Reg. v. Druitt*, 10 Cox C. C. 593, it appeared that operative tailors, in carrying out a conspiracy to compel an increase of wages, went on a strike. It was held that the greatest right under English law was perfect liberty of mind and body, and that any combination of men to coerce that liberty by compulsion and restraint was a criminal offense.

In *Reg. v. Bunn*, 12 Cox C. C. 316, it appeared that in carrying out a conspiracy to compel the reinstatement of a discharged employé, the employés struck; and it was held that a conspiracy was an agreement between two or more persons to do an unlawful thing,

or an agreement to do that which was lawful by unlawful means; that it was unlawful to form a combination to force an employer by threat or improper molestation to conduct his business in a manner against his will, or in a manner annoying to the persons carrying on his business; that it was not necessary that any one should be molested, but that it was sufficient if molestation was designed or agreed upon; that the breach of written contract for service, by quitting an employer simultaneously, though in itself a lawful act, was performed in an unlawful manner, because done with the evil intent of forcing the employer to carry on business in a way contrary to his will. The defendants were convicted of conspiracy.

Reg. v. Hibbert, 13 Cox C. C. 82, was an indictment for conspiracy by employés to compel the employer to change the manner of payment and prices paid for services. The defendants were convicted. *Reg. v. Bauld*, 13 Cox C. C. 282, was to the same effect.

In *Reg. v. Harris*, Car. & M. 663, the defendants were convicted of a conspiracy to compel their master, a collier, to increase their wages, change his mode of doing business, and to compel their co-laborers to join them in the strike.

In *Rex v. Bykerdyke*, 1 M. & Rob. 179, the defendants were indicted for conspiring to procure the discharge of certain workmen. This was a prosecution under the statute of 6 Geo. IV, ch. 120. It was held that the statute never meant to empower workmen to meet

trine announced by the earlier cases tended strongly toward this view of the law.¹ But of late years the doctrine has been modified and softened, and it is conceded that workmen or employes possess the right to quit work, singly or in a body, by preconcert of agreement, provided only that they do not interfere with the rights of others, whether co-employes, employers, or the public. They have the right to seek an increase in wages by all peaceable means, and meetings and combinations to that end, if unaccom-

and combine for the purpose of dictating to the master whom he should employ, and that such compulsion was clearly illegal.

1. **Early American Cases.**—The Philadelphia boot and shoemakers case of *Com. v. Pullis*, is the one earliest reported in *America*. This case was tried in the mayor's court of Philadelphia in 1806, and printed in pamphlet form, and is stated in Wright's *Law of Criminal Conspiracies*. Here there was a combination of shoemakers to compel other shoemakers to quit work to enforce an increase of wages. The defendants were convicted.

People v. Melvin, 2 Wheel. Cr. Cas. (N. Y.) 262; *Yates' Sel. Cas.* (N. Y.) 111, was similar to the foregoing case. A motion was made to quash the indictment on the ground that such a combination was not indictable at common law, but the defendants were convicted.

The Pittsburgh Cordwainers' Case was tried in 1815. It was there held that a conspiracy to coerce an employer, to prevent men from following their trade, and to compel them to join a society of workmen, was unlawful.

Com. v. Carlisle, Bright. (Pa.) 36, was decided in 1821, and was the first expression of judicial opinion in the *United States* by a court of last resort on the subject of labor combinations. Here, again, shoemakers were indicted for conspiring to reduce the rate of wages of journeymen shoemakers. It appeared that the reduced rate was what it had been formerly, and subsequently the defendants had been compelled by a combination of workmen to advance the rate. The court said: "A combination of employers to depress the wages of journeymen below what they would be if there was no recurrence to artificial means by either side, is criminal. There is between the different parts of the body politic a reciprocity of action on each other, which, like the action of antagonizing muscles in the natural body, not only

prescribes to each its appropriate state and condition, but regulates the motion of the whole. The effort of an individual to disturb this equilibrium can never be perceptible, nor carry the operation of his interest on that of any other individual beyond the limits of fair competition; but the increase of power by combination of means, being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual."

. . . "In no book of authority has the precise point before me been decided. *Rex v. Journeymen Tailors* is found in a book (8 Mod. 10) which can claim nothing beyond the intrinsic evidence of reason and good sense apparent in the cases it contains. In the trial of the boot and shoemakers of Philadelphia, there was no general principle distinctly asserted, but the case was considered only in reference to its particular circumstances, and in these it materially differed from that now under consideration. And in the trial of the journeymen cordwainers of New York, the mayor expressly omits to decide whether an agreement not to work, except for certain wages, would be indictable *per se*. There are, indeed, a variety of British precedents of indictments against journeymen for combining to raise their wages, and precedents rank next to decisions as evidence of the law; but it has been thought sound policy in *England* to put this class of the community under restrictions so severe, by statutes that were never extended to this country, that we ought to pause before we adopt their law of conspiracy, as respects artisans, which may be said to have, in some measure, indi-

rectly received its form from the pressure of positive enactment, and which, therefore, may be entirely unfitted to the condition and habits of the same class here. . . . It will therefore be perceived that the motive for combining, or, which is the same thing, the nature of the object to be attained as a consequence of the lawful act is, in this class of cases, the discriminative circumstance. Where the act is lawful for an individual, it can be the subject of a conspiracy, when done in concert, only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence. . . . I take it, then, a combination is criminal wherever the act to be done has a necessary tendency to prejudice the public or to oppress individuals by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief."

Another *Pennsylvania* case arose in 1827, viz., the case of *The Twenty-four Journeymen Tailors of Philadelphia*. This case was published in pamphlet form and is reported in *Wright's Criminal Conspiracies*, 153. The defendants were indicted for a conspiracy to increase wages, lessen the profits of master tailors, and injure their interests. The means resorted to were quitting work, assembling in the streets, obstructing workmen who continued at work, and by threats, intimidation and violence, trying to induce them to quit work. The court said: "These young men have an undoubted right, by agreement among themselves, to regulate their own conduct, to ask as much as they please for their services, to continue or to leave the service of any employer, as reason, inclination or caprice shall dictate; but the moment they interfere with the rights and privileges of others, equally valuable and sacred as those, which, in this prosecution, these defendants so jealously contend for, they are criminal, and if the means employed be combination, they become conspirators."

In *People v. Trequier*, 1 Wheel. Cr. Cas. (N. Y.) 142 (1823), the defendants, striking hatters, were convicted of a conspiracy to compel their employer to discharge a certain work-

man because he worked for "knocked-down wages."

In *People v. Fisher*, 14 Wend. (N. Y.) 9; 28 Am. Dec. 501, the defendants were convicted under the statutes of *New York*, of a conspiracy to prevent journeymen shoemakers working below certain rates. The conspirators were members of an association which imposed a penalty upon any shoemaker who worked for less than the rate fixed by the association, and who by agreement, refused to work for any master who would employ a shoemaker who violated the rules unless he paid a fine to the association. To force compliance with these rules the defendants quit the service of their master, and prevented him from employing others. The court said: "The raising of wages is no offense, but a conspiracy to raise wages of journeymen shoemakers is a matter of public concern, in which the public have a deep interest, and is indictable at common law. Journeymen may singly refuse to work unless their wages are advanced, but if they do so by preconcert or association it becomes a conspiracy."

In *Com. v. Hunt*, 4 Met. (Mass.) 111; 38 Am. Dec. 346, the defendants were convicted in the lower court. On appeal the question related solely to the sufficiency of the indictment. But in the course of the opinion the court announced its adherence to the common-law rule relating to conspiracies by workmen as laid down in the case of *Rex v. The Journeymen Tailors of Cambridge*, 8 Mod. 10. The purpose of the strike was to compel the discharge of workmen not members of a certain society. The court said: "The manifest intent of the association is to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes, or for dangerous and pernicious ones. If the latter were the real and actual object and susceptible of proof, it should have been specially charged. Such an association might be used to afford each other assistance in times of poverty, sickness and distress; or to raise their intellectual, moral and social condition; or to make improvements in their art; or for other purposes. Or the association might be employed for purposes of oppression and injustice." The foregoing case has been cited with ap-

panied by threats, violence, disorder, or attempts to coerce, are lawful. They may agree in a body that they will not work below certain rates, and a strike to this end, unaccompanied by any of the foregoing elements, is not an offense.¹

proval in later *Massachusetts* cases. See *Com. v. O'Keefe*, 10 N. Y. St. Bar Assoc. Rep., p. 160. This case was tried in the superior court in 1886. *State v. Opdyke*, 10 N. Y. St. Bar Assoc. Rep. 158, was also tried in 1886 in *Connecticut*. Here there was a conviction.

In *State v. Glidden*, 55 Conn. 47; 3 Am. St. Rep. 23, a verdict of guilty was sustained, the prosecution being for a conspiracy to compel a publishing company to discharge its workmen against its will; to injure and oppress the workmen in the employ of the company; to impoverish the company, and to reduce several of the employes of the company to beggary. This prosecution was under the *Connecticut* statute of 1878, providing "that every person who shall threaten or use any means to intimidate any person, and compel such person against his will to do or abstain from doing any act which such person has a legal right to do, or shall persistently follow such person in a disorderly manner, or injure or threaten to injure his property, with intent to intimidate him, shall" be liable to fine and imprisonment. The opinion in this case, however, went beyond the statute and decided the case upon common-law grounds.

In *State v. Buchanan*, 5 Har. & J. (Md.) 317; 9 Am. Dec. 534, it was said that an indictment would lie for a conspiracy to raise wages. The case was a conspiracy to defraud a bank. The statement was rather a *dictum* than an authoritative statement of the law as it was supposed to exist at that time.

In *Com. v. Haines*, 15 Phila. (Pa.) 356, it was held a criminal conspiracy to attempt by combination to compel a city to pay for materials and labor a higher price than but for the conspiracy it would have been obliged to pay.

In *Com. v. Curren*, 3 Pittsb. (Pa.) 143, it appeared that an incompetent workman was discharged from a colliery, whereupon all of the workmen struck and remained out until the reinstatement of the discharged man. In the charge to the jury on the trial of the indictment, the trial judge said that while the laborer had the right to work when, where, and for whom, and for

such time as he might choose, still he had no right to dictate whom his employer should hire; and that a combination of the sort shown, which not only tended to oppress individuals but also to prejudice the public, was criminal. In this case the defendants were found guilty of a conspiracy and a new trial was refused.

1. Cooley on Torts (1st ed.) 280; *O'Neill v. Longman*, 4 B. & S. 376; 116 E. C. L. 374. In this case Blackburn, J., said: "Every man has liberty to work for any master, but not to coerce others, or to combine to deprive others of that liberty."

Walsby v. Anley, 7 Jur. N. S. 465. Here Cockburn, C. J., said: "I am decidedly of the opinion that every workman in the service of an employer is entitled to the free and unfettered exercise of his own discretion, whether he will continue in that employment, provided he has not entered into a contract for a specific period of service. It rests with himself whether he will remain in such employment in conjunction with any other person or persons with whom he may not choose to work. And more than that, if several persons in the employment of a master consider others in that employment obnoxious, either personally or on account of their character or conduct, they have a perfect right to put to their employer the alternative whether he will discharge the obnoxious person or persons and retain their services, or lose them and retain the obnoxious persons. But if men go further than that, and do not fairly put the alternative to the master, but seek to coerce him by the threat of doing something which is likely to operate to his injury if he does not discharge from his employment certain other persons against whom they have some objection. I think that they properly come within § 3 of stat. 6 Geo. IV, ch. 129."

In *Com. v. Sheriff*, 15 Phila. (Pa.) 393, it was held that members of a trade union, which by its laws required them to obey its rules and regulations, were not indictable under the *Pennsylvania* act of 1872, which makes it lawful for workmen, either as individuals or as members of a club, society, or as-

sociation, to refuse to work for any person, whenever a continuance of work would be contrary to the rules of the union, and that such refusal to work shall not subject them to prosecution or indictment for conspiracy. The court, in its opinion, adverted to the elements of force, threats, or menace, as raising a different question.

A leading case is that of *Master Stevedores Assoc. v. Walsh*, 2 Daly (N. Y.) 1. It was here held that it was not unlawful for any number of journeymen or master workmen to agree that they would not work below certain rates, or pay above certain prices; but that an association or combination proposing to use compulsion, or to effect its purpose by threats, menaces, intimidation, violence, or other unlawful means, was guilty of an indictable conspiracy. The cases were reviewed, and the English common-law rule discussed. See *People v. Fisher*, 14 Wend. (N. Y.) 1; 28 Am. Dec. 501.

In *People v. Kostka*, 4 N. Y. Crim. Rep. 429, the court said that workmen might co-operate to improve their condition and to increase their wages, and that "they might refuse to work for less than the price they have jointly fixed, and they may do everything that is lawful and peaceable to secure that price. They may even go to their brethren and beseech them not to work for less than the fixed rate. They may use all fair arguments to prevent acceptance of less than the agreed standard of wages. All this they may lawfully do. Argument, reasoning and entreaty are lawful weapons. But the moment they go beyond these means and threaten to punish him whom they believe to be their erring brother, threaten him with violence should he stand in the way of their success by accepting a lower rate than that fixed by the co-operators, they bring themselves face to face with the law. Up to the point of threat or violence they may do what they please, and public opinion says, 'Heaven speed you.' But at that point they must stop." The above is a portion of the charge of the court to the jury.

In *Crump v. Com.*, 84 Va. 927; 10 Am. St. Rep. 895, it was said: "Every man has a right to work for whom he pleases, and for any price he can obtain; and he has the right to deal and associate with whom he chooses; or, to let severely alone arbitrarily and contemptuously, if he will, any and every-

body upon earth. But this freedom of uncontrolled and unchallenged self-will does not give or imply a right, either by himself or in combination with others, to disturb, injure or obstruct another, either directly or indirectly, in his lawful business or occupation, or in his peace and security of life."

In *People v. Wilzig*, 4 N. Y. Crim. Rep. 403, it was said: "Formerly, a conspiracy of workingmen to raise the rate of wages was criminally condemned as an act injurious to trade or commerce. But, now, it has been legislatively decreed that the orderly and peaceable assembling or co-operation of persons employed in any calling, trade or handicraft, for the purpose of obtaining an advance in the rate of wages and compensation, or of maintaining such rate, is not a conspiracy. This is what the laboring men may lawfully do. What they may not do is to combine together for the purpose of preventing other people from working at prices to suit themselves."

"They have a right to go to all their friends, make known their wrongs, and say to them: 'If you are a friend of labor, withdraw your patronage from the man who injures us or refuses us justice.' There is no law against that."

In *Springhead Spinning Co. v. Riley*, L. R., 6 Eq. 551, the court said: "Every man is at liberty to induce others, in the words of the act of Parliament, 'by persuasion or otherwise,' to enter into a combination to keep up the price of wages, or the like; but directly he enters into a combination which has as its object intimidation or violence, or interfering with the perfect freedom of action of another man, it then becomes an offense not only at common law, but also an offense punishable by the express enactment of the Act of 6 Geo. IV, ch. 129."

And in *Rogers v. Evarts*, 17 N. Y. Supp. 264: "The tendency of modern thought and judicial decision is to the enlargement of the right of combination, whether of capital or labor. All restrictions have not been removed; but I am not willing to hold that the combination which appears in this case, in itself, and apart from the methods used, is within the condemnation of the law as it is now interpreted by our courts. Irrespective of any statute, I think the law now permits workmen, at least within a limited terri-

But combinations of workmen are unlawful where it is designed to effect or enforce the purposes desired by threats, menaces, intimidation, coercion, or violence.¹

Boycotting, as the term is now used, embraces the elements of

tory, to combine together and by peaceable means to seek any legitimate advantage in their trade. The increase of wages is such an advantage. The right to combine involves of necessity the right to persuade all co-laborers to join in the combination. This right to persuade co-laborers involves the right to persuade new employes to join the combination. This is but a corollary of the right of combination."

In *Snow v. Wheeler*, 113 Mass. 179, it was said: "In the relations existing between labor and capital, the attempt by co-operation on the one side to increase wages by diminishing competition, or on the other to increase the profits due to capital, is within certain limits lawful and proper. It ceases to be so when unlawful coercion is employed to control the freedom of the individual in disposing of his labor and capital."

Federal Court Cases.—In *Re Wabash R. Co.*, 24 Fed. Rep. 217, it was said: "Men may work or cease working as they choose, provided they violate no contract. They may combine and peaceably seek to forward their interest in any manner, provided they do no violence to the rights of others, or commit no violation of law."

In *U. S. v. Kane*, 23 Fed. Rep. 748; 28 Am. & Eng. R. Cas. 608, Brewer, J., says: "Every man has a right to work for whom he pleases, and go where he pleases, and do what he pleases, provided, in so doing, he does not trespass on the rights of others."

In *Re Doolittle*, 23 Fed. Rep. 544, Justice Brewer again said: "It is not the mere stopping of work themselves, but it is preventing the owners of the road from managing their engines and running their own cars—that is where the wrong comes in. Anybody has a right to quit work, but in interfering with other persons' working, and preventing the owners of railroad trains from managing those trains as they see fit—there is where the wrong comes in."

In *Re Higgins*, 27 Fed. Rep. 443, it was observed: "Labor organizations are lawful and generally laudable associations, but they have no legal status or authority, and stand before men and the law on no better footing than

other social organizations, and it is preposterous that they should attempt to issue orders that free men are bound to obey; and no man can stand in a court of justice and shelter himself behind any such organization from the consequences of his own unlawful acts." . . . "The employes of the receivers, although, *pro hac vice*, officers of the court, may quit their employment, as can employes of private parties or corporations, provided they do not thereby intentionally disable the property; but they must quit peaceably and decently."

1. Threats, Coercion, and Violence—English Cases.—*Reg. v. Duffield*, 5 Cox C. C. 404. Here a strike was inaugurated by a labor association, a local committee of which met workmen when they left their work, got them drunk, sent them away and supplied them with small sums of money; in addition, threats were used to prevent new men from working.

Reg. v. Shepherd, 11 Cox C. C. 325, involved a discussion of the English statutes 6 Geo. IV, ch. 129, § 3, and 22 Vict., ch. 34. The first of these acts provided, "That if any person shall by threats or intimidation, or by molesting another, force, or endeavor to force, any journeyman, manufacturer, or other person hired or employed in any manufacture, trade or business to depart from his hiring, employment or work, or prevent, or endeavor to prevent, any journeyman not being hired or employed, from hiring himself to, or from accepting work from, any person or persons, or shall molest, or in any way obstruct another, force or endeavor to force, any manufacturer or person carrying on any trade or business, to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, trade, or business, he shall be imprisoned for three months." In explanation of this statute 22 Vict., ch. 34, was passed, and is as follows: "No workman or other person, by reason merely of his entering into an agreement with any workman, or by reason merely of his endeavoring peaceably, and in a reasonable manner, and without threat or intimidation, direct or in-

direct, to persuade others to cease or abstain from work, shall be deemed or taken to be guilty of 'molestation' or 'obstruction' within the meaning of the said act of 6 Geo. IV." The court defined coercion or compulsion as "something unpleasant to the mind," and said: "Workmen have a perfect right to persuade fellow laborers to quit work, and in order to do so they must have access to the persons whom they wish to persuade. If done in a peaceable manner their conduct will be perfectly lawful. If violence, threats, intimidation, molestation or obstruction are used, then the offense will be criminal."

In *Reg. v. Bunn*, 12 Cox C. C. 316, it appeared that a strike was ordered for the purpose of coercing the superintendent of a gas company to reinstate a workman who had been discharged for refusing to do work, his refusal being founded upon the rules of a labor organization. Other workmen struck because of coercion. It was said by the court that "molestation" consisted of annoyance or interference with an improper intent, and that the workmen by breaking their contracts simultaneously by agreement were guilty of doing in an unlawful manner that which might be a lawful act, the evil intent consisting of forcing the employer to carry on his business in a way contrary to his will.

In *Rex v. Bykerdyke*, 1 M. & Rob. 179, the fact of compulsion was found. Miners having struck for the purpose of compelling the discharge of seven co-workers, there was a meeting, oaths were taken, and a letter was sent to the agent of the colliery saying that all hands would strike in fourteen days unless the seven men were discharged. Other cases involving questions of threats, intimidation and coercion are *O'Neill v. Longman*, 4 B. & S. 376; 116 E. C. L. 374; *O'Neill v. Kruger*, 4 B. & S. 389; 116 E. C. L. 388; *Ex p. Perham*, 5 Jur. N. S. 1221; *Reg. v. Hewitt*, 5 Cox C. C. 162; *Skinner v. Kitch*, 10 Cox C. C. 493; *Wood v. Bowron*, L. R., 2 Q. B. 21; *Walsby v. Anley*, 7 Jur. N. S. 465; *Connor v. Kent* (1891), 2 Q. B. 545. The doctrine deduced in *England* from the foregoing cases may be said to be, that to constitute intimidation in connection with strikes there must be violence or threats of violence either to person or property.

American Cases.—*People v. Wilzig*, 4 N. Y. Crim. Rep. 403, involved ques-

tions of threats and intimidation. It was here laid down that to constitute intimidation it was not essential that there should be any overt act of violence or direct threat by word of mouth, if the attitude of those engaged in the overt act was intimidating; and that the fact of intimidation might be shown by the numbers involved, their methods, placards, circulars, and devices. In this case violence was resorted to, both to persons and property, and the threats were innumerable.

People v. Fisher, 14 Wend. (N. Y.) 1; 28 Am. Dec. 501, grew out of a strike, and criminal conspiracy in restraint of trade and commerce. *People v. Trequier*, 1 Wheel. Cr. Cas. (N. Y.) 143, was a similar case. See also *Master Stevedores Assoc. v. Walsh*, 2 Daly (N. Y.) 1; *People v. Melvin*, 2 Wheel. Cr. Cas. (N. Y.) 262.

In *State v. Donaldson*, 32 N. J. L. 151; 90 Am. Dec. 649, it appeared that employes and others combined to compel a manufacturer to dismiss certain workmen, and that this not being done there was a strike. In this case the court said: "It appears to me that it is not to be denied that the alleged aim of this combination was unlawful; the effort was to dictate to this employer whom he should discharge from his employ. This was an unwarrantable interference with the conduct of his business, and it seems impossible that such acts should not be, in their usual effects, highly injurious. How far is this mode of dictation to be held lawful? If the manufacturer can be compelled in this way to discharge two or more hands, he can, by similar means, be coerced to retain such workmen as the conspirators may choose to designate. So his customers may be proscribed and his business in other respects controlled. I cannot regard such a course of conduct as lawful. It is no answer to the above considerations to say, that the employer is not compelled to submit to the demand of his employes; that the penalty of his refusal is simply that they will leave his service. There is this coercion; the men agree to leave simultaneously, in large numbers, by preconcerted action. We cannot close our eyes to the fact that the threat of workmen to quit the manufacturer under such circumstances is equivalent to a threat, that unless he yield to their unjustifiable demand, they will derange his business, and thus cast a heavy loss upon him. The

workmen who make this threat understand it in this sense, and so does their employer. In such a condition of affairs, it is idle to suggest that the manufacturer is free to reject the terms which the confederates offer. In the natural position of things, each man acting as an individual, there would be no coercion. If a single employé should demand the discharge of a co-employé the employer would retain his freedom, for he could entertain or repel the requisition without embarrassment to his concerns; but in the presence of a coalition of his employés, it would be but a waste of time to pause to prove that, in most cases, he must submit, under pain of often the most ruinous losses, to the conditions imposed on his necessities. It is difficult to believe that a right exists in law, which we can scarcely conceive can produce, in any posture of affairs, other than injurious results. It is simply the right of workmen, by concert of action, and by taking advantage of their position, to control the business of another."

In *Com. v. Dyer*, 128 Mass. 70, an indictment charging that defendant, "by force and intimidation, did seek to prevent one A from continuing in the employment of," etc., was held to be sufficient under the *Massachusetts* statute of 1875, ch. 211.

The famous case of *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320, known as the Anarchists' Case, throws some light upon the rights of strikers, employers and the public. See also *Collins v. Hayte*, 50 Ill. 337; 99 Am. Dec. 521; *Collins v. Hayte*, 50 Ill. 353.

A recent leading case in which the law applicable to criminal conspiracies connected with strikes was considered and expounded is that of *State v. Stewart*, 59 Vt. 273; 59 Am. Rep. 710. This was an indictment for a conspiracy to hinder and prevent certain granite works from employing certain granite cutters, and for hindering and deterring certain laborers from working for the corporation. The authorities were reviewed at length both in the briefs of counsel and the opinion of the court. The law was discussed from the common-law standpoint. It was said that a combination of the character set forth in the indictment was a conspiracy at common law; that the subject-matter of the offense was the same in *America* as in *England*, viz., an interference with the property rights of third persons, and a restraint

upon the lawful prosecution of their industries as well as an unlawful control over the free use and employment by workmen of their own personal skill and labor, at such times, for such prices, and for such persons as they pleased, and that the common law of *England* was "applicable to our local situation and circumstances" in this behalf, and was therefore the common law of *Vermont*. The court said: "The principle upon which the cases, English and American, proceed, is, that every man has the right to employ his talents, industry and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy. The labor and skill of the workman, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer, the investments of commerce, are all in equal sense property. If men by overt acts of violence destroy either, they are guilty of crime. The anathemas of a secret organization of men combined for the purpose of controlling the industry of others by a species of intimidation that works upon the mind rather than the body, are quite as dangerous, and generally altogether more effective, than acts of actual violence. And while such conspiracies may give to the individual directly affected by them a private right of action for damages, they at the same time lay a basis for an indictment on the ground that the state itself is directly concerned in the promotion of all legitimate industries and the development of all its resources, and owes the duty of protection to its citizens engaged in the exercise of their callings. The good order, peace and general prosperity of the state are directly involved in the question." The court further, after discussing the language of the counts of the indictment, said: "These counts then charge a conspiracy to do an act unlawful at common law, by means unlawful under the statute." The case came up on a motion to quash the indictment and on demurrer. And see also *State v. Wilson*, 30 Conn. 507; *Alderman v. People*, 4 Mich. 414; 69 Am. Dec. 321; *Mifflin v. Com.*, 5 W. & S. (Pa.) 461; 40 Am. Dec. 527; *Hazen v. Com.*, 23 Pa. St. 355; *People v. Petheram*, 64 Mich. 252; *Reg. v. Rowlands*, 17 Q. B. 671; 79 E. C. L. 670; *Gunter v. Astor*, 4 Moore 12; *Walker v. Cronin*, 107 Mass. 555.

In *Virginia*, a charge to the grand jury in 1886 stated that the common law was in force in *Virginia*, and that when the object of an agreement of two or more persons was to compel one by threat or molestation to conduct his business contrary to his own will, such agreement was illegal and criminal. 10 Va. L. J. 707.

In *Com. v. Shelton*, 11 Va. L. J. 324, a demurrer to an indictment for a conspiracy to boycott was overruled. The court here said: "From the nature of this offense no comprehensive rule can be laid down which shall include all instances of it; but the authorities seem to agree that the gist of the offense is the conspiracy, and that a conspiracy is a confederacy to do an unlawful act, or a lawful act by unlawful means, whether to the prejudice of an individual or the public. But by 'unlawful' it is not intended to mean that the acts agreed to be done must be criminal; it is enough if they are wrongful and with an improper or evil intent. Thus it has been held that threats, intimidation, or any forcible means, other than lawful competition, are unlawful. To threaten another in order to deter him from doing some lawful act, or to compel him to do an unlawful one, or with intent to extort money from him, or to obtain any other benefit to those who may make use of the threat, has always been considered a misdemeanor at common law. . . . I consider it well established that any conspiracy formed and intended directly or indirectly to prevent the carrying on of any lawful business, or to injure the business of any one, by wrongfully preventing those who would be customers from buying anything from, or employing the representatives of said business, by threats, intimidation, or other forcible means, is unlawful." See also *Johnston Harvester Co. v. Meinhardt*, 9 Abb. N. Cas. (N. Y.) 393; 24 Hun (N. Y.) 489; *People v. Walsh*, 6 N. Y. Crim. Rep. 292; *People v. Smith*, 5 N. Y. Crim. Rep. 509; *Rogers v. Evarts* (Supreme Ct.), 17 N. Y. Supp. 364.

Unlawful Rule of Brotherhood of Locomotive Engineers.—On a petition to the *United States* circuit court for the District of *Georgia* of certain persons who styled themselves a committee of adjustment of the Brotherhood of Locomotive Engineers to have the receiver of a railroad make a contract with them for services, it was held that

a rule of the brotherhood which provided "That hereafter when an issue has been sustained by the grand chief and carried into effect by the Brotherhood of Locomotive Engineers, it shall be recognized as a violation of the obligations if a member of the Brotherhood of Locomotive Engineers, who may be employed on a railroad run in connection with or adjacent to said road, to handle the property belonging to said railroad or system, or in any way that may benefit said company with which the Brotherhood of Locomotive Engineers are at issue, until the grievances or issues or difference of any nature or kind have been amicably settled," was illegal, and that a court of equity would not direct the receiver of a railroad to enter into a contract with locomotive engineers who held themselves bound by such a rule. However, upon the petitioning engineers' waiving the rule, the court directed the receiver to enter into a contract with them, reserving to any engineer the right at any time, as an individual, to leave the service of the receiver, but not in such manner as to injure the property or impede its proper management.

Contribution to Expenses of Strikers.

—In *Warburton v. Huddersfield Industrial Soc.* (1892), 1 Q. B. 817, it was held unlawful for an industrial society established to carry on the trade of general dealers, manufacturers, and farmers, and having authority to apply its funds "to any lawful purpose," to resolve to devote a portion of the profits to a subscription fund for the support of workmen on strike; the society was restrained from making such an application of its funds. But in *Rogers v. Evarts* (Supreme Court), 17 N. Y. Supp. 264, it was held that a body of strikers undertaking by lawful and peaceable means to induce employes to strike, might lawfully pay the expenses of those who do leave their employment, or might offer money to induce them to quit work; and they might also post in a public place in their meeting house the names of those contributing to the fund for that purpose, and of those who had been requested to contribute but declined.

See also generally, as to the legal aspect of strikes, in their relation to a right of action in a civil court where they have interfered with the freedom of action of the employer, *infra*, this title, *Civil Action*.

coercion and intimidation,¹ and, therefore, when employed in connection with a strike, may be unlawful.²

Another mode of intimidation sometimes resorted to is that of picketing. This consists in posting members of the strikers' organization at the approaches to the works of the employer, who thereupon attempt to warn off workmen by persuasion or intimidation. This may, or may not, be unlawful according to the degree of intimidation used. If persuasion alone is resorted to,

1. **Boycotting.**—Century Dict.; Black's L. Dict.; Anderson's L. Dict.; *Brace v. Evans*, 3 Ry. & Corp. L. J. 561; *Casey v. Cincinnati Typographical Union*, 45 Fed. Rep. 135. In the case last cited it is said that to boycott is itself a threat.

2. A leading and recent case involving a boycott is *Crump v. Com.*, 84 Va. 927; 10 Am. St. Rep. 895. Here the attempt was to compel a firm of printers to employ none but union men, and a boycott on the business was instituted. This was conducted by sending out circulars, by frequent and repeated publications in a labor organ designed to excite public feeling. A black list was published and an attempt was made to make the boycott extensive and stringent. The members of the firm were followed, as were their wagons. Short of the employment of actual force, every conceivable effort was made to compel the customers of the firm to cease their dealings with it. The evidence adduced on the trial of the indictment for a criminal conspiracy was held sufficient to warrant a verdict of guilty.

State v. Glidden, 55 Conn. 79; 3 Am. St. Rep. 23, is another case. The court here said that the word "boycott" signified violence if not murder, and that there could be no doubt of the criminal intent if the word was used in its original sense. The court added, however, that it preferred to believe that the word was used in a modified sense and with a milder meaning, and that if thus used it might not have been criminal.

People v. Wilzig, 4 N. Y. Crim. Rep. 403, involves boycotting among other acts designed to coerce and intimidate an employer of labor. Here the court said: "The men who walk up and down in front of a man's shop may be guilty of intimidation, though they never raise a finger or utter a word. Their attitude may nevertheless be that of menace. They may intimidate by their

numbers, their methods, their placards, their circulars and their devices."

In *Casey v. Cincinnati Typographical Union*, 45 Fed. Rep. 135, the defendants boycotted the plaintiff and his newspaper because he employed non-union printers and workmen, and would not pay the wages dictated by the union. The purpose was to destroy the circulation of the newspaper and its value as an advertising medium. The boycott was conducted by posting in conspicuous places large printed handbills calling on all persons to withdraw their patronage from the newspaper, and sending circulars to its advertising customers requesting them not to advertise in it, and threatening them, in case of their refusal, with the ill-will of organized labor; similar circulars were sent to news agents selling the paper.

In *Sherry v. Perkins*, 147 Mass. 212; 9 Am. St. Rep. 689, it appeared that members of a union, in order to prevent persons in the employ of the plaintiff from continuing in it, and those who desired to do so from entering it, caused to be carried for over three months, in front of plaintiff's place of business, a banner with the following inscription: "Lasters are requested to keep away from P. P. Sherry's. Per order L. P. U." and also the following: "Lasters on strike and lasters are requested to keep away from P. P. Sherry's until the present trouble is settled. Per order L. P. U." This was found by the court to be a part of a scheme by threats and intimidation to accomplish the purpose of preventing the plaintiff from carrying on his business.

Other cases similar in their general features, and where the boycott was resorted to as an element of coercion, are *Brace v. Evans*, 3 Ry. & Corp. L. J. 561; *Mogul Steamship Co. v. McGregor*, 15 Q. B. Div. 476; *Old Dominion Steamship Co. v. McKenna*, 30 Fed. Rep. 48; *Moore v. Bricklayers' Union*, 23 Wkly. L. Bull. 48.

there is no breach of the law ; if threats, menaces, intimidation or violence are used, it is otherwise.¹

In addition to the English statutes recited above there are statutes in some of the states of the Union which bear more or less directly upon strikes.²

III. AS AFFECTING CARRIERS.—Questions involving the rights and liabilities of carriers as affected by strikes relate to the law of carriers rather than to the law of strikes. The duty of a common carrier to deliver goods, unless prevented by the act of God or of a public enemy, is so stringent that delay or non-delivery due to a strike of workmen has been held not a legal excuse, and such may be said to be the early rule, and the English rule, and the general rule.³ But recent American authorities have modified the strictness of this rule somewhat from necessity, where widespread and irresistible combinations of strikers and their sympathizers have put the carrier into a position where it was practically helpless.⁴

1. **Picketing.**—*Rex v. Selby*, 5 Cox C. C. 495, was a criminal prosecution under the act of 6 Geo. IV, ch. 129, § 3. Here the pickets of the strikers pursued such a system of annoyance by watching and interfering with workmen that they were forced to abandon work. The court said that under the statute picketing was not unlawful, unless accompanied by violence to person or property, or by threats, intimidation or molestation.

Again, in *Reg. v. Druitt*, 10 Cox C. C. 593, it was held that mere picketing, if so done as not to excite reasonable alarm, or as not to coerce or annoy, was no offense in law ; that it was lawful to endeavor to persuade ; but that if the pickets indulged in abusive language and alarming gestures, it was otherwise.

Reg. v. Shepherd, 11 Cox C. C. 325, was a similar case arising under the English statutes. Analogous English cases are *Reg. v. Duffield*, 5 Cox C. C. 404; *Reg. v. Hibbert*, 13 Cox C. C. 82; *Reg. v. Bauld*, 13 Cox C. C. 282.

American cases where unlawful picketing was resorted to in connection with strikes, are *People v. Kostka*, 4 N. Y. Crim. Rep. 429; *People v. Wilzig*, 4 N. Y. Crim. Rep. 403; *Crump v. Com.*, 84 Va. 927; 10 Am. St. Rep. 895; *Brace v. Evans*, 3 Ry. & Corp. L. J. 561.

But the right to resort to picketing merely as a means of persuasion and argument is fully recognized in the *United States*. *U. S. v. Kane*, 23 Fed. Rep. 748; 25 Am. & Eng. R. Cas. 608; *Richter v. Journeymen Tailor's Union*,

24 Wkly. L. Bull. 189; *Rogers v. Evarts* (Supreme Ct.), 17 N. Y. Supp. 264.

2. In *Arkansas, California, Florida, Iowa, Maine, Missouri, Nevada, New Jersey* and *Tennessee* are statutes making it a criminal offense to commit any act injurious to the public health, morals, trade or commerce, or for the perversion or obstruction of justice, or the due administration of the laws.

In *Michigan, Rhode Island* and *Vermont* it is made a misdemeanor to attempt by force, threats or intimidation to prevent any person from entering upon and pursuing any employment.

In *Delaware, Illinois, Kansas, Maine, Michigan, New Jersey, Pennsylvania* and *Wisconsin* are statutes aimed at combinations designed to impede by intimidation the regular operation of railroads, or the work of corporations, firms, or individuals, or to impede the running of engines or trains, freight or passenger.

3. *Forward v. Pittard*, 1 T. R. 27; *Blackstock v. New York, etc., R. Co.*, 20 N. Y. 48; 75 Am. Dec. 372, reported below in 1 Bosw. (N. Y.) 77; *Galena, etc., R. Co. v. Rae*, 18 Ill. 488; 68 Am. Dec. 574. See *Cooley on Torts* (2d ed.), *640, 641.

4. Where workmen after their discharge interfere unlawfully with the business of a carrier and cause delay, such delay has been held in effect in *Pittsburgh, etc., R. Co. v. Hazen*, 84 Ill. 36, to excuse the carrier. In this case the carrier, by way of excuse for a delay, sought to prove that the sole cause of the delay was the obstruction

IV. REMEDIES—1. Injunction.—The equitable remedy of an injunction is available sometimes as a protection against unlawful acts of strikers and conspirators upon an application of the general principles which govern the issue of this writ. For example, the display of banners with devices as a mode of threats and intimidation to prevent persons from entering into or continuing in the employment of the person in front of whose premises the banners were displayed, has been enjoined as an unlawful act injurious to business and property, and a nuisance against which

of the passage of trains, resulting from the irresistible violence of a large number of lawless men, acting in combination with brakemen, who, up to that time, had been employed by the carrier, a railway company; that the brakemen refused to work, and were discharged, and other brakemen promptly employed, but the moving of trains was prevented by the threats and violence of a mob. This evidence was excluded by the trial court, and the exclusion was held, three judges dissenting, to be error. The court said: "The proof offered tends to show that the delay was caused by the lawless and irresistible violence of the discharged brakemen, and others acting in combination with them. These men, at the time of this lawlessness, were no longer the employés of the company. The case supposed is not distinguishable in principle from the assault of a mob of strangers. All the testimony on this subject should have been submitted to the jury, for their determination of the question whether, under all the circumstances, the period of transit was unnecessarily long. For the delay resulting from the refusal of the employés of the company to do duty, the company is undoubtedly responsible. For delay resulting solely from the lawless violence of men not in the employment of the company, the company is not responsible, even though the men whose violence caused the delay had, but a short time before, been employed by the company. Where employés suddenly refuse to work, and are discharged, and delay results from the failure of the carrier to supply promptly their places, such delay is attributable to the misconduct of the employés in refusing to do their duty, and this misconduct in such case is justly considered the proximate cause of the delay; but when the places of the recusant employés are promptly supplied by other competent men, and the 'strikers' then prevent

the new employés from doing duty by lawless and irresistible violence, the delay resulting solely from this cause is not attributable to the misconduct of employés, but arises from the misconduct of persons for whose acts the carrier is in no manner responsible."

In *Geisner v. Lake Shore, etc., R. Co.*, 102 N. Y. 563; 55 Am. Rep. 837, it appeared that the delivery of livestock was delayed for the reason that the train was taken possession of by strikers who had been in the employ of the railway company; that they detached the engine hose and let the water out of the boilers, uncoupled the cars, hid the coupling-pins, put the engines in the round-house and barricaded them, and forcibly and violently refused to permit trains to be moved or new brakemen to take the place of the old ones. It was held that when the strikers abandoned work they ceased to be servants of the company for whose acts it was responsible; that the fact that the strike was organized while the strikers were in the employ of the company did not affect the case, and that the facts constituted an excuse for the delay. The judgment of the court of appeals in this case reversed the judgment below, reported in 34 Hun (N. Y.) 50, and *distinguished*, on the facts, *Blackstock v. New York, etc., R. Co.*, 1 Bosw. (N. Y.) 77; 20 N. Y. 48; 75 Am. Dec. 372. In *Indianapolis, etc., R. Co. v. Juntgen*, 10 Ill. App. 295, the facts were similar and the conclusions of the court likewise. See also *Pittsburgh, etc., R. Co. v. Hollowell*, 65 Ind. 188; *Lake Shore, etc., R. Co. v. Bennett*, 89 Ind. 457.

In *Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281, the carriage of livestock was delayed by a mob of riotous strikers who were beyond the control of the civil and military authorities, and who destroyed the railway road-bed, depots, and rolling-stock. It was held that the company was not liable

a court of equity should grant relief.¹ An injunction has been granted against a labor organization, which had instituted a boycott against a newspaper, and which was attempting to drive away business from it by threatening its subscribers and advertisers with a boycott in case they continued their patronage.² So members of a union have been enjoined from intimidating workmen and thereby preventing them from continuing in the employ of the applicant for the injunction.³ And very recently judges of a federal court have asserted the applicability of the writ of injunction to restrain railway employes from committing acts of violence or intimidation and from enforcing rules and regulations of labor

for the delay. See also *Sherman, etc., Co. v. Pennsylvania R. Co.*, 1 Fed. Rep. 226; 3 Am. & Eng. R. Cas. 274; *Wertheimer v. Pennsylvania R. Co.*, 17 Blatchf. (U. S.) 421; *Haas v. Kansas City, etc., R. Co.*, 81 Ga. 792; *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337; 18 Am. St. Rep. 45; *Read v. St. Louis, etc., R. Co.*, 60 Mo. 199; *Delaware, etc., R. Co. v. Bowns*, 58 N. Y. 573; *Lewis v. Ludwick*, 6 Coldw. (Tenn.) 368.

1. **Injunction.**—*Sherry v. Perkins*, 147 Mass. 212; 9 Am. St. Rep. 689. So an injunction was allowed in *Springhead Spinning Co. v. Riley, L. R.*, 6 Eq. 551, a case presenting facts like those of the case just cited.

2. *Casey v. Cincinnati Typographical Union*, 45 Fed. Rep. 135. In this case the jurisdiction in equity was challenged, and the authorities relied upon as justifying an application of the principles regulating injunctions to a case of this sort were reviewed.

In *Emack v. Kane*, 34 Fed. Rep. 47. *Blodgett, J.*, granted an injunction against persons who, by threatening infringement suits without any intention of bringing them, were attempting to interfere with the plaintiff's enjoyment of his lawful patent.

But, in *Rogers v. Evarts* (Supreme Ct.), 17 N. Y. Supp. 264, the supreme court of Broome county, N. Y., at special term, denied an injunction to restrain the publishers of a newspaper from advising and encouraging persons in the employ of others to violate their contracts of employment. It was held also in this case that an injunction would not issue to restrain workmen from combining and persuading peaceably and without intimidation fellow workmen to leave their employers for the purpose of compelling a raise of wages.

3. *Coeur d'Alene Consolidated Min. Co. v. Miners' Union*, 51 Fed. Rep. 260.

See also *Brace v. Evans*, 3 Ry. & Corp. L. J. 561.

In *Mogul Steamship Co. v. McGregor*, 15 Q. B. Div. 476, it was sought to restrain certain persons from sending out circulars or documents to different traders in *China*, with whom plaintiffs had been dealing, to the effect that if the parties receiving them dealt with plaintiffs, the defendants would cease to trade with them. An injunction was refused on the ground that the injury was not irreparable, but could be fully satisfied by damages in an action at law; and further, because it would be almost impossible for plaintiffs to establish their side of the case, while the defense could be easily established.

In *Rogers v. Evarts* (Supreme Ct.), 17 N. Y. Supp. 264, equity would not interfere to restrain the publishers of a newspaper from encouraging a strike, picketing, soliciting funds in aid of a strike, and posting the names of contributors to the fund and of those who refused to contribute.

In *Richter v. Journeymen Tailors' Union*, 24 Wkly. L. Bull. 189, the petition did not state facts sufficient to warrant an injunction, but showed a libel for which there was a remedy at law.

In *Johnston Harvester Co. v. Meinhardt*, 9 Abb. N. Cas. (N. Y.) 393, it was held that an injunction should not be granted against a confederation of persons whose object was to entice away employes, where there was not sufficient evidence that violence, force or intimidation were intended against the employes. The facts in the case did not show intimidation or coercion, and it was not intimated that an injunction would have been refused had those facts appeared.

In *New York, etc., R. Co. v. Wenger*, 17 Wkly. L. Bull. & Ohio L. J. 306, an injunction was granted to restrain

organizations, which, if carried out, would result in irremediable injury to the railway corporations and to the public.¹

2. Contempt.—In the case of property in the hands of a receiver of a court of equity, interfered with by strikers, courts have treated the unlawful interference as a contempt to be dealt with under the rule applicable to contempts generally. The law of the subject, in this phase thereof, has been expounded frequently by the federal courts.²

a trespass by discharged employes on strike.

1. *Toledo, etc., R. Co. v. Pennsylvania Co.*, 53 Am. & Eng. R. Cas. 293, was a proceeding in equity to attach certain railway employes for contempt of court in violating a mandatory injunction against refusing to offer and extend equal transportation facilities to certain companies, and refusing to deliver cars, etc. The foundation of the original proceeding was the Interstate Commerce act; and Ricks, J., after reciting the facts connected with an extensive strike, held, in effect, that if ruin to the business of railroads and disasters to the public are the result of conspiracy, combination, intimidation, or unlawful acts of organizations of employes, the courts have power to grant relief by restraining employes from acts of commission, violence, or intimidation, or from enforcing rules and regulations of organizations which result in irremediable injuries to their employers and to the public. A contemporaneous case was that of *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 730; 53 Am. & Eng. R. Cas. 307, in which Taft, J., on a motion for a temporary preliminary injunction against the chief executive of a brotherhood of locomotive engineers, held, in effect, after an exhaustive discussion of the facts and the law, that where the members of an organization known as the Brotherhood of Locomotive Engineers have a standing rule that whenever any of their comrades, with the consent of their chief executive, leave the employ of one railroad company because the terms of employment are unsatisfactory, the members employed by companies operating connecting lines will inflict an injury on the first company by preventing it so far as possible from doing any business as a common carrier involving the interchange of freight with the connecting lines, and threaten to accomplish this purpose by refusing to handle the freight of an offending com-

pany, and if necessary to quit the service to avoid handling it, a court of equity will enjoin the chief executive officer of such organization and restrain him from issuing or continuing to enforce such rule or order, and from in any way endeavoring to persuade the employes of connecting roads not to extend equal facilities for the interchange of traffic.

2. In *Re Wabash R. Co.*, 24 Fed. Rep. 217, the following circular was sent out: "Office of Local Committee, June 17, 1885. ———, Foreman. You are requested to stay away from the shop until the present difficulty is settled. Your compliance will command the protection of the Wabash employes. But in no case are you to consider this an intimidation." This was held to be an unlawful interference with the receiver's management of the road, and was punished as contempt of court.

In *Re Doolittle*, 23 Fed. Rep. 544, the employes of a railroad in the hands of a receiver, by concert of action, quit work and took possession of and obstructed the operation of engines, cars, and trains; and this was held contempt of court.

In *U. S. v. Kane*, 23 Fed. Rep. 748; 25 Am. & Eng. R. Cas. 608, a large and excited body of strikers, by intimidation, interfered with and prevented the running of trains on a road in the hands of a receiver. No damage was done to property, but it was held that there was contempt of court.

In *Re Higgins*, 27 Fed. Rep. 443, it appeared that the employes of an insolvent railroad company in the hands of a receiver were satisfied with their wages and treatment, yet a strike was inaugurated by a secret organization. The ostensible reason for ordering the strike was the refusal of the receiver to reinstate an employe who had been discharged as incompetent, and for being absent without leave. The court said: "The real reason for the strike was to compel recognition of a secret

3. Civil Action.—As combinations having for their object interference with the freedom of employers of labor in conducting their business by threats, intimidation, or violence, are unlawful, it follows that a civil action is maintainable for the recovery of damages caused thereby.¹

labor organization (which, by evidence, has been shown to be about as arbitrary and autocratic in dealing with labor as the famous Six Companies of China), as an existing power, so that its officers shall be consulted in the operation and management of railroads in which they do not own any interest, and of which they do not even pretend to be employes; and it is an indisputable fact that nine-tenths of the men obeying the order to strike were not aware of the alleged real reason for the arbitrary order which would result in so much injury to them and damage to the public. These present cases show that peaceable trifling with the courts of the land is not sufficiently criminal in the eyes of many of the leaders of these misguided men, and they, with others, have undertaken to order that railroad property in the hands of the *United States* courts should not be operated and managed at all unless with their consent and upon their terms; and violence and intimidation and bulldozing have been resorted to to prevent the officers of the court from performing their duties. This intolerable conduct goes beyond criminal contempt of court, into the domain of felonious crimes; but so far as the court has now to deal with it, it is criminal contempt of court." See also *King v. Ohio, etc., R. Co.*, 7 Biss. (U. S.) 529; *Secor v. Toledo, etc., R. Co.*, 7 Biss. (U. S.) 513; *Frank v. Denver, etc., R. Co.*, 23 Fed. Rep. 757; *In re Wabash R. Co.*, 24 Fed. Rep. 217.

1. *People v. Fisher*, 14 Wend. (N. Y.) 1; 28 Am. Dec. 501; *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 598; *State v. Donaldson*, 32 N. J. L. 151; 90 Am. Dec. 649; *Johnston Harvester Co. v. Meinhardt*, 9 Abb. N. Cas. (N. Y.) 393; 60 How. Pr. (N. Y.) 168; *Slaughter House Cases*, 16 Wall. (U. S.) 36; *Walsby v. Anley*, 3 El. & El. 516; 107 E. C. L. 515; *Kimball v. Harman*, 34 Md. 407; *Jones v. Blocker*, 43 Ga. 331; *Buffalo Lubricating Oil Co. v. Everest*, 30 Hun (N. Y.) 586; *Payne v. Western, etc., R. Co.*, 13 Lea (Tenn.) 509; *Haskins v. Royster*, 70 N. Car. 601; 16 Am. Rep. 780; *Old Dominion*

Steamship Co. v. McKenna, 30 Fed. Rep. 48; *Bowen v. Hall*, 6 Q. B. Div. 333; *Moore v. Bricklayers' Union*, 23 Wkly. L. Bull. 48; *Mapstrick v. Range*, 9 Neb. 390; 31 Am. Rep. 415; *Dickson v. Dickson*, 33 La. Ann. 1261; *Jones v. Blocker*, 43 Ga. 331; *Salter v. Howard*, 43 Ga. 601; *Walker v. Cronin*, 107 Mass. 555; *Boston Glass Manufactory v. Binney*, 4 Pick. (Mass.) 425; *Gunter v. Astor*, 4 Moore 12; *Hart v. Aldridge*, 1 Cowp. 54; *Carew v. Rutherford*, 106 Mass. 1; 6 Am. Rep. 287; *People v. Wilzig*, 4 N. Y. Crim. Rep. 423; *Haskins v. Royster*, 70 N. Car. 603; 16 Am. Rep. 780; *Bixby v. Dunlap*, 56 N. H. 456; 22 Am. Rep. 475.

In *Old Dominion Steamship Co. v. McKenna*, 30 Fed. Rep. 48, the defendants, who styled themselves "Executive Board of the Longshoremen Union," were held liable in damages for a strike and attempting to boycott the plaintiff in its business as a common carrier, by inducing its servants to abandon its service, because it would not pay southern negroes as high wages as New York longshoremen. The strike and boycott were declared for the express purpose of injuring the plaintiff's business.

In *Bowen v. Hall*, 6 Q. B. Div. 333, the action was for wrongfully enticing away and keeping other employes from entering the service of the plaintiff, and for leaving the plaintiff's service. Both parties to the action were manufacturers of white glazed brick, and one, an employe of the plaintiff, possessed a secret, known to but few, of making a superior quality of brick. The result was that the plaintiff was manufacturing a better quality of brick than the defendants. P. had entered into a written contract with the plaintiff, in which he agreed, for certain prices, to furnish all the labor and to manufacture for the plaintiff the best quality of white glazed brick and baths, in such quantities as the plaintiff required; and further agreed not to work for any one else for a period of five years. The defendants induced P. to break his contract with the plaintiff and enter their service. An injunc-

tion was asked restraining P. from entering the service of the defendants until the expiration of the term of his contract. It was held, Coleridge, C. J., dissenting, that the defendants were liable in an action on the case for maliciously inducing P. to break his contract, and that the injunction would lie against P.

In *Moore v. Bricklayers' Union*, 23 Wkly. L. Bull. 48, the defendants were sued for damages from a strike and boycott against the plaintiff, ordered by the defendants. The strike was ordered because the plaintiffs would not pay a fine imposed by the union against one of its members, because they would not reinstate an apprentice who had left them, and because they would not discharge a certain apprentice. The strike and boycott were kept up for months. It was held that the plaintiffs could recover.

In *Mapstrick v. Range*, 9 Neb. 390; 31 Am. Rep. 415, the defendants, journeymen tailors, did work for the plaintiff by the piece, and entered into a conspiracy to stop work simultaneously and return all work in an unfinished condition. The conspiracy was carried out by returning all work unfinished, thus rendering the garments worthless, as the plaintiff could not get other workmen to finish them. It was held, that the plaintiff had a good cause of action, and he recovered judgment.

In *Dickson v. Dickson*, 33 La. Ann. 1261, the defendants, who were co-heirs with the plaintiff to certain plantations, and were desirous to have partition of the estate, in order to compel the plaintiff to renounce her five years' lease of the property, procured the laborers, by threats, persuasion and other inducements, to abandon the plantations, and their contracts with the plaintiff. In consequence, one plantation and a large part of another remained uncultivated for one year. The plaintiff recovered judgment. See also *Jones v. Blocker*, 43 Ga. 331; *Salter v. Howard*, 43 Ga. 601.

In *Walker v. Cronin*, 107 Mass. 555; it was held that a plaintiff could recover, in an action of tort, damages for enticing away servants before the expiration of their term of service as fixed by contract, and also for inducing workmen to return in an unfinished state shoes, the stock for which had been delivered to them. See also *Hart v. Aldridge*, 1 Cowper 54.

In *Boston Glass Manufactory v. Binney*, 4 Pick. (Mass.) 425, it was held not actionable to induce servants to leave their master at the expiration of the time for which they hired themselves, although they previously had no intention of quitting his service.

In *Gunter v. Astor*, 4 Moore 12, both parties were manufacturers of pianos. The defendant invited the workmen of the plaintiff to his house to dinner, got them intoxicated, and while in that condition induced them to sign an agreement to leave their master and enter his service, by means of which the plaintiff's business was ruined. A judgment for the plaintiff for sixteen hundred pounds was sustained.

In *Carew v. Rutherford*, 106 Mass. 1; 8 Am. Rep. 287, the plaintiff being a freestone cutter at South Boston, contracted to furnish cut freestone for the Roman Catholic cathedral in Boston in large quantities at \$80,000. He not being able to get the right kind of stone when he could get workmen, sent to New York and had a part of the work done there. For this offense the Journeymen Freestone Cutters' Association of Boston, etc., of which plaintiff was a member, fined him in the sum of five hundred dollars, and upon his refusal to pay, all the freestone cutters in his employ, among them the defendants, left him in a body, pursuant to a vote and the rules of the association. In consequence of such abandonment, the plaintiff was without workmen for a week or ten days. All the cutters being members of the association it was impossible for plaintiff to procure workmen; so, in order to fulfill his contracts to furnish the stone and continue his business of stone cutting, he paid the five hundred dollars. The court said: "Without undertaking to lay down a precise rule applicable to all cases, we think it clear that the principle which is established by all the authorities cited above, whether they are actions of tort for disturbing a man in the exercise of his rights and privileges, or to recover back money tortiously obtained, extends to a case like the present. We have no doubt that a conspiracy against a mechanic, who is under the necessity of employing workmen in order to carry on his business, to obtain a sum of money from him, which he is under no legal liability to pay, by inducing his workmen to leave him, and deterring others from entering into his employment, or

STRIKING A JURY.—See JURY AND JURY TRIAL, vol. 12, p. 320; TRIAL.

STRUCK.—See note 1.

STRUCK JURY.—See JURY AND JURY TRIAL, vol. 12, p. 320.

STRUCTURE.—(*Compare* BUILDING, vol. 1, p. 601).—See note 2.

STUDENT.—See DOMICILE, vol. 5, p. 882; ELECTIONS, vol. 6, p. 278; SCHOOLS, vol. 21, p. 748; UNIVERSITIES AND COLLEGES.

by threatening to do this, so that he is induced to pay the money demanded, under reasonable apprehension that he cannot carry on his business without yielding to the illegal demand, is an illegal, if not a criminal, conspiracy; that the acts done under it are illegal, and that the money thus obtained may be recovered back, and, if the parties succeed in injuring his business they are liable to pay all the damages thus done to him. It is a species of annoyance and extortion which the common law has never tolerated."

A recent case is that of *Curran v. Galen* (Supreme Ct.), 22 N. Y. Supp. 826. Here it was held on demurrer by the special term of the supreme court, that a complaint which charged the defendants, who represented certain labor organizations, with conspiring to injure the plaintiff in his business and character, and to prevent his obtaining employment, and which set forth facts similar to those set forth in the foregoing cases, stated a cause of action.

1. **Struck Off; Knocked Down.**—Property is understood to be "struck off" or "knocked down" when the auctioneer, by the fall of his hammer, or by any other audible or visible announcement, signifies to the bidder that he is entitled to the property on paying the amount of his bid, according to the terms of the sale. *Sherwood v. Reade*, 7 Hill (N. Y.) 439. See generally AUCTIONS, vol. 1, p. 977.

2. **In Mechanics' Lien Laws**—(See generally MECHANICS' LIENS, vol. 15, p. 1).—In *Rutherford v. Cincinnati, etc., R. Co.*, 35 Ohio St. 559, where the statute provided a lien for "erecting, altering, repairing, or removing any house, mill, manufactory or other building, fixture, bridge, or other structure," it was held that a railroad was not a "structure" within the statute. The court, by Johnson, J., said: "Is a railroad a structure, within the meaning of section 1 of this act? That it is a structure, within the general signification of that term, may be con-

ceded. But a reasonable application of the maxim, *noscitur a sociis*, when construing the sentence, 'erecting, altering, repairing, or removing any house, mill, manufactory, or other building or fixture, bridge or other structure,' taken in connection with the provisions that the lien is to be on the same, and on the lot of land on which it stands or shall be removed to; and the further provision that the lien shall be recorded in the county where the work is done, or materials or machinery is furnished, would, to our minds, lead clearly to the conclusion that this phrase, 'other structures,' must be limited to improvements of the same class as those specifically named, and cannot be extended so as to include a railroad." And to the same effect, see MECHANICS' LIENS, vol. 15, p. 23.

But in *Giant-Powder Co. v. Oregon Pac. R. Co.*, 42 Fed. Rep. 470, where the general words "other structure" followed the terms "building," "ditch," "flume," "tunnel," etc., it was held that they did include a railroad. The court, by Deady, J., said: "The language of the act is certainly broad and comprehensive enough to include a railway. It is certainly a 'structure,' if not a 'superstructure.' A lien can as conveniently be imposed upon it as upon a 'ditch,' 'flume,' or 'tunnel.' These instances of lienable property are expressly mentioned in the statute; and the scope and operation of this general term, 'structure,' immediately following this specific enumeration, must be ascertained by reference to the latter. The doctrine of *noscitur a sociis* applies; and the significance of the word 'structure,' in this statute, is indicated by the company it is found in—'ditch,' 'flume,' and 'tunnel.' If the language of the act was, 'building or other structure,' only, then it might not be construed as including a railway. But the words, a 'ditch or any other structure'—cannot, consistently with this established rule of construc-

STULTIFY.—To make one out mentally incapacitated for the performance of an act.¹

STUMP—STUMPAGE.—(See also LOGS AND LUMBER, vol. 13, p. 1019).—One of the definitions of the word “stump” given by Webster is: “the part of a tree or plant remaining in the earth after the stem or trunk is cut off; the stub.” This is its usual meaning.²

SUB-AGENT.—See AGENCY, vol. 1, pp. 368, 394.

SUB-CONTRACTOR.—(See also CONTRACTOR, vol. 3, p. 822; MASTER AND SERVANT, vol. 14, p. 829; MECHANICS' LIENS, vol. 15, p. 52).—One who has entered into a contract, express or implied, for the performance of an act with a person who has already contracted for its performance.³

SUBJACENT SUPPORT.—See INJUNCTIONS, vol. 10, p. 850; LATERAL AND SUBJACENT SUPPORT, vol. 12, p. 933.

SUBJECT refers to one who owes obedience to the laws.⁴ The

tion, be held to exclude a railway. A railway is literally and technically a ‘structure.’ It consists of the bed or foundation, which may be of earth, stone, or trestle-work, on which are laid the ties and rails. These, taken together, constitute a ‘structure,’ in the full sense of the word—a something joined together, built, construed. Freund Lat. Lex. ‘Structio, Struo;’ Worcest. Dict. ‘Structure.’” And in *Forbes v. Williamette Falls Electric Co.*, 19 Oregon 61, it was held that poles set in the ground and connected by wire for the transmission of electricity constitute a “structure” within the statute.

Within the *California* statute a mine or pit has been held a “structure.” *Helm v. Chapman*, 66 Cal. 291.

A Railway Train.—A *Connecticut* statute provided that, when an injury on a highway is caused by a “structure” legally placed upon it by a railroad company, the company shall be liable therefor. It was held that a moving train of cars was not a “structure” within the meaning of the statute. The court said: “The word in its connection, being a structure ‘placed on such road,’ obviously refers to some permanent stationary erection, rather than to a moving car or locomotive engine.” *Lee v. Barkhamsted*, 46 Conn. 213.

Arson.—(See generally ARSON, vol. 1, p. 758.)

A *Texas* statute defines arson as the willful burning of any building, edifice, or “structure” inclosed with

walls and covered. It was held that a person could not be convicted of arson who first pulled down a crib and then burned the materials. *Mulligan v. State*, 25 Tex. App. 199.

1. Bouv. L. Dict.

It was at one time held that a man would not be permitted to stultify himself by pleading his own insanity. Litt., § 405; *Beverly's Case*, 4 Co. 123; Co. Litt. 247a. This doctrine was soon doubted (2 Bl. Com. 291) and finally completely overthrown. 2 Kent's Com. 451; INSANITY, vol. 11, p. 132.

2. *Cremer v. Portland*, 36 Wis. 96. In which case it was held that an averment, in a complaint against a town, that there was a large “stump” in or near the middle of the road against which the plaintiff's wagon struck, was sufficient.

3. Phil. Mech. Liens, § 44; *followed* in *Lester v. Houston*, 101 N. Car. 605.

“We suppose a sub-contractor to be one who takes from the principal contractor a specific part of the work, as, for instance, one who agrees with the principal contractor to construct ten miles of a railroad out of a line of twenty or more miles which the principal contractor has undertaken to build.” *Farmers' L. & T. Co. v. Canada, etc., R. Co.*, 127 Ind. 257. And in that case it was held that the term “sub-contractor” did not include a laborer nor a materialman.

4. *Respublica v. Buffington*, 1 Dall. (Pa.) 60.

“subject” of a monarchy corresponds to the “citizen” of a republic.¹

SUBJECT—SUBJECT-MATTER—(See also MATTER, vol. 14, p. 976).—See note 2.

SUB-LEASE.—See LEASE, vol 12, p. 1036.

SUBMISSION—(See also ARBITRATION, vol. 1, p. 646; REFEREES; SUBMIT).—A submission is a contract between two or more parties, whereby they agree to refer the subject in dispute to others and to be bound by their award. The submission itself implies an agreement to abide the result, even where such agreement is not expressed.³

SUBMISSION TO COURT (ON AGREED CASE).

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1. *In re Birdsong*, 39 Fed. Rep. 601; CITIZENSHIP, vol. 3, p. 242.

Thus in *The Pizarro*, 2 Wheat. (U. S.) 227, where the treaty of 1795 with *Spain* was under consideration, it was held that “the term ‘subjects,’ when applied to persons owing allegiance to *Spain*, must be construed in the same sense as the terms ‘citizens’ or ‘inhabitants’ when applied to persons owing allegiance to the *United States*.”

British Subjects.—See BRITISH, vol. 2, p. 570.

Liege-Subjects.—See LIEGE, vol. 13, p. 574.

2. The constitutions of many of the states provide that no law shall contain more than one “subject,” which shall be expressed in the title. Upon these provisions there have been numerous decisions, which will be found set out under the title STATUTES. There are similar provisions using the word “object” instead of “subject.” See OBJECT, vol. 17, p. 1.

The subject-matter involved in a litigation is the right which one party claims as against the other, and demands the judgment of the court upon; as, for example, the right in ejectment to have possession of the lands; in *assumpsit*, to recover a demand; in equity, to have a mortgage foreclosed for an

amount claimed to be due upon it, or to have specific performance of a contract, and so on. *Jacobson v. Miller*, 41 Mich. 93.

In *New York Code*.—Section 3253 of the *New York Code of Civil Procedure* authorizes the allowance of extra costs in an action wherein rights of property are involved, and a pecuniary value may be predicated of the subject-matter involved. *Held*, that “subject-matter involved” refers simply to property or other valuable thing, the possession, ownership, or title to which is to be determined by the action, and does not include other property, although it may be directly or remotely affected by the result. *Conaughty v. Saratoga Co. Bank*, 92 N. Y. 404. See also *Coleman v. Chauncey*, 7 Robt. (N. Y.) 578.

In *Borst v. Corey*, 15 N. Y. 509, it was held that “subject-matter,” as used in section 50 of the code, was synonymous with the term “cause of action” contained in the preceding section.

“Subject of the Action.”—See COUNTERCLAIM, vol. 4, p. 331.

“Subject To.”—See IMPLIED COVENANTS, vol. 9, p. 962.

3. From the opinion of the court in *Whitcher v. Whitcher*, 49 N. H. 180; 6 Am. Rep. 486.

I. DEFINITION.—By the submission of a controversy, as treated in this article, is meant the practice of preparing an agreed statement of the material facts in the cause and submitting such statement to the court for a decision upon the question or questions of law involved therein.¹

II. UPON WHAT SUBMITTED—1. The Case—Its Nature and Purpose.—The controversy is submitted upon what is variously known as a case made, case agreed or stated, agreed statement of facts, or special case. This is a written statement of all the facts in the cause, to which is added an agreement between plaintiff and defendant, or their respective counsel, to the effect that the facts are as therein agreed upon and set forth, whereby the necessity of a trial by jury is dispensed with, and a decision is obtained from the court upon the law arising out of the agreed facts.² The practice of making a case for the court is said to be a substitute for a special verdict, and is resorted to for convenience and to save the expense of a trial, its purpose being not to make evidence for a jury, but to supersede the action of a jury altogether

1. As to submission to arbitrators, see *ARBITRATION AND AWARD*, vol. 1, p. 646; to referees, see *REFEREES*, vol. 20, p. 660.

2. 1 Bouv. L. Dict. 288; 1 Troubat & Haly's Pr. (Pa.), § 752; Fuller v. Trevoir, 8 S. & R. (Pa.) 529; Diehl v. Ihrie, 3 Whart. (Pa.) 143; Whitesides v. Russell, 8 W. & S. (Pa.) 44. See *CASE*, vol. 3, p. 29.

A proceeding similar to this and described as another method of finding a species of special verdict is that in which trial is had by a jury, and they find a verdict generally for the plaintiff; but subject nevertheless to the opinion of the judge of the court above on a special case stated by the counsel on both sides with regard to a matter of law. This method has the advantage over a special verdict, that it is attended with much less expense and obtains a much speedier decision. 3 Bl. Com. 378.

Now, in *England*, a case may be submitted to the court on an agreed statement of facts and with or without formal pleadings. 2 Cooley's Blackstone (3d ed.), 377, n.

Under *Indiana* Rev. Stat., § 553, providing that parties shall have the right, with or without process, by agreement to that effect, to submit any matter of controversy between them to any court that would otherwise have jurisdiction upon an agreed statement of facts signed by the parties, but requiring an affidavit that the controversy is real, where, upon application to sell a dece-

dent's real estate to pay debts, issues are formed and the case submitted upon an agreed statement of facts, the proceedings do not constitute an agreed case. Witz v. Dale, 129 Ind. 120.

Distinguished from Special Verdict.—“The case agreed may occur any time after the suit is instituted, as well before as after issue joined, whilst a special verdict, of course, supposes that the case has been regularly matured, and, for the most part, that an issue has been joined, which the jury is sworn to try. Some diversities may grow out of this difference worthy to be noted. Thus, where the case is agreed before defendant pleads, the agreement cures the want of a plea, and the cause is submitted to the court upon the agreed facts, without reference to any particular form of defense; the general question to be determined being whether the plaintiff, upon the whole case as stated, ought to recover; but where an issue has been joined when the case is agreed, the decision must be restricted to the issue.” 4 Min. Inst. (2d ed.) 835. See *VERDICT*.

Waiver of Jury.—Case made or stated, is not to be confounded with the waiver of jury which exists, by statute, in some states, since in the former no inferences of fact are admitted, while in the latter the parties submit an agreed statement of all the evidence from which the court may make any just inferences of fact and upon them decide the questions of law. Hodge v. First Nat. Bank, 22 Gratt. (Va.) 51; Dearing

by imparting to facts ascertained by mutual agreement, the judicial certainty requisite to enable the court to pass upon the law and give judgment on the whole.¹

2. Requisites—Contents.—In order to enable the court to pass judgment, when this method of trial is adopted, the case made or stated, being a substitute for and in the nature of a special verdict, and equivalent to a finding of facts by the jury, must set out distinctly all the material facts as agreed upon, but not the evidence from which such facts may be inferred.² The nature of the controversy should be described specifically; and the judg-

v. Rucker, 18 Gratt. (Va.) 426; *Wickham v. Martin*, 13 Gratt. (Va.) 446. See *Virginia Code* 1873, ch. 158, § 36; *Martinton v. Fairbanks*, 112 U. S. 670.

1. *McLughan v. Bovard*, 4 Watts (Pa.) 308; *Diehl v. Ihrle*, 3 Whart. (Pa.) 143.

The object of a case made is to enable parties, without resort to legal process or formal pleadings, to submit to the court for its adjudication some alleged cause of action or claim for relief. *Williams v. Rochester*, 2 Lans. (N. Y.) 169.

"A case stated is a substitute for a special verdict, adopted for convenience to save the labor and expense of finding the same facts by the jury in the form of a special verdict." *Rogers, J., in Whitesides v. Russell*, 8 W. & S. (Pa.) 44.

In *McKethan v. Ray*, 71 N. Car. 165, it was said that the object of section 315 *North Carolina Code Civ. Proc.*, is simply to dispense with the formalities of a summons, complaint and answer, and permit the parties to agree upon the facts for the judgment of the court.

Loss—Destruction.—A case stated is a substitute for a verdict; and when lost or destroyed, and the parties cannot agree on a new one, the cause goes to the jury as if no case had been made. It is wrong to appoint a commissioner to take testimony of its contents, and give judgment on his report. *Cook v. Shrauder*, 25 Pa. St. 312.

2. *Old Colony R. Co. v. Wilder*, 137 Mass. 536; *Goodrich v. Detroit*, 12 Mich. 279; *Ford v. Cameron*, 19 Mo. App. 467; *Union Sav. Bank v. Fife*, 101 Pa. St. 388; *Helser v. Coyle*, 58 Pa. St. 461; *Berks County v. Pile*, 18 Pa. St. 493; *Holmes v. Wallace*, 46 Pa. St. 266; *Newark, etc., R. Co. v. Perry County*, 30 Ohio St. 120; *Raimond v. Terrebonne Parish*, 132 U. S. 192; *Burr v. Des Moines Nav., etc., Co.*, 1 Wall.

(U. S.) 99; *Glen v. Fant*, 134 U. S. 398; *Norris v. Jackson*, 9 Wall. (U. S.) 125.

Where the counsel for plaintiff and defendant filed an agreement in writing "that the evidence, oral and record, and the entire records, shall be treated as a case stated, judgment to be entered thereon by the court according to its views of the law and facts, each party reserving the right to sue out a writ of error," and the court afterwards entered judgment on the case stated for the plaintiff, it was held that the agreement was bad as a case stated. *Union Sav. Bank v. Fife*, 101 Pa. St. 388.

A case stated must contain a full and certain statement of all the facts belonging to the case, so that, when a judgment is entered thereon, it will be capable of enforcement to the same extent as though reached by the verdict of a jury. *Washburn v. Baldwin*, 10 Phila. (Pa.) 472.

In a case made or agreed, the parties need not agree upon all the facts in the case, but may state such facts as are pertinent to a particular question of law, and agree that the judgment be entered for the plaintiff or defendant, according as the opinion may be in favor of the one or the other party upon the facts as stated. *Stockton v. Copeland*, 23 W. Va. 696.

New York Code Civ. Proc., § 532, provides that in pleading a judgment, or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. This rule may with propriety be applied to the statement of facts required in a case agreed as required by section 1279; whatever is a sufficient statement of facts, according to the former, to impliedly allege jurisdiction, is a sufficient statement of facts, according to the latter, that jurisdiction existed. There is no

ment to be given for the party prevailing and the amount thereof, or the mode by which it can be liquidated, should also be stated.¹

reason for greater particularity in admitting facts for the submission of a controversy than in alleging them in pleading. *Brownell v. Greenwich*, 114 N. Y. 518.

The court will not assume the office of a jury in deciding upon a special case submitted by agreement of the parties, when the principal questions are questions of fact, to be decided upon the conflicting testimony of witnesses whose credit is made a matter of question. *Brockbank v. Anderson*, 7 Scott N. R. 813; 13 L. J. C. P. 102.

Where there is an essential fact in dispute, as, for example, whether natural gas is a volatile substance or not, the supreme court will quash a case stated. *Ford v. Buchanan*, 111 Pa. St. 31.

The *United States* Supreme Court on a case stated can only give judgment where facts alone are stated. Should there be any question as to the effect or competency of evidence, or as to any rulings of the court below on evidence examined, the case is not a "case stated." *Burr v. Des Moines Nav., etc., Co.*, 1 Wall. (U. S.) 99; *Pomerooy v. State Bank*, 1 Wall. (U. S.) 592.

In an action against a guardian for value of services voluntarily rendered in rearing and educating his ward, over and above the value of services rendered by such ward, an agreed statement of facts was submitted which set forth the character, but not the value, of such services. It was held not to be error for the court, upon the defendant's denying that the plaintiff was entitled to more than the services of the ward, to find for the defendant, since the agreed case omitted to set forth essential facts, viz., the respective values of the plaintiff's and ward's services. *Brown v. Rogers*, 61 Ind. 449.

"A statement of facts by the parties, or a finding of facts by the circuit court of the *United States*, is strictly analogous to a special verdict, and must state the ultimate facts of the case presenting questions of law only, and not be a recital of evidence or of circumstances, which may tend to prove the ultimate facts, or from which they may be inferred." Gray, J., in *Raimond v. Terrebonne Parish*, 132 U. S. 192.

Where Material Fact Is Omitted.—In *Massachusetts*, it is said that where a material fact is "inadvertently omitted,

or is a fact which is susceptible of proof, one way or the other, the usual course is for this court to discharge the case stated and remand the unsettled question of fact to be tried in the superior court by the proper tribunal." *Old Colony R. Co. v. Wilder*, 137 Mass. 537, citing *Gregory v. Pierce*, 4 Met. (Mass.) 478; *Lefavour v. Homan*, 3 Allen (Mass.) 354; *Morse v. Mason*, 103 Mass. 560; *Meserve v. Andrews*, 104 Mass. 360.

Examples.—Where a suit was brought to recover a statutory penalty, and the cause was submitted to the court on a case stated, which failed to show whether the acts relied on to establish the defendant's liability took place within the two years provided by law for the prosecution of such actions, or in what state they took place, such case is not sufficient to sustain a judgment. *Com. v. Howard* (Pa. 1892), 24 Atl. Rep. 308.

An agreed case occupies the same footing and stands in lieu of a special verdict, and the court pronounces the conclusion of law precisely as if a jury had found a verdict in that form. In order that judgment may be pronounced, all the facts necessary to a determination of the case must be definitely ascertained; if there be any ambiguity or omission of facts necessary to a recovery, or any lack of clearness and certainty on material points, the judgment cannot be allowed to stand. Therefore, in an action to attach the separate property of a wife, where the agreed statement did not show whether the debts were those of the husband or the wife, or whether the latter had any separate estate, or whether the debts were evidenced by notes, or, if so, whether the notes were signed by husband or wife or both, the cause was remanded. *Gage v. Gates*, 62 Mo. 412. See *Carr v. Lewis Coal Co.*, 96 Mo. 149; 9 Am. St. Rep. 328.

Where, on appeal, the statement refers to certain exhibits said to be annexed, but which are not, and where it is left to either party to add to the facts in the case agreed, the case will be remanded—such addition being wholly inadmissible, since the controversy is to be decided solely upon the facts contained in the agreed case. *Piedmont R. Co. v. Reidsville*, 101 N. Car. 404.

1. *Berks County v. Pile*, 18 Pa. St.

III. NATURE OF CONTROVERSY TO BE SUBMITTED.—In order that the court may have jurisdiction to hear and decide a controversy submitted upon an agreed statement of facts, it is primarily essential that such controversy be real, not fictitious, and the proceedings in good faith to determine the rights of the parties,¹ to

493; *Williams v. Rochester*, 2 Lans. (N. Y.) 169. See *Kennedy v. New York*, 79 N. Y. 361.

If a special case is made in a cause pending, the nature of the relief sought is sufficiently indicated to the court by the form of action. If, however, process and pleading are waived and the parties come before the court upon a naked statement of facts, the record does not show the relief desired, unless it is expressed in the agreement itself. In such case the court acquires jurisdiction of the parties and the subject-matter by force of the agreement, and if nothing is contained therein as to the judgment or decree to be rendered upon the facts, the court is powerless to act. *Central City Water Co. v. Kimber*, 1 Colo. 475.

In *Overman v. Sims*, 96 N. Car. 451, Smith, J., said: "We do not approve of this method of presenting a mere narrative of the facts, out of which the controversy springs, without any statement of the subject-matter of contention, and the conflicting claims of the litigants to be passed on and decided. While formal pleadings are not required, nor any preliminary process, to secure jurisdiction, the statute manifestly contemplates the existence of a controversy, and the case agreed should set out its nature, so that the court may understand what is intended to be submitted, and thus render an intelligent decision."

A case stated should "specifically describe the controversy arising upon the facts, and the rulings to be made, according to the opinion of the court, of their legal operation." See *Moore v. Hinnant*, 87 N. Car. 505; *McKethan v. Ray*, 71 N. Car. 165. But there are precedents where jurisdiction has been assumed and exercised, and the nature of the controversy inferred from the mere statement of facts. *Hager v. Nixon*, 69 N. Car. 108; *Lewis v. Wake County*, 74 N. Car. 194.

A court is not bound to accept the submission of a cause to its decision without a jury, where the assessment of unliquidated damages is involved; but if the submission is accepted, the

court should assess the damages. *Haldeman v. Chalmers*, 19 Tex. 1.

Nominal Damages.—If a case is submitted to the court upon an agreed statement of facts, in which the damages are not fixed or an assessment thereof provided for, the judgment, if for the plaintiff, will be for nominal damages only. *McAneany v. Jewett*, 10 Allen (Mass.) 151.

Form; Signature.—It has been held that a case made before trial must be signed by each of the parties, or by their attorneys, in order that it may be heard by the court. *Farrand v. Bentley*, 6 Mich. 280; *Branchardiere v. Elvery*, 18 L. J. Exch. 383.

1. *Washburn v. Baldwin*, 10 Phila. (Pa.) 472; *Williams v. Rochester*, 2 Lans. (N. Y.) 169.

Where the proceedings on their face appear to be an actual adversary proceeding, with no indication of a feigned action, the agreement as to the evidence will not change the character of the case nor overturn the presumption that there is an actual controversy. *Witz v. Dale*, 129 Ind. 120.

Where the judgment is genuine, an agreed case will not be considered fictitious merely because it contains no reference to the rights of third parties. *State v. Wilson*, 2 Lea (Tenn.) 204.

"This mode of procedure is not intended to provide for the submission of questions of law for the opinion of the court merely, without a case in which a judgment might be rendered, in accordance with its opinion, legally determining the rights of the parties. It does not authorize a submission of questions in cases that are merely anticipated, nor of cases where the facts are disputed, nor is such submission intended to be merely advisory as to the rights of the parties. It is rather a substitute for an action, and its effect upon the rights of the parties is the same as that of an action. It is a short and convenient mode for the final adjudication of the case submitted." Day C. J., in *Newark, etc., R. Co. v. Perry County*, 30 Ohio St. 120.

Where it appeared that the same attorney prepared the statement, and

which effect an affidavit must be filed with the agreement.¹ Further, the controversy must be one that may be the subject of a civil action,² and such that an effectual judgment may follow on

also the briefs of both parties in a controversy submitted on an agreed case under *New York Code Civ. Proc.*, § 1279, providing for such submission in good faith, of a real controversy, the decision in such controversy was set aside, as the latter was not of the independent character contemplated by the Code. *Wood v. Nesbitt* (Supreme Ct.), 19 N. Y. Supp. 423, vacating decision in 62 Hun (N. Y.) 445.

In *Smith v. Cudworth*, 24 Pick. (Mass.) 197, the court said: "The question of the exemption of the workbench from attachment and execution, does not arise in the case. It is true, the parties have attempted to present it, and have expressly agreed that judgment shall be rendered according to our opinion upon this question. But neither parties nor their counsel have any right to make their cases turn upon anything but their own intrinsic merits; or call upon the court by fictitious actions or assumed facts to decide mere speculative questions. The former would partake of the nature of gambling, and the latter would convert the highest tribunal in the state into a moot court to decide questions which might never arise, or to lay down rules for the government of cases in which the real parties would have had no opportunity to be heard. The members of this court, too, have quite labor enough to perform the duties which necessarily and legally devolve upon them."

The court refused to give judgment in a special case stated under 3 & 4 Wm. IV, ch. 42, § 25, it appearing that the action was not *bona fide* brought to try a question really in contest between the parties to the cause. *Doe v. Duntze*, 6 C. B. 100; 60 E. C. L. 99; 17 L. J., C. P. 220.

The statute 15 & 16 Vict., ch. 76, § 46, only enables the parties to state questions without pleadings which they might have raised with pleadings, but does not entitle them to put questions on speculation. *Wellesley v. Withers*, 4 El. & Bl. 750; 82 E. C. L. 750.

Misconduct of Attorney.—A special case was stated for the opinion of the court, and it appearing that the greater part of the statement was fictitious, the court fined the attorney for his

misconduct. 2 Tidd's Prac., *p. 899; *In re Elsam*, 3 B. & C. 597; 10 E. C. L. 193.

1. *Jones v. Hoffman*, 18 B. Mon. (Ky.) 656; *Myers v. Lawyer*, 99 Ind. 237; *Sharpe v. Sharpe*, 27 Ind. 507; *Manchester v. Dodge*, 57 Ind. 584; *Godfrey v. Wilson*, 70 Ind. 50; *McCarson v. Richardson*, 1 Dev. & B. (N. Car.) 561; *Aycöck v. Harrison*, 65 N. Car. 8; *Plainfield v. Plainfield*, 67 Wis. 525.

But where the agreement only substituted a brief statement on the record for written pleadings, and did not dispense with proof of the facts upon which the judgment of the court was sought, it was held that it was not such an agreed case as required an affidavit under the *Kentucky Code*, that the controversy was real; and although the proceeding was irregular, yet the trial court had jurisdiction to try it. *Canaday v. Hopkins*, 7 Bush (Ky.) 108.

It is not necessary that the affidavit required by the statute be made by more than one of the parties. *Booth v. Cottingham*, 126 Ind. 431. And under the *New York Code*, § 1279, the affidavit must be made by the party, not by his attorney, when there is a natural person as party who may make it. *Bloomfield v. Ketcham*, 95 N. Y. 657. An agreed case wanting this affidavit has been considered by the court, not as an agreed case under the statute, but as an agreed statement of the evidence. *Manchester v. Dodge*, 57 Ind. 584.

2. See *New York Code Civ. Proc.*, § 1279. Thus, where A claims to have been elected the successor of B to the office of justice of the peace, which claim B disputes, such a question arises as might be the subject of a civil action, and may be submitted upon an agreed case. *Frazer v. Miller*, 12 Kan. 459. See *Alexander v. McKenzie*, 2 S. Car. 86. But in *Buffalo v. Mackay*, 15 Hun (N. Y.) 204, it was held that a right to a public office could not be tried upon an agreed case, as the mode of trying such right, as prescribed by law, is by an action in the name of the people of the state; they must be made a party, and their presence is necessary in such a controversy.

If a question has not yet arisen between the parties, the court will not determine what their rights will be

the submission.¹ A matter which, if there is any question upon it, is proper for a plea in abatement, will not be decided upon a case stated.²

IV. DUTY OF THE COURT.—After the parties to a *bona fide* controversy, whether commenced by amicable agreement, or suing out of original process, have arrived at an agreement as to the facts in the cause, the statement prepared by them, either as a whole or divided into several parts, each involving a different point of law, signed by the parties or their counsel, together with the affidavit of realty, is submitted to the court for its opinion and decision upon the questions involved, whereupon the latter simply applies the law arising from such undisputed facts and renders judgment.³ But the court can in no case infer any other

when the question does arise. Thus, where a will provided for a legacy to a college payable in two years upon certain conditions being performed within one year, the question as to whether the conditions had been performed cannot, until the expiration of the two years, be submitted in a case agreed. *Hobart College v. Fitzhugh*, 27 N. Y. 130.

The *New York Code Civ. Proc.*, § 1279, contains no authority for the submission of actions, but relates only to the submission of questions of difference without action. *Van Sickle v. Van Sickle*, 8 How. Pr. (N. Y.) 265.

Where the court would have no jurisdiction over the action or suit if brought, it has declined to consider the submission. *Stone v. Hobart*, 8 Pick. (Mass.) 464.

1. *Cunard Steamship Co. v. Voorhis*, 104 N. Y. 525. And, therefore, where the only relief that the plaintiff would be entitled to on the case stated is an injunction, the submission should be dismissed, as that relief is expressly prohibited (section 1281) in such a proceeding. *People v. Mutual Endowment, etc., Assoc.*, 92 N. Y. 622.

2. *Libbey v. Hodgdon*, 9 N. H. 394; *Morse v. Calley*, 5 N. H. 222. Thus where the question was whether a coroner, who was also deputy sheriff, might serve process upon another deputy of the sheriff, the court held that it was an improper matter to be brought before it on a case stated. *Colby v. Dillingham*, 7 Mass. 475.

Decision of the Controversy.—The court will not hear a cause referred in a case stated, by which only a preliminary question will be settled leaving the merits undecided. *Austin v. Wilson*, 7 Mass. 205; *Capen v. Wash-*

ington Ins. Co., 12 Cush. (Mass.) 517. And under *New York Code Civ. Proc.*, § 1279, a case containing a mere abstract question not decisive of the controversy may not be submitted. *People v. Mutual Endowment, etc., Assoc.*, 92 N. Y. 622. Nor a case which propounds mere interrogatories. *Wood v. Squires*, 60 N. Y. 191. Compare *McKethan v. Ray*, 71 N. Car. 165.

3. *White v. Walker*, 22 Mo. 433; *Henri v. Grand Lodge*, 59 Mo. 581; *Shaw v. Padley*, 64 Mo. 519; *Barden v. St. Louis Mut. L. Ins. Co.*, 3 Mo. App. 248; *Frailey v. Legion of Honor*, 132 Pa. St. 578.

But the rule is subject to this qualification in its application; the agreed statement must cover all the facts of the case; but should the parties agree to certain facts which they do not care to controvert, while they controvert others which one or the other of the parties must introduce evidence to support, the agreed statement is used before the jury, or the court sitting as a jury, as evidence concluding the parties so far as they have agreed. But in that case the judgment will be upon the finding of the facts and not upon an agreed case. *Munford v. Wilson*, 15 Mo. 540.

Where a case stated has been filed by the parties for the opinion of the court, judgment must be based on the agreed facts; and the appointment of a master to report the facts in the case and the entry of judgment on such reports is error, for which the judgment will be reversed and the case stated, quashed. *Frailey v. Legion of Honor*, 132 Pa. St. 578.

An agreed statement of facts, imperfect and inconclusive in itself, containing an agreement that if, on any facts,

facts from those agreed upon, and pronounce the law arising thereon; ¹ nor can it go beyond the issue, if any has been made

plaintiff's case can be maintained, the case may be referred to a master or assessor to determine whether such vital facts exist, cannot be submitted. *Phelps v. Phelps*, 145 Mass. 416.

Judgment.—In an agreed statement of facts, the principle is, that the defendant is to have judgment if the facts would verify any plea which would be a bar to the action, unless there be a special limitation in the statement. *Moore v. Philbrick*, 32 Me. 102; 52 Am. Dec. 642; *Gardiner v. Nutting*, 5 Me. 140; 17 Am. Dec. 211; *Machias Hotel Co. v. Fisher*, 56 Me. 323.

Where there is a declaration, but no plea, and the plaintiff's cause of action, as set forth in the declaration, is submitted to the court without reference to any particular form of defense, the defendant is entitled to judgment, if the facts stated afford him a defense of which he might have availed himself under any form of pleading. *Sawyer v. Corse*, 17 Gratt. (Va.) 230; 99 Am. Dec. 445.

By the submission of a case upon an agreed statement of facts, all defects of pleading are waived, and the plaintiff can recover if the facts stated disclose a cause of action; but if the plaintiff's remedy is solely by the enforcement of a lien, and not by action, he cannot recover. *West Roxbury v. Minot*, 114 Mass. 546.

1. *Fearing v. Irwin*, 55 N. Y. 486; *Crosby v. Thedford*, 13 Daly (N. Y.) 150; *Canonsburgh Iron Co. v. Union Nat. Bank* (Pa. 1886), 6 Atl. Rep. 574; *Diehl v. Ihrie*, 3 Whart. (Pa.) 143; *Helser v. Coyle*, 58 Pa. St. 461; *Goodrich v. Detroit*, 12 Mich. 279; *Crandall v. Amador County*, 20 Cal. 72; *Binney v. Chesapeake, etc., Canal Co.*, 8 Pet. (U. S.) 214; *Byam v. Bullard*, 1 Curt. (U. S.) 100; *Brown v. Evans*, 15 Kan. 88; *Gray v. Crockett*, 30 Kan. 148. See *Engstrom v. Brightman*, 5 C. B. 419; 57 E. C. L. 418; 17 L. J., C. P. 14.

So in *Clark v. Wise*, 46 N. Y. 612, it was held that, as fraudulent intent is a matter of fact, the court cannot infer such fraudulent intent from the facts agreed upon in a case stated, although a jury might.

Where the facts of the case are agreed upon, the question of law alone being submitted to the court, it is outside of its province, as well as of the

agreement in the case, for the court to infer another fact from those agreed upon and pronounce the law arising thereon. *Bott v. McCoy*, 20 Ala. 578; 56 Am. Dec. 223.

A case stated must be decided on the facts agreed upon, and while inferences cannot be made from such facts, which may or may not be true, still legal presumptions and necessary conclusions may be drawn. *Van Brunt v. Pike*, 4 Gill (Md.) 270; 45 Am. Dec. 126. See *Hysinger v. Baltzell*, 3 Gill & J. (Md.) 158; *Lewis v. Hoblitzell*, 6 Gill & J. (Md.) 266; *Reeside v. Fischer*, 2 Har. & G. (Md.) 320.

Where a case stated, submitted to the court the validity of a voluntary transfer of the estate of a decedent as against an execution attachment, and set forth that the judgment on which the attachment issued was recovered on the bond accompanying a mortgage after the foreclosure of the same, and a purchase of the land at a judicial sale thereunder by the mortgagee, for a sum insufficient to pay the mortgage, and, also, that, after the recovery of the judgment and the voluntary transfer, the mortgagee sold the land so purchased and satisfied the mortgage, but contained no statement that the debt was unpaid in fact at the time of the satisfaction, nor that it was the intention of the parties that the debt should remain, although the mortgage was satisfied, it was held, that, since the presumption of law was that the satisfaction of the mortgage worked an extinguishment of the debt, and the burden of removing that presumption was on the creditor, the court could not infer facts not stated, for the purpose of defeating the effect of the satisfaction. *Seiple v. Seiple*, 133 Pa. St. 460.

A stipulation between parties to a series of similar suits provided, substantially, that in the thirty-seven untried cases the evidence adduced should be the same as in the one tried, and that the finding of facts in the case tried should be the same as in the untried cases. It was held, that when this case came on for trial, and the agreement and bill of exceptions in the formerly tried case were submitted to the court under the complaint, its sole duty was to enter a judgment on the agreed finding, its

up, however manifest the justice which might be reached by going further,¹ since it is to be presumed that what is not included in the statement either does not exist or is left out for sufficient reasons.²

V. CONSEQUENCE OF DEFECTIVE CASE.—If the case made is defective, as, for example, in the finding of facts, where evidence of the facts is set forth, instead of the facts themselves, it seems that the court may refuse to hear it, or treat it as a demurrer to evidence,³ or award a *venire facias de novo*.⁴ And so, where, by

jurisdiction being restricted thereto by the agreement, and if there were undeveloped points in the record of the tried case which might have been, but were not, made the basis of an exception, they were by necessary implication waived, as the agreement and finding in the tried case constituted an agreed case, upon which the circuit court was authorized to pronounce its conclusion of law. *State v. Hannibal, etc., R. Co., 34 Mo. App. 594.*

Power to Infer Facts Reserved to the Court.—It seems that the power to draw inferences from the facts stated may be reserved to, and accepted by, the court. *Doe v. Crisp, 1 P. & D. 37; 8 Ad. & El. 779.* See *Latter v. White, L. R., 5 H. L. 587.* But the court may nevertheless decline to pronounce upon a question of fraud. *Whitmore v. Claridge, 10 W. R. 1057.*

In a case stated, the court is confined to the precise facts embraced in the statement, and has no power to draw inferences from them, unless there is an express agreement that the court may make such deductions of fact as a jury ought to make. *Jackson v. Salisbury, 66 Md. 459.*

If a case is submitted on an agreed statement of facts, with power for the court to draw reasonable inferences, the court cannot infer that the facts stated constitute a color to conceal something really different, unless such inference is very clearly made out. *Bullen v. Sharp, L. R., 1 C. P. 86.*

When an action is submitted upon a statement of facts which contains a clause that the court may draw inferences of fact from the facts and evidence stated, the appellate court cannot inquire whether the inferences of fact drawn by the inferior court are correct, its judgment being conclusive upon such findings of fact. *Cochrane v. Boston, 1 Allen (Mass.) 480; Charlton v. Donnell, 100 Mass. 29; Old Colony R. Co. v. Wilder, 137 Mass. 536.*

1. *Philadelphia, etc., R. Co. v. Waterman, 54 Pa. St. 337; Sawyer v. Corse, 17 Gratt. (Va.) 230; 99 Am. Dec. 445.*

If by the terms of a case stated, the plaintiff's right to recover is limited to the pleadings, the court will not consider whether he might have recovered under any other form of declaration; and, unless the plaintiff is entitled to recover on his declaration as stated, the defendant must have judgment. *Com. v. Worcester, etc., R. Co., 124 Mass. 561.*

When the parties rest their case upon the decision of a particular point of law, the inquiry of the court will be narrowed accordingly, so as to exclude all other matters, and the court in such case will enter up its judgment in favor of the plaintiff or defendant according to its opinion on the point of law submitted. *Royall v. Eppes, 2 Munf. (Va.) 479.*

Where an agreed statement of facts set forth that "the plaintiffs are entitled to recover the whole of said real estate, except the improvements, unless prevented by the facts hereinafter stated," the effect was to submit only the question of title to the real estate, aside from the improvements. *Burns v. Keas, 21 Iowa 257.*

2. *Berks County v. Pile, 18 Pa. St. 493; Philadelphia, etc., R. Co. v. Waterman, 54 Pa. St. 337; Diehl v. Ihrie, 3 Whart. (Pa.) 143; Seiple v. Seiple, 133 Pa. St. 460; Canonsburg Iron Co. v. Union Nat. Bank (Pa. 1886), 6 Atl. Rep. 574.*

3. *Ament v. Sarver, 2 Grant (Pa.) 34.* See also *Parker v. Urie, 21 Pa. St. 305; Fisher v. Purdue, 48 Ind. 323; Mellick v. Smith, 1 Leg. Opin. (Pa.) 157.*

4. *Helser v. Coyle, 58 Pa. St. 461; Union Sav. Bank v. Fife, 101 Pa. St. 388; Clark v. Halberstadt, 1 Miles (Pa.) 26; Holmes v. Wallace, 46 Pa. St. 266.*

A case submitted upon an agreed statement of facts may be discharged

reason of a gross misstatement of facts, judgment cannot be entered according to the justice of the cause, or where, by the terms of the agreement, the statement cannot properly be considered a case agreed, it may be set aside and treated as a nullity, and a new trial granted.¹

VI. PRACTICE—1. Parties.—Since the submission of a controversy upon a case implies an agreement between the parties, it follows that such parties must be capable of consenting.²

if there has been any material mistake or omission in making out the same. *Gregory v. Pierce*, 4 Met. (Mass.) 480.

After judgment of the superior court upon a case agreed has been affirmed on appeal and a rescript transmitted accordingly, the superior court has power, if satisfied that by mistake of the parties or counsel, or misunderstanding of that court, a question of fact essential to the determination of the rights of the parties has not been tried, to order the statement of facts to be discharged and the case tried by jury. *West v. Platt*, 124 Mass. 353.

If a case stated, submitted to the superior court and an appeal taken, presents evidence instead of facts, the supreme court may discharge it and order the action to stand for further proceedings in the superior court. *Powers v. Provident Inst.*, 122 Mass. 443. So, where, on appeal in the superior court, the case stated does not contain all the facts necessary to determine the rights of the parties. *Morse v. Mason*, 103 Mass. 560.

Where an action submitted to the court of common pleas upon a case stated was carried to the supreme court on exceptions, and it appeared that the facts were not sufficiently stated in the bill of exceptions, the case was remanded for further proceedings. *Merriam v. Merriam*, 6 Cush. (Mass.) 91.

1. *Davila v. Herring*, 1 Str. 300; *Hankey v. Smith*, 3 T. R. 507; *Wheldon v. Matthews*, 2 Chit. Rep. 398; 2 Tidd's Pr. 899; *Cook v. Shrauder*, 25 Pa. St. 312; *Odell v. Cromwell*, 10 N. Y. Wkly. Dig. 273.

An agreed case was made up and submitted to the court for its decision. In the agreement it was stated that if, on the facts agreed, the court should find for the defendants, judgment should be entered for the defendants subject to any writ of error to which the plaintiffs might be entitled; but if upon the facts agreed the court should find the law for the plaintiffs, it should

enter up no judgment for them, but the case should then be tried by the jury, and the defendants might rely on any defenses which they could legally set up and prove, and the agreed facts should be used by neither against the other. In other words, the facts agreed were to be regarded as true if the court found for the defendants; otherwise, none of the facts agreed were to be taken as true either by the court or jury. This was clearly no agreed case, and should have been set aside and treated as a nullity. *Stockton v. Copeland*, 23 W. Va. 696.

The rules which govern in proceedings on a case agreed are similar to those which govern on a special verdict; and if the agreed statement be too uncertain for the court to determine in whose favor the judgment should be rendered, or if an important fact be omitted therefrom, the case agreed should be set aside and further proceedings directed. *Brewer v. Opie*, 1 Call (Va.) 212; *James v. McWilliams*, 6 Munf. (Va.) 301; *Phelps v. Phelps*, 145 Mass. 416.

It is a serious matter to disturb a carefully drawn agreed statement of facts upon which a cause has been tried, and it would not be done between private litigants, in the absence of any unfairness; yet such an agreement between a receiver and another party to a suit may be set aside and a rehearing had, upon allegation of mistake on the part of the receiver, he being an officer of the court and representing many claimants to a fund. *In re Smith*, 9 Abb. N. Cas. (N. Y.) 452.

2. Therefore there can be no submission where an infant is interested. *Fisher v. Stilson*, 9 Abb. Pr. (N. Y.) 33; and it seems that there is no authority, under the *New York Code*, at least, for the appointment of a guardian for an infant for the purpose of such submission. *Lathers v. Fish*, 4 Lans. (N. Y.) 213. *Baumgras v. Brickell*, 44 Hun (N. Y.) 626, in which case

But the necessary parties must be before the court, and voluntarily.¹

2. Amendment.—As a rule, the court is reluctant to order an amendment of the statement in a case made, because of the solemnity of the agreement entered into between the parties. Yet it seems that in some cases, for sufficient cause shown, this will be done.²

the question of authority of several devisees, some of them being minors, to dispose of part of the estate, was involved.

1. *Hobart College v. Fitzhugh*, 27 N. Y. 130. See *Buffalo v. Mackay*, 15 Hun (N. Y.) 204; *Wavle v. Tuttle*, 11 N. Y. Wkly. Dig. 186.

An agreed case in which the defendant has no interest, does not authorize a decision of a controversy between the plaintiff and other persons who are not parties to the suit. *Hodgdon v. Darling*, 61 N. H. 582; *Union Nat. Bank v. Kupper*, 63 N. Y. 617; *Kennedy v. New York*, 79 N. Y. 361.

The court will decline to accept the submission of a cause against the wishes of those who, being collaterally interested in the decision which might be made, unite in the employment of counsel to present their defense and contribute to a common fund for the payment of the expenses of litigation. *St. Louis Smelting, etc., Co. v. Kemp*, 103 U. S. 666.

An action, in the nature of a suit by an executor, for instructions as to his duty, was submitted by a widow and an administrator. Where it appeared that a decision in favor of the widow would charge the decedent's debts upon the real estate, and involve a consideration of what purported to be a release of dower made in the lifetime of her husband, it was held that the heirs at law were necessary parties. *Wavle v. Tuttle*, 11 N. Y. Wkly. Dig. 186.

2. Thus, where the statement of facts was evidently entered into under a mistake, it was held proper for the court to relieve the party from such mistake. *Levy v. Sheehan*, 3 Wash. 420. See also *State v. Porter*, 86 Ind. 404.

If the case be misstated, the parties must apply to amend; or if it be so defective that the court cannot enter a final judgment for the plaintiff in the event of determining the law to be in his favor, but must send the cause to be tried by a jury, the case stated will be treated as a nullity and set aside. *Davila v. Herring*, 1 Str. 300; *Hankey*

v. Smith, 3 T. R. 507; *Wheldon v. Matthews*, 2 Chit. Rep. 398; 2 Tidd's Prac., *p. 899.

In *Bell v. Twilight*, 17 N. H. 528, the court, by Parker, C. J., said: "The court cannot amend a statement of facts agreed to by the parties on motion of one of them. The parties make their own agreements and the court cannot alter them. The only relief which the court can grant, when it appears that a decision upon the facts as agreed would work injustice, is to discharge the case and let the action stand for trial, or other proceedings in the usual course. In order to justify us in interfering in that mode, it must appear that the agreement has been entered into under some misapprehension of the facts, or that new facts have been discovered since the agreement material to the party's case; that due diligence was used in the preparation of the case, and due care and caution exercised in entering into the agreement."

In an action submitted to the court on a case agreed, judgment was ordered for the plaintiff according to the agreement which defined the relief to which the plaintiffs, if successful, would be entitled—viz., the recovery of damages because of the interference of the defendants with the plaintiffs' property, consisting of a bulkhead and wharf on the Hudson river. After this decision was made and judgment entered, the court of appeals, in another case, decided that under similar circumstances the owners of such property might be entitled to a different kind of relief, and motion was made by the plaintiffs to amend the claim of relief as agreed upon so as to secure the benefit of that decision. The court held that the motion should be denied; that the court had probably no authority to change the part of the agreement made by the parties as to the relief which should be awarded; and that if it had the authority, it would not be a provident use to make of it, to interfere with and change this part of the agreement, after the case itself had been heard and decided,

3. Rescission.—An agreement to submit a case may be rescinded, either by express or tacit consent ; and the abandonment of it is sufficiently shown by the parties subsequently pleading to the issue.¹

4. Costs ; Argument of Counsel.—The hearing of a cause submitted on an agreed statement of facts is, in effect, a trial of the issues of law arising upon the admitted facts, for which costs of trial may be allowed, as in any other proceeding, to the party prevailing.² The argument of counsel and the right to open and close

and the rights and obligations of the parties had been declared and defined by the judgment which had been entered. *Kingsland v. New York*, 42 Hun (N. Y.) 599.

Although the court may have power, even after judgment on a special case, to order an amendment by the statement of a fact omitted, but intended to be introduced, it will not exercise the power when the fact is disputed or the intention denied. *Pennington v. Cardale*, 10 W. R. 544. Nor in such case will the court amend by inserting a fact which was known to the parties when the case was drawn. *Ganthony v. Witten*, 16 W. R. 61 ; 17 L. T. N. S. 117. Nor by inserting a new fact, unless satisfied that the judgment would have been different if that fact had been originally inserted. *Ganthony v. Witten*, 16 W. R. 61 ; 17 L. T. N. S. 117.

The court will not allow a special case to be amended, by raising a point which the parties have not raised for their consideration. *Hills v. Hunt*, 15 C. B. 1 ; 80 E. C. L. 1.

Where a special case has been stated for the opinion of the court, the court will not, on application of one of the parties, amend the case to enable the party applying to raise a point which the other party refuses to consent to raise, unless the point has been omitted by error or through fraud. *Mersey Dock, etc., Com'rs v. Jones*, 6 Jur., N. S. 960 ; 29 L. J., C. P. 239 ; 8 C. B. N. S. 124 ; 98 E. C. L. 114.

Where an action is submitted upon a case stated by the parties, but the agreement does not limit the plaintiff's right of recovery to the particular form in which the action is brought, the writ may be amended in the court, into another form of action, of which that court has original jurisdiction, although it has no jurisdiction of the action in the form in which it was first brought. So held as to the amendment of a land-

lord and tenant process, brought in the superior court, into an action of ejectment, where the facts agreed would support such an action. *Merrill v. Bullock*, 105 Mass. 486. See *Folger v. Columbian Ins. Co.*, 99 Mass. 267 ; 96 Am. Dec. 747.

1. When the case is thus abandoned it is not evidence which may be given to the jury upon the trial of the case. *McLughan v. Bovard*, 4 Watts (Pa.) 308. See *Hart's Appeal*, 8 Pa. St. 32 ; *Darlington v. Gray*, 5 Whart. (Pa.) 502.

2. *Richards v. James*, 16 L. T. N. S. 672 ; *Neilson v. Mutual Ins. Co.*, 3 Duer (N. Y.) 683.

In case of a controversy submitted to the court according to the provisions of *New York Code Civ. Proc.*, section 1279, the court has power to grant an additional allowance of costs where it appears that the case is difficult and extraordinary. *Kingsland v. New York*, 52 Hun (N. Y.) 98.

On the trial of an issue in the king's bench, a case was made and argued in court. The facts were not sufficiently stated, so that the court could give judgment according to the justice of the cause. It was recommended to the parties, and they so agreed, to go to a new trial, when the plaintiff was non-suited. And the question being as to costs—whether the master should tax the common costs of a non-suit, or take into consideration all the former proceedings ; upon motion for the court's direction to the master, it was ordered, that he should tax the defendant his costs upon the whole, as well with respect to the first trial as the last. *Davila v. Herring*, 1 Str. 300 ; 2 Tidd's Prac. *p. 900. From the statement of this case, it does not appear whether, upon granting a new trial, anything was said about the costs of the former trial or whether they were directed to abide the event of the suit. If they were not, it seems from subsequent cases, that

are not subject to different rules from those governing other forms of trial.¹

VII. EFFECT OF SUBMISSION—1. Finality.—The judgment of the court, in a controversy submitted to it on a case made or agreed, is final unless appealed from.² In *England*, a case made or agreed was not entered upon the record, as was a special verdict, and consequently a writ of error could not be brought on the decision;³ but in the *United States* it seems that no such distinc-

at this day they would not have been allowed. *Hankey v. Smith*, 3 T. R. 507. But where, after the argument of a special case, the court directed a new trial, because the case was insufficiently stated, and the defendant, without going to trial again, gave the plaintiff a *cognoovit*, the court held that the defendant was liable to pay the costs of the former trial. *Booth v. Atherton*, 6 T. R. 144; and see *Garland v. Jekyll*, 9 Moore 620.

Where, instead of proceeding to a new trial, the parties agreed to state the facts specially, as if in a case reserved at the trial, on which the *postea* was afterwards delivered to the plaintiff, it was held that he was entitled to the costs of the first trial. *Robertson v. Liddell*, 10 East 416.

Where, after writ issued, a special case is stated without pleadings, under 15 & 16 Vict., ch. 76, § 46, and there is no agreement as to costs, a plaintiff who has obtained judgment for part of his claim is entitled to the general costs of the cause, and the defendant is entitled to deduct any costs which he may have incurred in respect of the matter on which he has succeeded. *Elliott v. Bishop*, 10 Exch. 522; 1 Jur. N. S. 46.

Where, after verdict, the court recommended a special case, which was acceded to by both parties, but which was never finally settled, by reason of the defendant's default, held, that the plaintiff, who had the general costs of the cause, was not entitled to the costs of the abortive special case. *Holey v. Botfield*, 4 D. & L. 328; 16 M. & W. 65.

1. Argument.—In arguing a special case, the counsel are not permitted to go out of it, and the courts must pass judgment upon it as stated. *Doe v. Lewis*, 1 Burr. 617; and see *Pike v. Carter*, 3 Bing. 85; 11 E. C. L. 41.

Right to Begin.—(See also OPEN AND CLOSE, vol. 17, p. 194).—Upon the argument of a special case, where the verdict is entered for the plaintiff, he is entitled to begin, though by the

pleadings the affirmative of the issue may be upon the defendant. *Stone v. Compton*, 1 Arn. 436.

Upon the argument of a special case stated in replevin, the plaintiff has the right to begin. *Vigar v. Dudman*, 24 L. T. N. S. 734.

Where a rule to set aside an award is made a special case, the counsel who objects to the award ought to begin and have the reply. *Dippins v. Anglesea*, 2 Dowl. Pr. Cas. 647.

2. *Bank of Commonwealth v. Hopkins*, 2 Dana (Ky.) 395; *Jarboe v. Smith*, 10 B. Mon. (Ky.) 257; 52 Am. Dec. 541.

In *Van Sickle v. Van Sickle*, 8 How. Pr. (N. Y.) 265, it was held that where an action is commenced, and a case containing the facts upon which the controversy depends is then agreed upon and submitted, the action must be deemed to be abandoned or at least suspended. If the submission of the case does not of itself work a discontinuance of the action, it must do so when followed by a judgment.

Non-Suit.—After judgment for the defendant on an agreed case and an appeal, plaintiff, on motion before argument in the appellate court, may have the statement discharged and become non-suit. *Lowell v. Merrimac Mfg. Co.*, 11 Gray (Mass.) 382.

3. *Stephen's Pl.* (Tyler's ed.) 124. See *Pray v. Jersey City*, 33 N. J. L. 506.

An action for the obstruction of ancient lights was referred to arbitration, and the order of reference provided that the arbitrator should, if required by either party, state a special case for the opinion of the court, and that judgment should be entered according to the opinion of the court. A special case was stated raising the question whether the plaintiff was entitled to the flow of light, on which the judgment of the court was for the plaintiff, and it was held that there was no judgment upon which error could be brought. *Courtlauld v. Legh*, 20 L. T. N. S. 496.

tion now exists, and that the decision of a case agreed is subject to revisal by an appellate court, by means of a writ of error¹ or by an appeal.²

2. Waiver of Objections to Form of Action and Pleadings.—Where a case, in which the facts are agreed upon by the parties, has been

1. *Sawyer v. Corse*, 17 Gratt. (Va.) 230; 99 Am. Dec. 445; *M'Michen v. Amos*, 4 Rand. (Va.) 137; *Ramsey v. McCue*, 21 Gratt. (Va.) 349; *Ottawa v. La Salle County*, 12 Ill. 339; *Delaware, etc., R. Co. v. Nevelle*, 51 N. J. L. 332.

In an action at law submitted to the decision of the circuit court by the parties on a case agreed, in which the record does not show the filing of the stipulation in writing as required by Rev. Stat. U. S., § 649, the court, upon a bill of exceptions and writ of error, cannot review rulings upon the admission or rejection of testimony, or upon any other question of law growing out of the evidence, but may determine whether the declaration is sufficient to sustain the judgment. *Bond v. Dustin*, 112 U. S. 604.

In *Burnett v. Pacheco*, 27 Cal. 411, it was held that a stipulation, to the effect that an agreed statement of facts upon which a cause had been tried might be used by either party "in any and all proceedings in the action," had the effect of making such statement of facts a part of the record on appeal.

2. *Com. v. Cutter*, 13 Allen (Mass.) 393; *Hovey v. Crane*, 10 Pick. (Mass.) 440; *Furlong v. Leary*, 8 Cush. (Mass.) 409; and such appeal may be taken from the decision of a judge on agreed facts on an *audita querela*. *White v. Clapp*, 8 Allen (Mass.) 283.

In *Massachusetts*, it was held in the early cases that a writ of error did not lie upon a judgment rendered by the court of common pleas upon a case stated; that if either party intended to bring a writ of error and wished the facts spread upon the record, the proper course was to have the facts found by the jury in its special verdict; that the consent of parties could not give jurisdiction in a case where the law had not conferred it. *Carroll v. Richardson*, 9 Mass. 329. See also *Alfred v. Saco*, 7 Mass. 380; *Gray v. Storer*, 10 Mass. 163. But an appeal lies from the judgment of the common pleas upon an agreed statement of facts. *Hovey v. Crane*, 10 Pick. (Mass.) 440; *Furlong v. Leary*, 8 Cush. (Mass.) 409; *Com. v. Cutter*, 3 Allen (Mass.) 393.

But where the judgment of a superior court on a case stated involves the decision of fact or the drawing of inferences of fact, no appeal lies therefrom to the supreme judicial court. *West v. Platt*, 120 Mass. 421; *Cochrane v. Boston*, 1 Allen (Mass.) 480; *Fox v. Adams Express Co.*, 116 Mass. 292; *Charlton v. Donnell*, 100 Mass. 229. See *supra*, this title, *Duty of the Court*.

Where a case has been submitted to the court below upon an agreed statement of facts, no motion for a new trial is contemplated or necessary, since the facts being agreed upon, a new trial could make no change in them, and there is no question for decision except the law as it arises out of the facts. If the party wishes to have the decision reviewed in the supreme court, he must except to such decision at the time it is made. *Fisher v. Purdue*, 48 Ind. 323; *State v. Newton County*, 66 Ind. 216; *Lofton v. Moore*, 83 Ind. 112; *Manchester v. Dodge*, 57 Ind. 584; *Martin v. Martin*, 74 Ind. 207.

Where a case, which, in the lower court, has been submitted on an agreed statement of facts, is brought to the supreme court, and the record contains both the agreed statement and the findings of the court below, the supreme court will disregard the findings of the court and decide the case upon the agreed statement of facts. *Brown v. Evans*, 15 Kan. 88. See *Olathe v. Adams*, 15 Kan. 395.

Where there is a clear and palpable mistake in an agreed case and in the judgment thereon, the trial court or superior court of Marion county, at general term, may correct the mistake upon motion. At such general term, if the opposite party desires to present any question on such ruling, he must assign the same as error or cross-error, and unless there made, it cannot be urged on appeal. *State v. Porter*, 86 Ind. 404.

New Trial.—Provision of 2 Rev. Sts. *New York*, § 37, p. 309, which made it the duty of the court in which a judgment had been rendered in an action of ejectment to vacate the same and

Effect of Submission. SUBMISSION TO COURT. Waiver of Objections.

submitted to the court for its decision, all objections to the form of action are waived,¹ and any defect in the previous pleadings, if there have been any, are cured, unless the right to object thereto be expressly reserved,² and this is none the less true although

grant a new trial upon the application of the party against whom the judgment was rendered, is not applicable when the judgment has been rendered in a controversy submitted without action by agreement of the parties, as such new trial means a trial by jury; but there can be no such trial when the controversy has been submitted. The court has no power upon a motion to release either party from the legal effect of their submission so as to enable them to litigate before a jury the facts upon which they had agreed. "In such a case," said Oakley, C. J., in delivering the opinion, "as a court of equity we may have power to relieve the plaintiff, but only in a suit properly instituted and upon a complaint properly framed. The submission under the code is a contract of high and solemn nature, and it is only upon the fullest evidence of fraud or mutual error that a court of equity would adjudge it to be void, and then only in a form in which their decision might be reviewed, and, if erroneous, reversed." *Lang v. Ropke*, 1 Duer (N. Y.) 701.

1. *Snow v. Miles*, 3 Cliff. (U. S.) 608; *Kimball v. Preston*, 2 Gray (Mass.) 567.

Under an agreed statement of facts no question as to the form of the action can be raised at the argument, unless the right to raise such question is specially reserved. *Cushing v. Kenfield*, 5 Allen (Mass.) 307. See *Com. v. Worcester, etc., R. Co.*, 124 Mass. 561; *Baugh v. Barrett*, 69 Iowa 495. And an objection that the plaintiff has a plain, adequate, and complete remedy at law cannot be raised for the first time on the final hearing of a suit in equity, on facts agreed, when not stated in any of the pleadings. *Russell v. Loring*, 3 Allen (Mass.) 121.

So, a case stated, whereby it is agreed that judgment shall be for the plaintiff, if the action can be maintained in any form, either at law or in equity, waives all questions of form and process. *Second Religious Soc. v. Harriman*, 125 Mass. 321.

Where land of two tenants in common was sold by them, and one brought *assumpsit* for his share of the proceeds against the other, and, in an agreed statement of facts, the parties set forth

the proportions in which they owned the land, it was held that the objection that the title to land was drawn in question in an action of *assumpsit* did not apply. *Haven v. Foster*, 9 Pick. (Mass.) 112; 19 Am. Dec. 353.

An infant's disability to sue can be taken advantage of by plea in abatement only, and, unless specially reserved, is not open to objection in a case submitted on an agreed statement of facts. *Smith v. Carney*, 177 Mass. 129.

But in an action at law against the officers of a corporation, to enforce their liability for the corporation's debts, where the case is submitted upon an agreed statement of facts necessary for the determination of the question of liability, an objection that the remedy is not at law but in equity, when the corporation is a necessary party, is not waived by such submission. *McRae v. Locke*, 114 Mass. 96.

One of several sureties became insolvent and the debt was paid by another; where the latter seeking to enforce contribution from the other solvent sureties, instead of suing in equity, agreed with them to submit the case, admitting the defaulting sureties insolvency, the defect of parties in not bringing in the insolvent surety is waived, and the court must decide upon the parties' rights whether from legal or equitable principles. *Weed v. Calkins*, 24 Hun (N. Y.) 582.

2. *Ellsworth v. Brewer*, 11 Pick. (Mass.) 316; *Scudder v. Worster*, 11 Cush. (Mass.) 573; *Miner v. Coburn*, 4 Allen (Mass.) 136; *Brettun v. Fox*, 100 Mass. 234; *West Roxbury v. Minot*, 114 Mass. 546; *Hamilton v. Cook County*, 5 Ill. 519; *Chappell v. McIntyre*, 9 Tex. 161; *Snow v. Miles*, 3 Cliff. (U. S.) 608.

A cause may be submitted to the court on a case agreed without a plea as well as with one, and it is sometimes done without either a declaration or plea. The defect of pleadings is cured by the agreement. *Sawyer v. Corse*, 17 Gratt. (Va.) 230; 99 Am. Dec. 445. However, as a general rule, a declaration is previously filed, but in such case is not to be considered. *Bixler v. Kunkle*, 17 S. & R. (Pa.) 310, where Tod,

the pleadings are expressly referred to in the submission as part of the case.¹

3. On Admissions—Estoppel.—The parties to a controversy submitted on an agreed case are estopped from denying the competency or sufficiency of any admissions made by them in their agreement to such case.²

J., in delivering the opinion of the court, said: "The declaration is not before us; it is waived and superseded. The parties have agreed to put and actually have put before us the facts of the case. True the counsel did reserve their exceptions; but it is a reservation incompatible with the agreement. They cannot, at the very time they are placing the facts specifically upon the record, object because the facts are not specifically upon the record. It is an attempt to mix a special demurrer with a case stated. It is without a precedent; and can be subservient to no one purpose of justice or law, nor productive of anything but vexation and delay, thus to entangle the merits of a cause with points of form relative to the wording of a declaration which both parties have agreed to set aside."

The court is not required to consider the sufficiency of the pleadings in a case stated. *American Coal Co. v. Allegany County*, 59 Md. 185; *Bostick v. Blades*, 59 Md. 231; 43 Am. Rep. 548. They are unnecessary, and if filed will be disregarded. *Day v. Day*, 100 Ind. 460; *Warrick Bldg., etc., Assoc. v. Hougland*, 90 Ind. 115.

But where a case is submitted on the pleadings and certain agreed facts, such facts must be considered by the court, and the case determined upon the whole record, although some of the facts were not pleaded. *Perry v. Murray*, 55 Iowa 416.

An agreed case, under *Indiana Rev. Stat.* (1881), § 553, does not require any pleadings, and, if pleadings be filed, they should be disregarded; nor can any question be made upon them in the supreme court. *Warrick Bldg., etc., Assoc. v. Hougland*, 90 Ind. 115.

1. *Kimball v. Preston*, 2 Gray (Mass.) 567; *Esty v. Currier*, 98 Mass. 500.

2. A party may not agree upon a case stated which admits a certain fact, and then insist that the proof of the fact is not competent, in that it was not in writing. *Swatara R. Co. v. Brune*, 6 Gill (Md.) 47. If the admission was improvidently made, the injured party has the remedy by motion to amend

or strike out the admission. *Fearing v. Irwin*, 4 Daly (N. Y.) 385.

Under *New York Code*, § 372, admissions made in a case stated are binding on the parties agreeing to it; and although there may appear in the case evidence casting doubt on the truth of the matter admitted, it will be presumed that there is other evidence not produced, or other reasons which induced the admission. *Fearing v. Irwin*, 4 Daly (N. Y.) 385.

A stipulation that a cause shall be heard and determined on the pleadings and agreed statement of facts, does not preclude either party from taking advantage of a statute enacted between the time of the settlement of the statement and the time of the hearing. Such stipulation governs only the facts, not the law. *Huff v. Cook*, 44 Iowa 639.

Where a verdict was found, subject to a special case, and a new trial directed, it was ruled at *nisi prius* that the special case, signed by counsel on each side, was evidence of the facts therein stated. *Van Wart v. Wolley, R. & M.* 4; 21 E. C. L. 366.

A case stated, signed by the appellant and by the attorney in both courts for the appellee, which was submitted to the trial court, and on which it based judgment, is binding on the appellee, where there is nothing beyond the statement of counsel to show that the appellee repudiated the act of his attorney. *Booth v. Cottingham*, 126 Ind. 431.

A case made, containing the statement that when a certain county officer entered on his official duties the population of the county "was over 150,000, and less than 200,000, based upon the reasons incorporated in the following paragraph," is not such an admission of the fact as will warrant a judgment based upon it. *Luzerne County v. Glennon*, 109 Pa. St. 564.

In an action of ejectment, a recital, in an agreed state of facts, that plaintiff's grantor "died in 1871 intestate and her husband in 1864 intestate," is not such a precise affirmation that

plaintiff's grantor was a *feme covert* at the time of her husband's death as to estop defendants in a subsequent partition proceeding of the same land, from showing that she had been divorced in 1860, before she executed a deed of trust of the land to the defendants. *Sutton v. Dameron*, 100 Mo. 141.

The state is bound by an agreed case, where submitted to the court by its proper officers. *State v. Porter*, 86 Ind. 404.

In *Boston v. Tileston*, 11 Mass. 468, it was held that where the parties agreed to a fact decisive of title, an officer's return, which, upon a trial between them, would have been conclusive evidence that the fact was otherwise, was not to be regarded. *Aff'd* in *Wolcott v. Ely*, 2 Allen (Mass.) 338. And so, in an action upon a recognizance, the record is not conclusive to show that it was duly taken, if, from the agreed statement of the parties, it appears that it was not duly taken. *Com. v. Greene*, 13 Allen (Mass.) 251.

An action on a poor debtor's recognizance was submitted to the court on agreed facts, which set forth a notice, in due form, to the judgment creditor, a return of the officer that he had served an attested copy of the same, and the discharge of the debtor by the magistrate, the creditor not appearing. The agreed facts further set forth that the copy served upon the creditor did not state the time fixed for the examination of the debtor, and concluded with the statement, that if, upon the foregoing facts, the court was of opinion that there had been a breach of the recognizance, judgment was to be entered for the plaintiff; otherwise for the defendant. It was held that the conclusiveness of the officer's return was not to be considered as waived by the agreed facts. *Lowry v. Caldwell*, 139 Mass. 88. See also *Collins v. Douglas*, 1 Gray (Mass.) 167.

Where one of several parties to a case made was in court when the statement of facts agreed upon was read without his objection, he cannot in the supreme court object to its admission in evidence as error. *Whitehall v. Crawford*, 37 Ind. 147.

If a statute requires a demand to be made on the officers of a city within a certain time before the commencement of a suit, an agreement, in a case stated, that the demand was made on the city, will be understood to be

such a demand as is required by the statute. *Jennison v. Roxbury*, 9 Gray (Mass.) 32.

Agreeing to a fact in a case stated which one party would have been estopped to assert, is a waiver of such estoppel. *Wheelock v. Henshaw*, 19 Pick. (Mass.) 341.

Where a case was submitted to the superior court on an agreed statement of facts, and then to the supreme court, on appeal, after judgment for the respondent, it was held that the conclusion of the statement—which was as follows: "The parties hereto admit the foregoing facts for the purpose of raising the preliminary question of law arising thereon; and the facts so admitted are not to be used by either party, without proof of the same at any trial of this or any other cause,"—meant that the facts as agreed should be passed upon by the court as if the complainants had made an offer of proof of them, and the superior court had ruled that, if proved, they would not warrant proceedings under the statute for the assessment of damages by a jury. "Any other construction would put court and parties in the position of deciding and arguing a moot question; and the words, 'and the facts so admitted are not to be used by either party without proof of the same, at any trial of this or any other cause,' must necessarily be confined to proceedings before a jury, in case a jury should be ordered, and cannot be applicable to this hearing." *Campbell v. Talbot*, 132 Mass. 174.

Admissions as Evidence — Mandamus.—In *Ex p. Hayes*, 92 Ala. 120, it was held that if an agreed statement of facts is reduced to writing, signed by the attorneys of the respective parties, and not limited to use on one trial only, the party cannot be relieved from the admissions therein contained, on a subsequent trial after a reversal and remandment of the cause, except for some cause which would authorize a rescission of a contract; and neither his attorney's understanding that the agreement was for the purpose of one trial only, nor his opinion that the admitted facts were immaterial, is a sufficient cause to set it aside. It was further held that the supreme court would not award a *mandamus* to the circuit court to compel that court to vacate an order improperly relieving a party from an admission contained in an agreed statement; but if the court refuses to re-

SUBMIT—(See also SUBMISSION). — “A thing submitted to another is put under his control.”¹

SUBORNATION OF PERJURY.—See PERJURY, vol. 18, p. 332.

SUBPŒNA.—See BILL OF DISCOVERY, vol. 2, p. 199; EQUITY PLEADINGS, vol. 6, p. 724; NOTICE TO PRODUCE PAPERS, vol. 16, p. 843; PRIVILEGED COMMUNICATIONS, vol. 19, p. 121; PRODUCTION OF DOCUMENTS, vol. 19, p. 227; SERVICE OF PROCESS, vol. 22, p. 107; SUMMONS, vol. 24; WITNESSES; WRITS.

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I. TO PROCURE THE ATTENDANCE OF WITNESSES—1. Subpœna ad Testificandum—a. DEFINITION.—A writ of subpœna² *ad testificandum* is a mandatory writ or process issued under authority of law, commanding the person or persons to whom it is directed,

receive the admission as evidence on the second trial, an exception may be reserved and the ruling reversed on appeal.

1. *Brouwer v. Cotheal*, 10 Barb. (N. Y.) 218. That case turned upon a provision of a statute that the books of a corporation should be submitted to the stockholders for examination; and it was held that the stockholder had a right, not only to inspect the books,

but also to take memoranda. See generally STOCKHOLDERS, vol. 23, p. 776.

Distinguished from Consent.—“There is a difference between consent and submission. Every consent involves a submission, but it by no means follows that a mere submission involves consent.” *Reg. v. Day*, 9 C. & P. 722; 38 E. C. L. 306. Compare CONSENT, vol. 3, p. 662.

2. Subpœna, *i. e.*, under a penalty.

under a penalty specified therein, to appear before a court, whether of law or equity, or some public body or official, at a certain time and place, to give evidence in the action or proceeding mentioned in the writ.¹

b. AT COMMON LAW—(1) In Courts of Justice—(a) In Civil Cases.—The writ of subpoena *ad testificandum* for the purpose of summoning witnesses was from an early period issued by the courts of justice at common law.² Beginning with 5 Eliz., ch. 9, § 12, several statutes were passed in *England* to enforce the attendance of witnesses in civil cases, but all of them were only supplementary to the already existing law.³ The writ of subpoena may be used also to secure the presence of a party to a cause, but formerly he could not be compelled to testify as, by statute, he may be now.⁴

(b) In Criminal Cases.—At common law, process by subpoena was allowed to summon witnesses for the prosecution in cases of felony. But in such cases the defendant had no means of compelling the attendance of his witnesses except by a special order of the court.⁵ In misdemeanors, however, the defendant was allowed compulsory process to bring his witnesses into court.⁶ The harsh rule applied in cases of felony has been changed by statute, and prisoners in such cases may now have the writ of subpoena and have their witnesses sworn the same as may other defendants.⁷

1. Bouv. L. Dict. 676; 2 Abb. L. Dict. 510; 1 Gr. Ev. (14th ed.), § 309; Wharton's Ev. (3d ed.), § 377; 3 Bl. Com. 369; Hill v. Dolt, 7 De G. M. & G. 397.

Formerly the witness was commanded, laying aside all pretenses and excuses, to appear at the trial on pain of £100 to be forfeited to the king. To this, statute 5 Eliz., ch. 9, added a penalty of £10 to the party aggrieved, and damages sustained for want of evidence of the offending witness. 3 Bl. Com. 369.

2. Wharton's Ev. (3d ed.), §§ 376, 377; 2 Phillips Ev. 370 *et seq.*

3. 3 Bl. Com. 369; 1 Stark Ev. 79, 80; 2 Phillips Ev. 378 *et seq.* See Amey v. Long, 9 East 473 (per Lord Ellenborough), and Pearson v. Iles, 2 Dougl. 556, 561 (per Lord Mansfield), where it is laid down that the courts of Westminster Hall proceeded against witnesses who did not obey the writ, as for contempt, before 5 Eliz., ch. 9, was enacted.

4. Barton's Pr. 134; 4 Minor's Inst. 743; WITNESSES.

5. 2 Hawk. Pl. Cr., ch. 46, § 170; 4 Bl. Com. 359, 360.

6. 2 Hawk. Pl. Cr., ch. 46, § 170; 3 Russ. on Crimes (9th ed.) *576.

7. Statute 7 Wm. III, ch. 3, § 7, provided that in cases of treason, where corruption of blood might be worked, the accused persons could have like process to compel witnesses to appear in their behalf, as was granted to compel witnesses to appear against them. And Stat. 1 Anne, st. 2, ch. 9, § 3, gave compulsory process to all defendants in treason and felony, and provided that their witnesses should be sworn the same as those for the crown. See 2 Hawk. Pl. Cr. ch. 46, § 172; 3 Russ. on Crimes (9th ed.) *575.

The sixth amendment to the constitution of the *United States* provides that in all criminal prosecutions the accused shall have compulsory process for obtaining witnesses in his favor. See the constitutions and statutes of the several states for provisions substantially the same. See also State v. Adam, 40 La. Ann. 745; State v. Dill (Del. 1889), 18 Atl. Rep. 763; Neyland v. State, 13 Tex. App. 536; West v. State, 1 Wis. 209; Com. v. Buzzell, 16 Pick. (Mass.) 153.

In State v. Smith, 2 Bay. (S. Car.) 62, it was held that a defendant who had been found guilty by a jury was entitled as a matter of right to a subpoena

(2) *Legislative Bodies*.—The English Parliament is a high court of judicature as well as a legislative body,¹ and witnesses may be compelled to appear and testify concerning any matter which is before either house or a committee thereof for investigation.² It has been decided that the power of Parliament to punish for contempt of its process is so ample that courts of justice will not inquire into the merits of its commitments.³ But if the warrant of commitment shows on its face that there is no good cause for it, the courts will take cognizance of the matter.⁴ The rule in the *United States* is that Congress and the state legislatures may compel witnesses to attend and testify before either house or a committee thereof, and for willful refusal to attend or to give evidence concerning any matter which is a proper subject of in-

to compel witnesses to attend court on sentence day to give evidence of extenuating circumstances which might lessen his punishment.

In *Neyland v. State*, 13 Tex. App. 536, it was held that a subpœna is a compulsory process within the meaning of art. 1, § 10, of the *Texas* constitution, which provides that in all criminal prosecutions the accused shall have compulsory process for obtaining witnesses in his favor.

And in *Homan v. State*, 23 Tex. App. 212, it was held that a statute requiring fees to be paid to the witnesses of a defendant in a criminal case before an attachment should issue to compel their attendance, was unconstitutional in so far as it deprived the defendant of compulsory process. See also *Roddy v. State*, 16 Tex. App. 502.

But the defendant's right to compulsory process does not extend to non-resident witnesses. *Woolfolk v. State*, 85 Ga. 69; *State v. Pagels*, 92 Mo. 300.

And the provision of the constitution which secures to accused persons compulsory process for obtaining witnesses does not authorize the issuing of such process to ambassadors who, by public law, or consuls who, by express treaty, are not amenable to the process of the courts. *In re Dillon*, 7 Sawy. (U. S.) 561.

A member of Congress may be subpœnaed to testify on behalf of the defendant in a criminal case. *U. S. v. Cooper*, 4 Dall. (U. S.) 341. And if he fails to attend, an attachment may issue against him for contempt, provided he is not attending Congress or going to or returning from the same. *Respublica v. Duane*, 4 Yeates (Pa.) 347.

1. Besides the well-known appellate jurisdiction of the house of lords and the joint power of the two houses to pass bills of attainder for treason and other high crimes, which are in their nature judicial determinations, the house of commons retained upon the separation of the two houses the power of impeachment. See opinion of Miller, J., in *Kilbourn v. Thompson*, 103 U. S. 168. And there are many authoritative declarations of the judicial character of the house of commons.

In *Burdett v. Abbot*, 14 East 1, Bailey, J., said: "In an earlier authority upon this subject, Lord Coke, 4 Inst. 23, it is expressly laid down that the house of commons has not only a legislative character but is also a court of judicature." See also *Case of Lord Mayor of London*, 3 Wils. 188.

But the house of commons is not a court of law in a sense in which that term can be properly applied. Neither originally nor on appeal can it decide a matter in litigation between two parties. *Stockdale v. Hansard*, 9 Ad. & El. 1; 36 E. C. L. 13, per Lord Denman, C. J.

2. Com. Dig., tit. *Parliament* (E), 6 (H.) 1; 4 Inst. 11, 36; *Howard v. Gosset*, 10 Q. B. 359; 59 E. C. L. 358; *Reg. v. Paty*, 2 Ld. Raym. 1105.

3. *Burdett v. Abbot*, 14 East 1; *Burdett v. Colman*, 14 East 163; *Beaumont v. Barrett*, 1 Moo. P. C. 59; *Howard v. Gosset*, 10 Q. B. 359; 59 E. C. L. 358. See also *Case of Lord Mayor of London*, 3 Wils. 188; *Case of Sheriff of Middlesex*, 11 Ad. & El. 273; 39 E. C. L. 80, per Lord Denman, C. J.

4. *Burdett v. Abbot*, 14 East 1, per Lord Ellenborough; *Case of Sheriff of Middlesex*, 11 Ad. & El. 273; 39 E. C. L. 80.

vestigation in these bodies, a witness who has been duly subpœnaed may be committed for contempt.¹ The legislative bodies of municipal corporations have the right to call witnesses before them for examination, and it seems that they may pass ordinances imposing pecuniary penalties upon witnesses who refuse to attend or testify.²

c. UNDER STATUTE.—The statutory enactments in *England* and the various states concerning the writ of subpœna, so far as they relate to the authority of courts of justice to issue it, have been merely supplementary to the rule that prevailed at common law. But statutes have been passed conferring the power on certain officers acting under orders from or on behalf of the courts, such as examiners, masters in chancery, auditors, and referees.³ These statutes also frequently confer similar authority on certain municipal corporations, administrative bodies, and officers, in relation to matters pending before them, as, for example, boards of aldermen and common councils, assessors, arbitrators, coroners, supervisors, and the like.⁴

1. *Kilbourn v. Thompson*, 103 U. S. 168; *Anderson v. Dunn*, 6 Wheat. (U. S.) 204; *Burnham v. Morrissey*, 14 Gray (Mass.) 226; 74 Am. Dec. 676; *In re Gunn*, 50 Kan. 155.

2. In *Briggs v. Mackellar*, 2 Abb. Pr. (N. Y.) 59, Daly, J., said: "Not only had the common council the right to examine witnesses, but it was within their power to enact ordinances imposing pecuniary penalties upon witnesses neglecting to attend or refusing to testify. (Grant on Corporations 86; Wilcox on Municipal Corporations 164.) Whether the provision in Magna Charta, incorporated in our bill of rights, that no one shall be imprisoned except by due process of law, would, as has been held repeatedly in respect to municipal corporations (*Wood v. London*, 12 Mod. 686; *King v. Clark*, 1 Salk. 349; *Wood v. Searle*, Bridg. 141), deprive either board of the common council of the power of imprisoning a disobedient witness, it is not in this case necessary to inquire, the act of 1855 having provided a mode by which the disobedience of the witness may be punished by imprisonment, if necessary."

3. For examples of these statutes, see *Alabama Civ. Code*, § 768; *Sayles Civ. Stat. of Texas*, § 2209; *California Deer. Code Civ. Proc.*, §§ 1985-97; *Rhode Island Pub. Stat.*, p. 584, §§ 3-15. See also *REFEREES*, vol. 20, pp. 684, 691; *Sparhawk v. Wills*, 5 Gray (Mass.) 423; *Wood v. Neale*, 5 Gray

(Mass.) 538; *Maccubin v. Matthews*, 2 Bland (Md.) 235; *Clark v. Grant*, 2 Wend. (N. Y.) 257.

The 78th Equity Rule of the *United States* circuit courts provides that witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioners appointed to take testimony, or before a master or examiner appointed in any cause, by the issuance of a subpœna in proper form.

When proceedings before an examiner are adjourned, the witness may be required to attend on the adjourned day without a new subpœna; but he should be served with a notice of such adjourned day. *Lawson v. Stoddardt*, 10 Jur. N. S. 33.

4. See *Howell's Ann. Stat. of Michigan*, § 2526; *Alabama Civ. Code*, § 3229; *Virginia Code* (1887), § 3352; *Idaho Rev. Stat.*, § 8379. See also *ARBITRATORS*, vol. 1, p. 679; *CORONERS*, vol. 4, pp. 174, 179; *Randall v. Gurney*, 3 B. & Ald. 252; 5 E. C. L. 271; *Spence v. Stuart*, 3 East 89; *Blue's Case*, 46 Mich. 268.

New York Code Civ. Proc., § 854, provides that "where a judge or an arbitrator, referee or other person, or a board or committee has been heretofore, or is hereafter, expressly authorized by law to hear, try or determine any matter, or to do any other act in an official capacity in relation to which proofs may be taken, or the attendance of a person as a witness may

d. HOW AND BY WHOM ISSUED.—A subpoena runs in the name of the people or of the chief magistrate representing the people, under the seal of the court,¹ and should be signed by the clerk or other officer issuing it.² It is directed to the person or persons³ whose presence is required, and sets forth the name of the party at whose request it is issued, the style of the cause, the title of the court, and the time and place at which the cause will be tried.⁴

be required . . . a subpoena may be issued by and under the hand of the judge, arbitrator, referee or other person," to compel the attendance of witnesses. And the statutes of *California, Washington, Minnesota* and *Wisconsin* are substantially the same.

Commissioners appointed by the courts of other states to take depositions are also authorized by statute in many states to compel the attendance of witnesses by subpoena. *Alabama* Civ. Code, § 2805; *Iowa* Code (Miller), § 3680.

Other Officers.—In addition to those officers mentioned in the text, the following have power to issue a subpoena in some of the states: Railroad and insurance commissioners, *Alabama* Civ. Code, § 1140; *California* Pol. Code, § 599; shell fish commissioners, *Connecticut* Gen. Stat., § 2331. See *Noyes v. Byxbee*, 45 Conn. 382.

1. In some states the seal is not necessary. But in all cases the writ of subpoena must be sealed when issuing out of the *United States* courts. U. S. Rev. Stat., § 911.

Where the law requires a process to be under seal of the court it is void on its face if issued without a seal. *Aetna Ins. Co. v. Doe*, 6 Wall. (U. S.) 556; *Waddell v. McGinty*, 2 Ch. Cham. (Ont.) 445.

Any alteration made in the writ after it is issued, though before it is served, necessitates resealing; and therefore where the day of appearance was altered from one term to another and the writ was not resealed, it became void. *Barber v. Wood*, 2 M. & Rob. 172.

2. *United States* Rev. Stat., § 911, provides that all writs and processes issuing from the courts of the *United States* shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the supreme court or a circuit court shall bear *teste* of the Chief Justice of the *United States*; or when that office is vacant, of the associate justice next in precedence; and those issuing from a district court

shall bear *teste* of the judge; or, when that office is vacant, of the clerk thereof. See *Middleton Paper Co. v. Rock River Paper Co.*, 19 Fed. Rep. 252.

A subpoena tested in vacation is a void writ. *Edgell v. Curling*, 8 Scott, N. R. 663; 2 D. & L. 600; 7 M. & G. 958.

3. 1 Greenl. Ev. (14th ed.), § 309. For the number of names which the writ may contain, the statutes of the states must be consulted.

The name of a witness, though not in the original subpoena, may be inserted therein at any time, if the party has been served with a copy. *Wakefield v. Gall*, Holt 526, where it was also held that as many names as were needed could be inserted in one writ.

4. *Milson v. Day*, 3 M. & P. 333. A subpoena requiring the party to attend the trial of a cause on the commission day extends to the whole assizes, and it need not go on to require his service "from day to day until the cause is tried." *Scholes v. Hilton*, 10 M. & W. 16.

In *New York* it has been held that a subpoena ticket in the supreme court is good, although it does not say where the court will be held, and although it directs the witness to appear at term, and the indictment on which he is summoned to testify is in the oyer and terminer. *People v. Van Wyck*, 2 Cai. (N. Y.) 333.

If a subpoena issued by a notary for a witness to appear before him and give his deposition, fails to specify the precise place where the notary will take such deposition, the witness will not be excused from non-attendance, if he is not misled thereby. *Keisker v. Ayres*, 46 Cal. 83.

Where a subpoena required a witness to attend at Westminster Hall, the sittings being in fact held in an adjoining sessions house, notices of which had been posted with directions to witnesses to proceed to that place, it was held that an attachment might be granted for non-attendance. *Chapman v. Davis*, 1 Dowl. N. S. 239; 4 Scott N. R. 319; 3 M. G. 609.

A subpoena tested May 9th and

It is issued at the request of either party to the suit by the clerk of the court or by a justice of the peace, as the case may be,¹ and in some of the states where certain officers, as arbitrators, referees, etc., may compel the attendance of witnesses in pursuance of statute, the writ may be issued by and under the hand of such officers.²

c. WHO MAY BE COMPELLED TO ATTEND.—The rule is that all persons who are competent as witnesses and reside within the jurisdiction of the court may be compelled to obey the writ of subpœna, unless excused by the court for sufficient reason. But to this general rule there are some exceptions, such as ambassadors, and other officers representing foreign governments, who are not amenable to the processes of the courts.³ It seems also that the President of the *United States*,⁴ and the governors of the states may not, when in discharge of their official duties, be compelled by attachment to obey the writ of subpœna.⁵

served on May 19th required attendance on "21st March, instant." The court refused to set aside the service. *Page v. Carew*, 1 C. & J. 514.

1. Any party may, without leave of court, issue a subpœna for the examination of a witness at any stage of the action, but the court will exercise a control over this privilege to prevent its being oppressively used. *Raymond v. Tapson*, 22 Ch. Div. 430.

A subpœna to testify is a process within the meaning of a statute prohibiting any person not the general law partner of an attorney or a clerk in his office from suing out any "process," etc., in the name of such attorney. *Yorks v. Peck*, 31 Barb. (N. Y.) 350.

In *Alabama*, where a party directs a subpœna for a witness, it is the duty of the clerk to issue it to each succeeding term until the order is countermanded or the suit disposed of. *Marsh v. Branch Bank of Mobile*, 10 Ala. 57.

The 78th Equity Rule of the *United States* circuit courts provides that a subpœna to a witness to appear before a commissioner or examiner may be issued by the clerk of the court in blank, to be filled either by the party applying for the same, or by the commissioner, master or examiner, commanding the witness therein named to appear at the time and place therein specified to testify, and the witnesses shall be allowed the same compensation for such attendance as for attendance before a court.

2. See *New York Code Civ. Proc.*, § 854; *Alabama Civ. Code*, § 2792; *Illinois Rev. St.*, p. 1012, § 14.

3. *In re Dillon*, 7 Sawy. (U. S.) 561.

4. In the trial of Aaron Burr, Chief Justice Marshall, at the request of the defense, awarded a *subpœna duces tecum* directed to President Jefferson, requiring him to appear and bring with him a certain letter from General Wilkinson to himself. He refused either to appear or to produce the letter. The Chief Justice said: "In no case of this kind would the court be required to proceed against the President as against an ordinary individual. The objections to such a course are so strong and obvious that all must acknowledge them. . . . In this case however, the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it he himself is the judge." 2 Burr's Trial (Hopkins & Earle) 536.

5. In *Thompson v. German Valley R. Co.*, 22 N. J. Eq. 111, a subpœna was directed to the governor of *New Jersey*, which he declined to obey. The court expressed the opinion that he ought to obey the writ unless he had a sufficient excuse for not doing so, and that dignity of office was not of itself an excuse; but refused to make an order requiring him to testify. The chancellor said: "If the executive thinks he ought to testify, in compliance with the opinion of the court, he will do it without an order; if he thinks it to be his official duty, in protecting the right and dignity of his office, he will not comply, even if directed by an

f. WHERE THE WRIT MAY RUN.—A subpœna has no force beyond the limits of the jurisdiction of the court from which it is issued,¹ unless otherwise provided by statute.² To the *United States* courts power is given by statute to send subpœnas into other districts than the one in which such court is sitting, provided that in civil causes the witness does not live at a greater distance than one hundred miles from the place of trial.³ But where the witness resides more than one hundred miles from the place of trial, and it is desired to take his testimony *de bene esse*, or that he appear and testify before an examiner, application for the subpœna must be made to the court of the district in which the examination is to be made.⁴

order. And in his case, the court would hardly entertain proceedings to compel him, by adjudging him in contempt. It will be presumed that the chief magistrate intends no contempt, but that his action is in accordance with his views of his official duty."

In Appeal of Hartranft, 85 Pa. St. 433; 27 Am. Rep. 667, it appeared that the governor of *Pennsylvania* and some of his subordinate officers were subpœnaed to testify before the grand jury of Allegheny county, relative to the riots of July, 1877, in the city of Pittsburgh. They did not appear, and an attachment was awarded against them by the *nisi prius* court. The supreme court set the attachment aside, on the ground that the governor and his subordinates could not be required to obey the subpœnas when official duties required their presence elsewhere; and that the question as to what those official duties were, and the time when they should be attended to, was one of which the governor himself was the sole judge.

1. Greenleaf on Ev. (14th ed.), § 315; Taylor's Ev., § 126; Grantham v. Bishop, 1 C. P. (Ont.) 237; Woolfolk v. State, 85 Ga. 69; State v. Trounce (Wash. 1893), 32 Pac. Rep. 750.

Under a statute providing that a person shall not be compelled to attend to give his deposition outside of the county where he resides, or where he may be when served with the writ, it was held that one need not obey a subpœna served upon him while sojourning temporarily in a county in which he does not reside, requiring him to attend as a witness in such county several days afterwards. *In re* Hugbanks, 44 Kan. 105.

The code of *Indiana* provides that witnesses residing in the county in

which the court is held may be required to attend without prepayment of fees; that a witness from another county is entitled to prepayment of expenses and fees, and that where a witness does not reside in the county where the court is held, or in the adjoining county, his deposition may be taken. Under these provisions it was held that a witness could not be compelled to attend court in any other county than that of his residence or an adjoining one to it. *Alexander v. Harrison*, 2 Ind. App. 47; *Alexander v. Horn* (Ind. App. 1891), 28 N. E. Rep. 122.

2. In *California*, a subpœna may run into any county. Cal. Gen. Stat., § 205. This provision is also made by statute in *New Jersey*. N. J. Rev. L., p. 380, § 14.

In *Montana* and *Nevada* no person is required to attend out of the county in which he resides, unless the distance from his residence to the place of trial be less than twenty miles. Mont. Comp. Stat., § 654; Nev. Gen. Stat., § 3410.

In most of the states a subpœna in a criminal case runs throughout the state. See Bright. Purd. Dig. *Pennsylvania* L., p. 472, § 1; *Florida* Stat. p. 990. In *England* a corresponding provision was made by act Geo. III, ch. 92, §§ 3, 4.

3. *United States* Rev. Stat., § 876. This also applies to cases in bankruptcy. *In re* Woodward, 12 Nat. Bankr. Reg. 297. See also *Patapsco Ins. Co. v. Southgate*, 5 Pet. (U. S.) 616; *Russell v. Ashley*, Hempst. (U. S.) 546; *Ex p. Beebee*, 2 Wall. Jr. (U. S.) 127; *Henry v. Ricketts*, 1 Cranch (C. C.) 580; *U. S. v. Williams*, 4 Cranch (C. C.) 372.

4. *Ex p. Humphrey*, 2 Blatchf. (U. S.) 228; *Henry v. Ricketts*, 1 Cranch (C.

g. SERVICE—(1) By Whom Made.—A writ of subpœna *ad testificandum*, since it is directed to the witness himself, may be shown or delivered to him by a private party, or it may be served by the sheriff or other officer.¹ In the former case, proof of service must be made by affidavit of such private party, but in the latter the service is shown by the official return of the officer.²

(2) Mode of Service.—In order to compel the attendance of the witness, and to charge him with contempt for failure to appear in answer to the writ, service must be personal.³ In *England*, the original subpœna should be shown to the witness at the same time the copy of it or a subpœna ticket, which is a statement of the substance of the writ, is delivered to him, otherwise an attachment will not lie against him for disobedience.⁴ In the *United*

C.) 580; *Ex p. Peck*, 3 Blatchf. (U. S.) 113; *U. S. v. Tilden*, 25 Internal Rev. R. 352.

If the witness refuses or neglects to appear, the court from which the subpœna was issued may punish him for contempt. *In re Steward*, 29 Fed. Rep. 813.

1. *Cummings v. Akron Cement, etc., Co.*, 6 Blatchf. (U. S.) 509; *Schwabacker v. Reilly*, 2 Dill. (U. S.) 127; *Power v. Semmes*, 1 Cranch (C. C.) 247; *Miller v. Scott*, 6 Phila. (Pa.) 484; *Larimore v. Bobb* (Mo. 1893), 21 S. W. Rep. 922.

In most of the states provision is made by statute for the service of subpœnas by private persons as well as by an officer of the court. And while in some states no restriction in regard to age is made, in others the person is required to be twenty-one years old, and in others eighteen. See Gen. Stat. of *Colorado*, § 1952; *Illinois* Rev. Stat. 864, § 53; *Kentucky* Code, § 533; *Hill's Ann. Laws of Oregon*, § 792.

The *Georgia* Code, § 3841, provides that the person executing the writ shall be capable of proving the service, and it is to be presumed, where no restriction is made as to who shall execute the writ, that the person is capable of making such proof. See *Smith v. Wilbur*, 35 Vt. 133.

Under *Indiana* Laws, March, 1879, no person other than the sheriff or his deputy was authorized to serve a subpœna, and a party who had not thus subpœnaed his witness, but served the subpœna himself, was not entitled to a continuance on account of the absence of such witness. *Leary v. Meier*, 78 Md. 393.

A subpœna may be served upon a witness by the sheriff, or by a party to

the suit, or by any private person, or may even be sent by mail, and as the command is to the witness he is bound to obey it whenever it comes to his hands. *Chicago, etc., R. Co. v. Dunning*, 18 Ill. 494.

A subpœna from the supreme court of the *District of Columbia* must be served by the marshal or his deputy. *In re Spencer, McArthur & M.* (D. C.) 433.

2. See SERVICE OF PROCESS, vol. 22, p. 107.

3. *Taylor's Ev.*, § 1244; *Greenleaf's Ev.* (14th ed.), § 315; *Wadsworth v. Marshall*, 3 Tyr. 228; 1 C. & M. 87; *Rex v. Soloman*, 1 Dowl. Pr. Cas. 618; *Pitcher v. King*, 2 Dowl. & L. 755; *Smith v. Truscott*, 6 M. & G. 267; 1 D. & L. 530; 46 E. C. L. 267; *Thorpe v. Gisborne*, 11 Moore 55; *Spicer v. Dawson*, 22 Beav. 282.

Difficulty in serving a writ will not dispense with personal service, unless it is sworn that the person kept out of the way to avoid it. *Barnes v. Williams*, 1 Dowl. Pr. Cas. 615.

But if a witness attends the trial in obedience to the writ, he cannot refuse to testify on the ground of any irregularity in the service. *Wisden v. Wisden*, 6 Hare 549.

4. *Smith v. Truscott*, 6 M. & G. 267; 46 E. C. L. 267; *Wadsworth v. Marshall*, 1 C. & M. 87; *Garden v. Cresswell*, 2 M. & W. 319; *Taylor's Ev.*, § 1244; *Rex v. Soloman*, 1 Dowl. Pr. Cas. 618; *Pitcher v. King*, 2 Dowl. & L. 755; *Thorpe v. Gisborne*, 11 Moore 55.

The original subpœna should be shown to the party subpœnaed at the time the copy of it is served, or an attachment will not lie against him for disobedience, even though the party serving it was not asked to produce it.

States the usual practice is either to show the subpœna to the witness or to serve him with an attested copy.¹

(3) *Payment of Fees and Expenses.*—To make the service of a writ of subpœna complete, it is necessary in civil causes, unless otherwise prescribed by statute, to pay, or offer to pay, in advance, to the person summoned, his lawful fees and expenses;² and it matters not whether the person be in court or elsewhere, he can-

Wadsworth *v.* Marshall, 1 C. & M. 87; Rex *v.* Soloman, 1 Dowl. Pr. Cas. 618; Pitcher *v.* King, 1 Dowl. & L. 755. Or even where the service of the subpœna has been previously evaded. Smith *v.* Truscott, 6 M. & G. 267; 46 E. C. L. 267.

On the other hand, however, it has been held that the service of a subpœna ticket containing the substance of the writ will be as effectual as service of the writ itself. Goodwin *v.* West, Cro. Car. 522; Maddison *v.* Shore, 5 Mod. 355.

The service of a subpœna to appear as a witness before an examiner must in all cases be personal, and is effected by delivering a copy of the writ, with the indorsement thereon, to the witness at the producing of the original writ. 1 Dan. Ch. Pr. (5th Am. ed.) 907; Spicer *v.* Dawson, 22 Beav. 282.

In civil cases a witness who refuses to be examined unless his expenses are tendered him, is not guilty of contempt. Bowles *v.* Johnson, 1 W. Bl. 36. In criminal cases, however, a person present in court, although he has not been served with a subpœna, is bound to testify if called on. Rex *v.* Sadler, 4 Car. & P. 218; 19 E. C. L. 352. See Blackburn *v.* Hargreave, 2 Lewin C. C. 259.

Variance Between Writ and Copy.—Where there is any material variance between the original subpœna and the copy, an attachment for disobedience will not lie. Thus, where the copy specified the 24th of May as the day for the appearance of the witness and the writ itself named the 27th, it was held to be a material variance. Doe *v.* Thomson, 9 Dowl. Pr. Cas. 948; Chapman *v.* Davis, 4 Scott N. R. 319; 3 M. & G. 609.

1. For the provisions regulating the service of subpœnas in the *United States* reference must be had to the statutes of the various states. See 1 Greenl. Ev. (14th ed.), § 315 and notes.

2. Taylor's Ev., § 1149; 1 Whart. Ev., § 381; 2 Bouv. Inst., § 3145; Fuller *v.* Prentice, 1 H. Bl. 49; Dixon *v.* Lee, 1

C. M. & R. 645; Horne *v.* Smith, 6 Taunt. 9; Ashton *v.* Haigh, 2 Chit. 201; Bowles *v.* Johnson, 1 W. Bl. 36; Newton *v.* Harland, 1 M. & G. 956; 39 E. C. L. 727; Brocas *v.* Lloyd, 23 Beav. 129; Bittley *v.* McLeod, 3 Bing. N. Cas. 405; Chapman *v.* Paynton, 13 East 13, n.; Bliss *v.* Brainard, 42 N. H. 255; Ogden *v.* Gibbons, 5 N. J. L. 518.

The fees to which a witness is entitled, when served with a subpœna, are for his daily sustenance, and he is entitled to them from day to day in advance. Muscott *v.* Runge, 27 How. Pr. (N. Y.) 85; Wheeler *v.* Ruckman, 5 Robt. (N. Y.) 702.

A witness is not bound to attend on a day following that for which he was summoned, unless his fees are paid again. Hurd *v.* Swan, 4 Den. (N. Y.) 75; Courtney *v.* Baker, 3 Den. (N. Y.) 27; Mattock *v.* Wharton, 10 Vt. 493; Atwood *v.* Scott, 99 Mass. 177; 96 Am. Dec. 726.

What the lawful fees and expenses of a witness shall be, has, in *England*, been fixed by a regular scale, and in most of the *United States* by statutory enactment. A certain sum *per diem* is generally allowed, together with mileage for going to and returning from the place of trial. See statutes of the various states.

A subpœna served on a witness at the place of trial on the day on which he is required to attend does not entitle him to traveling expenses to and from his place of residence. The Sunnyside, 5 Ben. (U. S.) 162.

A witness subpœnaed in several suits at the same time and place at the instance of the same person is entitled to compensation in each case. Flores *v.* Thorn, 8 Tex. 377; Hicks *v.* Brennan, 10 Abb. Pr. (N. Y.) 304.

In case of service of a subpœna upon a married woman or a ward, the fees must be paid or tendered, not to the husband or guardian, but to the witness. Hairthbury *v.* Harvey, 1 Cro. Eliz. 131.

Parties.—In Reed *v.* Fairless, 3 F. & F. 958, it was held that a party to a

not be compelled to testify unless this is done.¹ This right, however, may be waived by the witness, either directly by express agreement, or impliedly by accompanying the parties to the place of trial without previously making any claim, and in case such waiver is made, the witness will be liable to punishment for contempt, should he refuse to attend or to testify;² but it has been held that he is not liable in civil damages unless such waiver be expressly made.³

In criminal cases no tender or payment of fees is, in general, necessary, either on the part of the government or of the accused;⁴ but if a witness for the government is unable, on account of extreme poverty, to attend, he is not guilty of contempt, unless his traveling expenses were tendered him when the subpœna was served.⁵

cause, about to attend on his own account, had no right to conduct money or expenses when subpœnaed by the other side. But see *Anderson v. Johnson*, 1 Sandf. (N. Y.) 713, where it was held that where a party undertakes to examine the adverse party as a witness, under the Code of Procedure, he must pay the latter his fees for attendance.

In *Goodpaster v. Voris*, 8 Iowa 334; 74 Am. Dec. 313, it was held that a party to a suit, already in court, might be called as a witness without being served with a subpœna; and in *McCall v. Butterworth*, 8 Iowa 329, it was held that where a witness is a party to the suit, no technical objection to the regularity or sufficiency of the subpœna shall be suffered to prevail.

1. *Bowles v. Johnson*, 1 W. Bl. 36; *Fuller v. Prentice*, 1 H. Bl. 49; *Ashton v. Haigh*, 2 Chit. 201; *Hallet v. Meares*, 13 East 15; *Hurd v. Swan*, 4 Den. (N. Y.) 79; *Courtney v. Baker*, 3 Den. (N. Y.) 27; *Beaulieu v. Parsons*, 2 Minn. 37; *Mattock v. Wheaton*, 10 Vt. 493.

In *Woodward v. Purdy*, 20 Ala. 379, it was held that the court might, in its discretion, refuse a motion to have a person, who was about the court, but had not been duly subpœnaed, brought in to testify.

2. *Goodwin v. West*, Cro. Car. 522; *Hurd v. Swan*, 4 Den. (N. Y.) 75; *Norris v. Hassler*, 23 Fed. Rep. 581.

Where a subpœna is regularly served upon a witness, and at the same time money is tendered him for expenses, to which he does not object on the ground of its insufficiency, an attachment for contempt may be granted against him in the first instance, in case he disobeys the subpœna. *Andrews v. Andrews*, 2 Johns. Cas. (N.

Y.) 109; *Gough v. Mills*, 2 Dowl. & L. 23.

3. In *Hurd v. Swan*, 4 Den. (N. Y.) 75, it was held that a failure to object to the sufficiency of the money tendered a witness for expenses upon service of the subpœna, was not such a waiver as would make the witness liable in civil damages, in case he failed to attend. But the court said that if the witness had expressly waived the payment of a part or even the whole of the fees, it would have made a different question; citing *Goodwin v. West*, Cro. Car. 522, 540.

4. **Fees and Expenses in Criminal Cases.**—2d Phil. Ev. 380; 1 Starkie Ev. 82; 2d Taylor's Ev., § 1252; *Rex v. Ring*, 8 T. R. 585; *Pill v. Danbury*, 5 Ex. 957; *Rex v. Cooke*, 1 C. & P. 322; *U. S. v. Moore*, Wall. (C. C.) 23.

An exception, however, has been made by statute in *England* in the case of witnesses living in one distinct part of the kingdom who are required to attend in another. They are not liable to punishment for disobedience unless a reasonable and sufficient sum of money has been tendered them to defray expenses. Stat. 45 Geo. III, ch. 92, § 4; 44 & 45 Vict., ch. 24, § 4.

In *New York*, witnesses are bound to attend for the state in all criminal prosecutions, and for the defendant in any criminal indictment, without payment or tender of fees. 2 Rev. Stat., p. 329, § 65; *Ex p. Chamberlain*, 4 Cow. (N. Y.) 49.

In *Massachusetts*, the prisoner in capital cases may have process to bring in his witnesses at the expense of the commonwealth. *Com. v. Williams*, 13 Mass. 501.

5. In criminal cases where the witness is bound to attend without the

(4) *Time of Service*.—The writ of subpœna must in all cases be served within a reasonable time before the trial, which is understood to mean time enough for the witness conveniently to come from his home to the place of trial, and also to put his affairs in such order that they will suffer as little injury as possible by reason of his absence.¹

h. RETURN OF THE WRIT.—When a subpœna has been issued a return must be made thereto, as in the case of any other pro-

payment of fees by the prosecution, if on account of extreme poverty he cannot obey the summons, he will not, it seems, be guilty of contempt. 1 Gr. Ev. (14th ed.), § 311; U. S. v. Durling, 4 Biss. (U. S.) 509; 2 Phil. Ev. 379, 383.

1. Taylor's Ev., § 1242; 2 Bouv. Inst., § 3145; 1 Greenleaf on Ev. (14th ed.), § 314; Hammond v. Stewart, 1 Stra. 510. The question as to whether the writ has been served within a reasonable time is in the discretion of the judge, and depends on the circumstances of each particular case. Barber v. Wood, 2 M. & Rob. 172.

In Hammond v. Stewart, 1 Stra. 510, it was held that a summons in the morning to appear in the afternoon of the same day was insufficient, although the witness resided in the same town and near the place of trial. See also Barber v. Wood, 2 M. & Rob. 172.

But where a witness was served with the subpœna at noon, while standing on the steps of the courthouse, and being then told that the cause was coming on that day, replied, "Very well," the court held that his non-attendance at five o'clock, when the trial was held, rendered him liable to an action, since his answer was equivalent to an admission that the service was in time. Maunsell v. Ainsworth, 8 Dowl. Pr. Cas. 869; Jackson v. Seager, 2 Dowl. & L. 13.

Where a subpœna requiring the attendance of a witness on the 31st of March and so on from day to day until the cause should be tried, was served on the 2d of April when the witness was distinctly told that the cause had not come on, he was held civilly responsible for disobeying it on the 6th of April when the cause was heard. Davis v. Lovell, 7 Dowl. Pr. Cas. 178; 4 M. & W. 679; 1 H. & H. 451.

A witness should be subpœnaed at the very latest on the day preceding that on which he is required to attend, though the cause is not actually tried at the time specified. Alexander v.

Dixon, 1 Bing. 366; 8 E. C. L. 551; 1 Moore 387.

A subpœna must be served a sufficient length of time before the trial to allow the witness time for travel by ordinary modes of conveyance exclusive of the Sabbath. Wilkie v. Chadwick, 13 Wend. (N. Y.) 49; People v. Potter, 6 N. Y. St. Rep. 753.

A subpœna *ad testificandum* may be served upon a person in a court of justice, and while a trial is going on. Poole v. Gould, 1 H. & N. 99. And where a witness is in court as a spectator he cannot object to giving evidence on the ground that the subpœna has only just been served. Doe v. Andrews, 2 Cowp. 845. Though if he were a solicitor winding up another cause the rule would probably be different; at least he would not be liable to attachment for disobedience. Pitcher v. King, 2 Dowl. & L. 755.

The issuing of a subpœna during the progress of a cause at the request of a party is a matter of right when it is not shown that the attendance of the witness cannot be procured, and is not a matter resting in the discretion of the judge or clerk. Edmondson v. State, 43 Tex. 230.

The practice which has grown up in the City of New York, and which has been tolerated by the court, of not subpœnaing witnesses until there is a reasonable expectation of the cause being reached for trial, merely requires a party to use reasonable diligence and judgment in ascertaining when a cause may be expected on the day calendar, and in having his witnesses in attendance when the cause is called for trial. Wheeler v. Ruckman, 5 Robt. (N. Y.) 702. See Curtis v. Dutton, 4 Sandf. (N. Y.) 719.

The reasonableness of time, however, is generally fixed by statute and rules of court, the usual provision being to allow one additional day for every 20 miles which the witness has to come over and above a specified dis-

cess, setting forth the time and manner of service and showing that all the requirements of law have been complied with.¹

i. OBEEDIENCE TO THE WRIT—HOW ENFORCED.—If a person, duly served with a subpœna in the manner prescribed by law, neglects or refuses without lawful excuse to appear and testify when so required by the writ, he may be compelled to obey by the granting of an attachment by the court, upon the application of the party by whom he was summoned.²

In order to obtain an attachment it must be distinctly shown by affidavit, or otherwise, that the evidence of such witness is

tance. Under this rule an additional day is not allowed for any fractional part of twenty miles. *Scammon v. Scammon*, 33 N. H. 52.

1. See SERVICE OF PROCESS, vol. 22, p. 179 *et seq.*

2. Attachment.—*Ex p.* Humphrey, 2 Blatchf. (U. S.) 228; *Ex p.* Beebee, 2 Wall. Jr. (U. S.) 127; *U. S. v. Moore*, Wall. (C. C.) 23; *In re Roelker*, 1 Sprague (U. S.) 276; *Mitchell v. Maxwell*, 2 Fla. 594; *Green v. State*, 17 Fla. 669; *Chicago, etc., R. Co. v. Dunning*, 18 Ill. 494; *Com. v. Carter*, 11 Pick. (Mass.) 277; *Jackson v. Justices, etc.*, 1 Va. Cas. 314; *Burnham v. Morrissey*, 14 Gray (Mass.) 226; 74 Am. Dec. 676; *Andrews v. Andrews*, 2 John's Cas. (N. Y.) 109; *State v. Trumbull*, 4 N. J. L. 140; *Malcolm v. Ray*, 3 Moore 222; *In re Jacobs*, 1 H. & W. 123; *Rex v. Fenn*, 3 Dowl. Pr. Cas. 546; 1 H. & W. 200.

The motion for an attachment should be brought forward as soon as possible. *Rex v. Stretch*, 4 Dowl. Pr. Cas. 30.

In *Barrow v. Humphreys*, 3 B. & Ald. 600, it was held that an attachment does not issue for the redress of the party injured, but to vindicate the dignity of the court and compel obedience to its mandate. See also *State v. Nixon*, Wright (Ohio) 763. Where, therefore, it appears that the witness against whom an attachment for disobedience had issued has a reasonable excuse for his non-attendance he will be discharged. *Butcher v. Coats*, 1 Dall. (U. S.) 340.

Where a solicitor had been served with a subpœna to attend a trial on the following day and went in the morning to the meeting of a board to which he was clerk, and the cause was called during his absence, it was held that he had no right to speculate on the chance of being in time, and that an attachment might issue. *Jackson v. Seager*, 2 Dowl. 13.

A party is not entitled to an attachment for an absent witness, or postponement on account of such absence, unless he has duly summoned the witness; and it is no excuse that the witness had been summoned by the other side and examined at a previous stage of the proceeding, and they had stated that they had no objection to his remaining in attendance in the interests of the other party. *Beaulieu v. Parsons*, 2 Minn. 37.

Courts will not generally award an attachment against a witness residing in another district when he shows no disposition to treat the process with contempt. *Ex p.* Beebee, 2 Wall. Jr. (U. S.) 127.

Where an employer tells his employé, who has been subpœnaed as a witness, that he shall lose his situation if he attends the trial, the employer may be attached. *Campbell v. Fort*, 3 N. J. L. J. 157.

As to indicting persons who refuse to obey a subpœna, see *Drake v. State*, 60 Ala. 62; *Com. v. Reynolds*, 14 Gray (Mass.) 87; 74 Am. Dec. 665.

Legislative Bodies and Other Tribunals.—Refusal to attend the House of Representatives or a committee of the House is a contempt, and the witness may be arrested and brought in. *Burnham v. Morrissey*, 14 Gray (Mass.) 226; 74 Am. Dec. 676. See also *In re Pilsbury*, 56 How. Pr. (N. Y.) 290; *In re Dickenson*, 58 How. Pr. (N. Y.) 260; *Briggs v. Matsell*, 2 Abb. Pr. (N. Y.) 156. So also in case of a refusal to appear before an examiner, *Com. v. Newton*, 1 Grant (Pa.) 453; or a master in chancery, *Brockman v. Aulger*, 12 Ill. 277; or a magistrate empowered to take depositions, *In re Jenckes*, 6 R. I. 18; *Burnham v. Stevens*, 33 N. H. 247.

Where an attachment is issued against a witness for not appearing before a commissioner, the question of the authority of the commissioner and

material,¹ that he was duly summoned,² that his lawful fees and expenses were paid or tendered,³ or such payment or tender waived,⁴ and that he was willfully absent.⁵ If a case of palpable contempt is shown, such as an express refusal to obey, the court will grant an attachment in the first instance, but the usual course is to grant a rule to show cause why the attachment should not issue.⁶

j. DISOBEDIENCE—HOW PUNISHED—(1) *Action for Damages.*—A witness who has been duly subpœnaed and fails to attend, without a good excuse for his delinquency, is liable, in an action at law, for such actual damages as the party in whose behalf he

of the regularity of the proceedings is properly brought before the court by affidavit. *Ex p.* Humphrey, 2 Blatchf. (U. S.) 228.

Experts.—It has been held frequently that witnesses summoned as experts in a particular art or science are not bound to attend, and no attachment will issue against them. *In re Roelker*, 1 Sprague (U. S.) 276; *Buchman v. State*, 59 Ind. 1; 26 Am. Rep. 75; *U. S. v. Howe*, 12 Cent. L. J. 193; *Webb v. Page*, 1 Car. & K. 23; 47 E. C. L. 23 (per Maule, J.). See also *Parkinson v. Atkinson*, 31 L. J., C. P., N. S. 199; *Turner v. Turner*, 5 Jur. N. S. 839. But the law on this subject cannot be said to be well settled. In *Ex p.* Dement, 53 Ala. 389; 25 Am. Rep. 611, the supreme court of *Alabama*, after a thorough review of authorities, decided that a physician might be compelled to attend and testify as an expert, in either a civil or criminal case, without being paid the fees of an expert witness; and in *Summers v. State*, 5 Tex. App. 365; 32 Am. Rep. 573, it was held that a physician might be compelled to testify as to the result of a *post-mortem* examination made by him, although he could not be compelled to make such examination. See also *Wright v. People*, 2 Lanc. L. Rev. (Pa.) 379; *Larimer County v. Lee* (Colo. App. 1893), 32 Pac. Rep. 841.

1. *Dicars v. Lawson*, 1 C. M. & R. 934; *Rex v. Russell*, 7 Dowl. Pr. Cas. 693; *Woods v. DeFiganiere*, 1 Robt. (N. Y.) 607, 641.

In Bonesteel v. Lynde, 8 How. Pr. (N. Y.) 226, it was held that the fact that the witness deems his evidence immaterial will not excuse non-attendance.

2. *Barber v. Wood*, 2 M. & Rob. 172; *Wadsworth v. Marshall*, 1 C. & M. 87; *Garden v. Cresswell*, 2 M. & W. 319; *Jacob v. Hungate*, 3 Dowl. Pr. Cas.

457; *Smith v. Truscott*, 1 Dowl. & L. 530; *Netherwood v. Wilkinson*, 17 C. B. 226; 84 E. C. L. 226; *State v. Johnson*, 41 La. Ann. 574.

3. *Brocas v. Lloyd*, 23 Beav. 129; *Fuller v. Prentice*, 1 H. B. 49; *Ashton v. Haigh*, 2 Chit. 201.

4. *Goff v. Mills*, 2 Dowl. & L. 23; *Feree v. Strome*, 1 Yeates (Pa.) 303.

5. *Scholes v. Hilton*, 10 M. & W. 15; *Netherwood v. Wilkinson*, 17 C. B. 226; 84 E. C. L. 226.

It has been held that where the absence of the witness is shown to be an intentional defiance of the court, he cannot justify his conduct by proving the immateriality of his evidence. *Chapman v. Davis*, 3 M. & G. 609; 42 E. C. L. 319; *Scholes v. Hilton*, 10 M. & W. 16; *Maloney v. Morrison*, 1 Allen (New Br.) 240.

Proof.—The return of the sheriff to a writ of subpœna, showing that the witness, knowing the nature thereof, willfully refuses to permit it to be served on him and to obey it, is sufficient proof to justify an attachment for contempt. *Wilson v. State*, 57 Ind. 71.

Time of Issuing Attachment.—In *Bland v. Swafford*, Peak 60, it was held that the cause should be called for trial, the jury sworn and the witnesses called to testify before an attachment could issue. See also *Malcolm v. Ray*, 3 Moore 222; *In re Jacobs*, 1 H. & W. 123; *Rex v. Fenn*, 3 Dowl. Pr. Cas. 546; *Dixon v. Lee*, 3 Dowl. Pr. Cas. 259. But it seems that the calling of him into court is of no other use than to prove clearly his disobedience to the writ, and that is not necessary if such disobedience can be otherwise shown. *Mullett v. Hunt*, 1 C. & M. 752; 2 Tidd's Practice 808; *Gough v. Mills*, 2 Dowl. & L. 23.

6. *Alexander v. Dixon*, 1 Moore 387; *Doe v. Thomson*, 9 Dowl. Pr. Cas. 948; *Rex v. Jones*, 1 Stra. 185; *Jack-*

was subpoenaed may have suffered by reason of his non-attendance.¹

(2) *Attachment for Contempt; Fine and Imprisonment.*—A witness, who has been duly subpoenaed, is guilty of contempt of court if he refuses or fails to attend without excuse for his delinquency; and may be brought in upon attachment and fined or imprisoned, in the discretion of the court.²

Under certain circumstances, however, a witness may be excused for non-attendance. Thus, if he be too ill, or otherwise incapacitated,³ or if the party requiring his attendance, or the solicitor of

son *v. Mann*, 2 Cai. (N. Y.) 92; *Andrews v. Andrews*, 2 Johns. Cas. (N. Y.) 109; *Thomas v. Cummins*, 1 Yeates (Pa.) 1; *Morris v. Creel*, 2 Va. Cas. 49.

The federal courts may grant an attachment in the first instance, when the witness neglects to obey the subpoena. *U. S. v. Caldwell*, 2 Dall. (U. S.) 333.

1. *Masterman v. Judson*, 8 Bing. 224; 1 M. & S. 367; 21 E. C. L. 281; *Mullett v. Hunt*, 1 C. & M. 752; *Needham v. Fraser*, 3 Dowl. & L. 190; 1 C. B. 815; *Davis v. Lovell*, 4 M. & W. 679; 1 H. & H. 451; *Maunsell v. Ainsworth*, 8 D. P. C. 869; 1 H. & W. 5; *Lamont v. Crook*, 6 M. & W. 615; *Betteley v. McLeod*, 3 Bing. N. Cas. 405; 4 Scott 131; 32 E. C. L. 179; *Couling v. Coxe*, 6 Dowl. & L. 399; 6 C. B. 703; 60 E. C. L. 701; *Robinson v. Trull*, 4 Cush. (Mass.) 249; *Prentiss v. Webster*, 2 Dougl. (Mich.) 5; *Connett v. Hamilton*, 16 Mo. 442; *Hasbrouck v. Baker*, 10 Johns. (N. Y.) 248; *West v. Tuttle*, 11 Wend. (N. Y.) 639; *Hurd v. Swan*, 4 Den. (N. Y.) 75.

In such action, the plaintiff must prove actual damages. The law will not presume damages from the failure of the witness to attend. *Couling v. Coxe*, 6 Dowl. & L. 399; 6 C. B. 703; 60 E. C. L. 701.

Under statute 5 Eliz., ch. 9, § 12, the injured party is entitled to bring an action for further recompense against a witness for non-attendance; in which case the damages must be assessed by the court out of which the process issued, and not by the judge or jury at *nisi prius*. *Pearson v. Iles*, 2 Dougl. 556.

In order to sustain an action for damages for neglect to obey a subpoena, it is necessary to prove that the witness was material, that the trial could not safely proceed without him, and that the party has sustained some damage by reason of the absence of the witness.

Mullett v. Hunt, 1 C. & M. 752; *Couling v. Coxe*, 6 C. B. 703; 60 E. C. L. 701; *Courtney v. Baker*, 3 Den. (N. Y.) 27; *Carrington v. Hutson*, 28 Hun (N. Y.) 371.

The plaintiff must also prove that the witness was duly summoned, and that his fees for travel and attendance were duly paid or tendered to him. It is not sufficient, in such case, to prove a waiver, on the part of the witness, of his right to service and fees. *Robinson v. Trull*, 4 Cush. (Mass.) 249.

2. 4 Bl. Com. 286; *Rex v. Beardmore*, 2 Burr. 792; 7 C. & P. 497; *Holme v. Smith*, 1 Marsh. 410; *Reg. v. Russell*, 7 Dowl. Pr. Cas. 693; 3 Jur. 604; *Dixon v. Lee*, 3 Dowl. Pr. Cas. 259; 1 C. M. & R. 645; *Ex p. Humphrey*, 2 Blatchf. (U. S.) 228; *Ex p. Judson*, 3 Blatchf. (U. S.) 89; *Ex p. Beebee*, 2 Wall. Jr. (U. S.) 127; *In re Roelker*, 1 Sprague (U. S.) 276; *U. S. v. Moore*, Wall. (C. C.) 23; *Mitchell v. Maxwell*, 2 Fla. 594; *Green v. State*, 17 Fla. 669; *Chicago, etc., R. Co. v. Dunning*, 18 Ill. 494; *Wilson v. State*, 57 Ind. 71; *Com. v. Carter*, 11 Pick. (Mass.) 277; *Burnham v. Morrissey*, 14 Gray (Mass.) 226; 74 Am. Dec. 676; *State v. Trumbull*, 4 N. J. L. 139; *Bleecker v. Carroll*, 2 Abb. Pr. (N. Y.) 82; *Woods v. DeFiganieri*, 1 Robt. (N. Y.) 607; *Stephens v. People*, 19 N. Y. 549; *Icehour v. Martin*, Busb. (N. Car.) 478; *Respublica v. Duane*, 4 Yeates (Pa.) 347. See also CONTEMPT, vol. 3, p. 783.

A witness who has been duly subpoenaed to appear and testify before one of the houses of a state legislature or a committee thereof, may, in case he willfully refuses to attend or testify, be arrested and brought before the body, and, after proper proceedings, committed for contempt. *In re Gunn*, 50 Kan. 155.

3. *In re Jacobs*, 1 H. & W. 123. See *Scholes v. Hilton*, 10 M. & W. 16; *People v. Davis*, 15 Wend. (N. Y.) 602;

such party, give him leave to depart, and he does so, he will not be in contempt.¹ And so in criminal cases where no fees are tendered, a witness unable to obey the writ on account of extreme poverty will not be guilty of contempt.²

k. PROTECTION AFFORDED BY THE WRIT.—See WITNESSES.

2. **Habeas Corpus ad Testificandum.**—If the person whose testimony is desired is a prisoner, or is in the military or naval service, the proper process to bring him into court as a witness is the writ of *habeas corpus ad testificandum*.³ The writ may be granted

Cutler v. State, 42 Ind. 244; State v. Benjamin, 7 La. Ann. 47; State v. Hatfield, 72 Mo. 518; Butcher v. Coats, 1 Dall. (U. S.) 340.

The serious illness of the wife of a witness has been held a sufficient excuse for his failure to attend. Foster v. McDonald, 12 Heisk. (Tenn.) 619; Slaughter v. Birdwell, 1 Head (Tenn.) 341.

No witness is bound to endanger his life by attendance at court. Jackson v. Perkins, 2 Wend. (N. Y.) 308; Butcher v. Coats, 1 Dall. (U. S.) 340. But a witness is not excused on account of a lameness which made it difficult to produce him in court, provided his general health is good. Pipher v. Lodge, 16 S. & R. (Pa.) 214.

Where a party has delayed the service of a subpœna so as not to give the witness sufficient time (in this case only three or four hours) to arrange his affairs, his non-attendance will be excused on very slight grounds, though the shortness of time is not *per se* an excuse. Chalmers v. Melville, 1 E. D. Smith (N. Y.) 502. And a person can also show any other reasonable excuse. Netherwood v. Wilkinson, 33 Eng. L. & Eq. 297; Maclin v. Wilson, 21 Ala. 270.

An attachment will not issue for disobedience to a writ of subpœna, where the witness is in custody at the time of service. Reg. v. Wetmore, Ber. (New B.) 244.

Where two subpœnas were served the same day on a witness, requiring his presence in two different places distant from each other, it was held that he might make his election as to which he should obey. Icehour v. Martin, Busb. (N. Car.) 478.

Where it is provided by statute that a witness is not bound to attend outside of the county in which he lives, unless he resides within twenty miles of the place of trial, the court has no jurisdiction to punish a witness subpœnaed to attend in a county other than that

of his residence, unless proof is submitted that he resides within said distance. State v. Frounce, 5 Wash. 804.

1. Farrah v. Keat, 6 Dowl. Pr. Cas. 470; State v. Nixon, Wright (Ohio) 763.

2. Phil. Ev. 383; U. S. v. Moore, Wall. (C. C.) 23.

3. Bac. Abr., tit. *Habeas Corpus* (a); 3 Bl. Com. 130; Rex v. Roddam, Cowp. 672; Rex v. Barbage, 3 Burr. 1440; Browne v. Gisborne, 2 Dowl. N. S. 963; Rex v. Pilgrim, 4 Dowl. Pr. Cas. 89; Graham v. Glover, 5 El. & Bl. 591; 85 E. C. L. 590; Geery v. Hopkins, 2 Ld. Raym. 851; Marsden v. Overbury, 18 C. B. 34; 86 E. C. L. 33; *Ex p.* Barnes, 1 Sprague (U. S.) 133; Shank's Case, 15 Abb. Pr. N. S. (N. Y.) 38; Willard v. Santa Barbara County, 82 Cal. 456; People v. Willard, 92 Cal. 482. See also Adams' Case, 3 Keb. 51; Trial of Sir John Friend, 13 How. St. Tr. 1.

In Langston v. Cotton, Peake's Add. Cas. 21, it was held that a *habeas corpus ad testificandum* should not be granted to bring up a prisoner in custody for high treason. And in Furley v. Newnham, 2 Dougl. 419, it was held that the writ should not be granted to bring up a prisoner of war.

In State v. Adair, 68 N. Car. 68, it was held that the state was entitled to a writ of *habeas corpus ad testificandum* to bring up a felon under sentence of death to testify on behalf of the state, although it was said that parties litigant would not be entitled to the writ in such case. And in *Ex p.* Marmaduke, 91 Mo. 228; 60 Am. Rep. 250, it was held (Sherwood, J., dissenting) that the writ should not be granted to bring up one in custody under sentence for a felony, notwithstanding his competency as a witness.

But in *California*, the court, in a criminal cause, may make an order, in the nature of a *habeas corpus ad testificandum*, requiring a prisoner confined in the state prison to attend and

on motion in open court, or by a judge, at chambers, who has authority to grant a writ of *habeas corpus*;¹ but it seems to be the English practice to apply for the writ at chambers and not in open court.² In civil cases, the application for the writ is made upon affidavit, stating the nature of the suit, the materiality of the evidence sought, and the circumstances of restraint which render the writ necessary.³ It is directed to the sheriff or other officer in whose custody or under whose command the witness is; and is to be served, obeyed, and returned as other writs of *habeas corpus*.⁴

3. Subpœna Duces Tecum—*a.* DEFINITION.—The subpœna *duces tecum* is the form of process issued where the witness upon whom it is served is required to bring with him any papers, books, or documents in his possession or under his control, which can be put in evidence on the trial of a cause.⁵

testify in behalf of either the defendant or the prosecution. *Willard v. Santa Barbara County*, 82 Cal. 456; *People v. Willard*, 92 Cal. 482.

But a *mandamus* does not lie to compel the granting of such order by the trial court. *Willard v. Santa Barbara County*, 82 Cal. 456.

The writ may be granted to bring up a prisoner to give evidence before an election committee of a legislative body. *In re Price*, 4 East 587; 1 Smith 284; *In re Pilgrim*, 1 H. & W. 319; 3 Ad. & El. 485.

Parties.—Where a party is in custody he is entitled to a *habeas corpus ad testificandum* for himself, as much as for any other witness, if his evidence is necessary at the trial of the cause. *Ex p. Cobbett*, 3 H. & N. 155; 27 L. J. Exch. 199; 4 Jur. N. S. 145; *Wattles v. Marsh*, 5 Cow. (N. Y.) 176.

1. 1 Greenleaf's Ev. (14th ed.), § 312; *Hassam v. Griffin*, 18 Johns. (N. Y.) 48; 9 Am. Dec. 184; *Wattles v. Marsh*, 5 Cow. (N. Y.) 176.

2. *Browne v. Gisborne*, 2 Dowl. N. S. 963.

3. 1 Greenleaf's Ev. (14th ed.), § 312; Bouv. L. Dict., tit. *Habeas Corpus*. See also *Rex v. Roddam*, Cowp. 672.

4. 1 Greenleaf's Ev. (14th ed.), § 312, citing 2 Phil. Ev. 374, 375; Conkling's Pr. 264; 1 Paine & Duer's Pr. 503, 504; 2 Tidd's Pr. 809.

The sheriff will be protected in obeying the writ, even though it be defective, if it is not void on its face. *Hassam v. Griffin*, 18 Johns. (N. Y.) 48; 9 Am. Dec. 184; *Wattles v. Marsh*, 5 Cow. (N. Y.) 176.

Although the process by which a

prisoner is brought into court as a witness may be defective, yet he may be compelled to answer when once before the court. *Maxwell v. Rives*, 11 Nev. 213.

5. 2 Bouv. Law Dict. 676; 1 Greenleaf's Ev. (14th ed.), § 309; 1 Wharton Ev., § 377; 3 Bl. Com. 382; *Lane v. Cole*, 12 Barb. (N. Y.) 680; *Bull v. Loveland*, 10 Pick. (Mass.) 9; *Central Nat. Bank v. Arthur*, 2 Sweeny (N. Y.) 194; *Davenbagh v. McKinnie*, 5 Cow. (N. Y.) 27; *Aiken v. Martin*, 11 Paige (N. Y.) 499; *Carlton v. Litton*, 4 Blackf. (Ind.) 1; *Townshend v. Townshend*, 7 Gill (Md.) 10; *Martin v. Williams*, 18 Ala. 190; *Amey v. Long*, 9 East 473; *Chaplain v. Briscoe*, Sm. & G. 198.

Only Documents May be Required to be Produced.—The general rule in regard to the production of documents under a subpœna *duces tecum* extends to documents only and not to personal property. *Hunter v. Allen*, 35 Barb. (N. Y.) 42. A subpœna *duces tecum* may not issue to a party to the suit to compel him to bring before the court patterns for a stove. *In re Shephard*, 3 Fed. Rep. 12. See also *Johnson Steel Street Rail Co. v. North Branch Steel Co.*, 48 Fed. Rep. 191.

Document Defined.—A document is defined in 1 Whart. Ev., § 614, as being "An instrument upon which is recorded by means of letters, figures, or marks, matter which may be evidently used. In this sense the term document applies to writings; to words printed, lithographed, or photographed; to seals, plates or stones on which inscriptions are cut or engraved; to pho-

b. BY WHOM ISSUED.—There is no record in the books of the use of the writ of subpœna *duces tecum* by the courts of common law prior to the time of Charles II.¹ But it is settled that courts of justice possess inherent power to compel, by this writ, the production of written evidence which is in the possession or under the control of the witness, and there is no distinction in principle between compelling him to produce a document in his possession and compelling him to testify in court.² And, generally, the subpœna *duces tecum* may be issued by any body or tribunal which is authorized by law to issue the writ of subpœna *ad testificandum*.³

c. SERVICE UPON PARTIES.—Prior to any statutory enactments on the subject parties to a cause could not be examined as witnesses on the trial of the cause; but now by statute parties may

tographs and pictures; to maps and plans. So far as concerns admissibility it makes no difference what is the thing on which the words or signs offered may be recorded. They may be, as is elsewhere seen, on stones or gems, or on wood, as well as on paper, or parchment."

In *Johnson Steel Street Rail Co. v. North Branch Steel Co.*, 48 Fed. Rep. 194, where certain "drawings and templates" (a template is a piece of sheet iron used by machinists as a mold for shaping the teeth of wheels) were called for by a subpœna *duces tecum*, the court held that, as to the drawings, their production could be enforced, but not that of the templates.

The writ is unnecessary where a witness admits the possession in court of a written instrument which is material and admissible as evidence, and the fact that no subpœna *duces tecum* has been served will not excuse him from producing it upon demand. *Boynton v. Boynton*, 25 How. Pr. (N. Y.) 490; *Snelgrove v. Stevens*, 1 Car. & M. 508; 41 E. C. L. 278; *Dwyer v. Collins*, 7 Exch. 639.

1. *Amey v. Long*, 9 East 473.

2. In *Amey v. Long*, 9 East 473, Lord Ellenborough, C. J., said: "The right to resort to means competent to compel the production of written as well as oral testimony seems essential to the very existence and constitution of a court of common law which receives and acts upon both descriptions of evidence and could not possibly proceed with due effect without them. And it is not possible to conceive that such courts should have immemorially continued to act upon both without great and notorious impediments having oc-

curred if they had been furnished with no better means of obtaining written evidence than what the immediate custody and possession of the party who was interested in the production of it, or the voluntary favor of those in whose custody the required instruments might happen to be, afforded. The courts of common law, therefore, in order to administer the justice they have been in the habit of doing, for many centuries, must have employed the same and similar means to those which we find them to have in fact used from the time of Charles II, at least according to the entries before referred to."

In *Bull v. Loveland*, 10 Pick. (Mass.) 9, 14, Shaw, C. J., said: "There seems to be no difference in principle between compelling a witness to produce a document in his possession under a subpœna *duces tecum* in a case where the party calling the witness has the right to the use of such document, and compelling him to give testimony when the facts lie in his own knowledge. It has been decided, though it was formerly doubted, that a subpœna *duces tecum* is a writ of compulsory obligation which the court has power to issue and which the witness is bound to obey and which will be enforced by proper process to compel the production of the paper when the witness has no lawful or reasonable excuse for withholding it." *Citing Amey v. Long*, 9 East 473; *Corsen v. Dubois*, 1 Holt's Cas. 239.

3. In *Barnes' Case*, which is reported in full in the Cong. Rec., vol. 5, pt. 1 (44th Cong., 2d Sess.), pp. 452-455, 602-608, 678, 694; and reviewed in *South. Law Rev.*, vol. 5 (N. S.), p. 475 *et seq.*, it appeared that the manager of the

generally be compelled to testify, and, when this is the case, they may also be required by a subpoena *duces tecum* to bring with them any papers, books, or documents in their possession or control which may be used in evidence.¹

d. TO CORPORATIONS.—In cases where the books or other papers belonging to a private corporation are required as evidence,

Western Union Telegraph Company, at New Orleans, was directed by a subpoena *duces* to produce certain telegrams before the Louisiana Affairs Special Committee. He refused to produce them, and, upon recommendation of the judiciary committee, he was adjudged guilty of contempt by the House of Representatives and ordered into close custody till he should obey the subpoena.

The writ may be issued from the court of chancery without an application to the chancellor. *Holden v. Holden*, 7 De G. M. & G. 397.

By the charter of the city of St. Louis power is conferred to pass an ordinance compelling the production of books and papers before a committee of either house of the municipal assembly, and a witness who refuses to produce such books and papers under the writ may be punished for contempt. And the fact that they are private property will afford him no excuse for their non-production. It is not necessary that the subpoena declare them material to the investigation. *In re Dunn*, 9 Mo. App. 255.

Where the court has appointed a special examiner, under Equity Rule 67, to take evidence in another district, a subpoena *duces tecum* may be issued from the clerk's office where the evidence is taken without an order from the court, and the court has power to punish for disobedience. Section 869 of the Revised Statutes, which requires an order from the court to issue such a subpoena, is inapplicable to such a case, as it is limited to the taking of depositions *de bene esse* or *in perpetuam rei memoriam*, or under a *dedimus potestatem* in accordance with the provisions of §§ 863 & 866 Rev. Stat. *Johnson Steel Street Rail Co. v. North Branch Steel Co.*, 48 Fed. Rep. 191. See also *Ex p. Fisk*, 113 U. S. 713.

1. *Murray v. Elston*, 23 N. J. Eq. 212; *Shelp v. Morrison*, 13 Hun (N. Y.) 110; *People v. Kent County*, 38 Mich. 351; *Mitchell's Case*, 12 Abb. Pr. (N. Y.) 249; *Norris v. Hassler*, 23 Fed. Rep. 581; *Mott v. Consumers'*

Ice Co., 52 How. Pr. (N. Y.) 244. See PRODUCTION OF DOCUMENTS, vol. 19, p. 227.

In *Trotter v. Latson*, 7 How. Pr. (N. Y.) 261, it was held that the words "may be compelled to testify," used in section 390 of the old Code, as applied to a party to a suit, included only the giving of oral testimony and not the production of papers or books. But this ruling of Judge Roosevelt was repudiated afterwards in *Bonesteel v. Lynde*, 8 How. Pr. (N. Y.) 226, where it was held that the word to "testify" embraced also the production of books or papers, or any kind of evidence in the possession of a party; and this ruling has been followed in *People v. Dyckman*, 24 How. Pr. (N. Y.) 222; *Mitchell's Case*, 12 Abb. Pr. (N. Y.) 249; *Jarvis v. Clerk*, 12 N. Y. Leg. Obs. 129. But see *Campbell v. Johnston*, 3 Del. Ch. 94, where it was held that an adverse party could not be compelled to produce a document in his possession by means of a writ of subpoena *duces tecum*.

In *Bischoffsheim v. Brown*, 29 Fed. Rep. 341, the court said: "Parties to suits in equity, as well as in suits at law, are now competent witnesses in the courts of the *United States* by statute, and may now be examined at the instance of their adversary. As a witness, a party can be compelled by a subpoena *duces tecum* to produce books, documents and papers in his possession the same as any other witness." *Citing Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. (U. S.) 201.

A party cannot excuse the non-production of documents that in his own hands are unprivileged, by showing that they have been delivered into the hands of his counsel. *Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 44 Fed. Rep. 294.

Although the party may have other means of procuring the documents called for by the subpoena *duces tecum*, the witness is nevertheless bound to obey the writ. *Corsen v. Dubois*, 1 Holt's Case 239. See also *Smith v. McDonald*, 50 How. Pr. (N. Y.) 519.

their production may, as a rule, be enforced by the service of the subpœna *duces tecum* upon the president or other officer of the corporation in whose custody and under whose control they are.¹

2. PROCEDURE; OBEDIENCE TO WRIT.—The practice in regard to the issuing, service, and return of a subpœna *duces tecum* is substantially the same both at common law and by statute as in the case of a subpœna *ad testificandum*.² Nor is there any difference between the two in respect to the means of enforcing obedience, the penalties for disobedience, or the privileges which the two writs afford those on whom they have been served.³ But a

Conditional Examination of Witness.—

Upon the conditional examination of a party as a witness before trial a summons and not a subpœna *ad testificandum* must be used to secure his attendance, yet for the purpose of obtaining proof of books and papers a subpœna *duces tecum* may be used, although it may not be used as a means of obtaining discovery. *Central Nat. Bank v. Arthur*, 2 Sweeny (N. Y.) 194. See *Smith v. McDonald*, 50 How. Pr. (N. Y.) 519; *Woods v. De Figanieri*, 16 Abb. Pr. (N. Y.) 159; *De Bary v. Stanley*, 48 How. Pr. (N. Y.) 349; *Hauseman v. Sterling*, 61 Barb. (N. Y.) 347.

1. *Wertheim v. Continental R., etc., Co.*, 15 Fed. Rep. 716; *U. S. v. Hunter*, 15 Fed. Rep. 712; *U. S. Express Co. v. Henderson*, 69 Iowa 40; *U. S. v. Babcock*, 3 Dill. (U. S.) 566; *Central, etc., R. Co. v. Twenty Third St. R. Co.*, 53 How. Pr. (N. Y.) 45; *Erie R. Co. v. Heath*, 8 Blatchf. (U. S.) 413; *Crowther v. Appleby*, L. R., 9 C. P. 27.

Telegraph companies may in a proper case be compelled to produce copies of dispatches sent and received between certain dates. *U. S. v. Babcock*, 3 Dill. (U. S.) 566; *U. S. v. Hunter*, 15 Fed. Rep. 712.

In *Bank of Utica v. Hillard*, 5 Cow. (N. Y.) 153, it was held that a bank clerk upon whom a subpœna *duces tecum* had been served was not obliged to produce the books of the bank. *Savage, C. J.*, said: "The obligation of compelling to produce the books upon the *duces tecum* depends on the question whether they were in his possession and under his control. He was the mere clerk of the plaintiffs, and in that character had no such property in or possession of the books as imposed the obligation to bring them. They were under control of the cashier, who might forbid their removal, or place them beyond the reach of the witness."

Upon the supposed authority of this case it was held in a number of cases in the lower courts, which seem never to have reached the court of last resort, that a corporation which was a party to an action could not thus be compelled to produce its books and papers, on the ground that a party could not be compelled to give evidence against himself, and on the further ground that the opposite party might serve on the corporation a notice to produce the desired documents at the trial and give secondary evidence of their contents in case they were not produced, or might obtain the desired information by an inspection of the documents under an order of the court or by discovery under the Code of Procedure. *La Farge v. La Farge F. Ins. Co.*, 14 How. Pr. (N. Y.) 26; *Central Nat. Bank v. White*, 37 N. Y. Super. Ct. 297; *Morgan v. Morgan*, 16 Abb. Pr. N. S. (N. Y.) 291. But the question was subsequently set at rest by section 868 of the Code of Civil Procedure, which provides that a corporation may be compelled in like manner as a natural person to produce its books and papers by means of the writ of subpœna *duces tecum*; and this provision, it has been held, applies also to foreign corporations doing business in the state. *U. S. v. Tilden*, 18 Alb. L. J. 416. See generally PRODUCTION OF DOCUMENTS, vol. 19, p. 227.

2. See *supra*, this title, *Subpœna ad Testificandum*.

A subpœna *duces tecum* from the federal courts should be tested in the name of the chief justice, and should require the production of the papers before a "court" and not before a "judge." *Corbett v. Gibson*, 16 Blatchf. (U. S.) 334.

3. Obedience.—A person served with a subpœna *duces tecum* must obey the writ, unless he has some lawful excuse of the validity of which the court is to

witness will not be required to produce any paper or book under a subpœna *duces tecum* unless it be shown conclusively that he is able to do so.¹

f. DESCRIPTION OF DOCUMENTS IN WRIT.—A writ of sub-

judge. *Amey v. Long*, 9 East 473; *Corsen v. Dubois*, 1 Holt's Cas. 239; *Chaplain v. Briscoe*, 5 Smed. & M. (Miss.) 198; *Bull v. Loveland*, 10 Pick. (Mass.) 9; *U. S. v. Hunter*, 15 Fed. Rep. 712.

The materiality or immateriality of the document required by the writ does not affect the duty of the witness to produce, for of that the court alone and not the witness is to be the judge. *Doe v. Kelly*, 4 Dowl. Pr. Cas. 273; *Rex v. Russell*, 7 Dowl. 693; *O'Toole's Estate*, 1 Tuck. (N. Y.) 39. And the fact that a person has a lien upon a document does not excuse him from producing it under a subpœna *duces tecum*. But if he fears it may be abstracted the judge may allow him to stand by the witness while the latter is being examined in regard to it. *Thompson v. Mosley*, 5 C. & P. 501.

Parties Having Legal Custody of Papers.

—A document may be in the legal custody of one man, yet if a subpœna *duces tecum* be served on another in whose possession it is, he is bound to produce it, in the absence of a valid excuse. *Amey v. Long*, 9 East 473. So where the legal custody of certain papers was in the assignee in bankruptcy, a solicitor who had the actual possession was bound to produce them. *Corsen v. Dubois*, 1 Holt's Cas. 239.

Where a writ of ejectment issued against the grantee in a deed and his warrantor, though not nominally a party to the suit, employed counsel to defend it and placed in his hands the deed to be used in the litigation, such document was legally in the custody and under the power and control of the warrantor, and its production was properly required under a subpœna *duces tecum*. *Steed v. Cruise*, 70 Ga. 168.

Miscellaneous Cases.—If a party obtains possession of documents in order to prevent others from introducing them in evidence, and this fact becomes known, his excuse that he has lost or mislaid them will be of no avail. *Bonesteel v. Lynde*, 8 How. Pr. (N. Y.) 226.

The refusal of a witness, on account of his privilege as attorney, to produce papers acknowledged to be in his possession, which his client might be

compelled to produce, is assuming the right of determining for himself the question of privilege, which is not his province but that of the court, and such refusal is contempt. *Mitchell's Case*, 12 Abb. Pr. (N. Y.) 249.

A witness called on a subpœna *duces tecum*, who objects to the production of documents, has no right to have the question of his liability argued by counsel. *Doe v. Egremont*, 2 M. & Rob. 386.

If a person required to produce a document by a subpœna *duces tecum* has doubts as to whether or not he should produce it, he may submit it to the inspection of the court who will then determine whether or not it should be produced. *Hill, J.*, in *U. S. v. Hunter*, 15 Fed. Rep. 712; *Chaplin v. Briscoe*, 5 Smed. & M. (Miss.) 198; *Bull v. Loveland*, 10 Pick. (Mass.) 9; *Amey v. Long*, 9 East 473.

A newspaper printer is not bound under a subpœna *duces tecum* to produce papers containing the advertisements of county commissioners. In such a case the party wishing to prove the contents of a newspaper must buy it or get it the best way he can. *Shippen v. Wells*, 2 Yeates (Pa.) 260.

A defendant in his sworn answer set up a defense, which, if true, would necessitate the production upon trial of the books of the plaintiff, about fifty in number. A subpœna *duces tecum* for the production of these books was set aside upon the plaintiff's affidavit that it was issued for the purpose of annoying the plaintiff. This was held to be error. If the subpœna was too broad, an inspection could have been substituted, or copies of portions of the books. *Clyde v. Rogers*, 24 Hun (N. Y.) 145.

In courts of equity, objections to the production of instruments are considered and determined when the witness is brought up on an attachment for refusing to produce the instruments called for. *Bradshaw v. Bradshaw*, 3 Sim. 285.

1. *Hall v. Young*, 37 N. H. 134; *Monroe v. Building Assoc.*, 14 W. N. C. (Pa.) 107.

Action for Damages.—It is a defense to a common-law action against a witness, and excuses him from contempt, if

pœna duces tecum must describe with reasonable certainty the papers or documents which are desired, in order that the witness may understand readily what he is required to produce. A demand for all papers or documents relating to a particular matter will not, as a rule, be sufficient.¹ But no greater degree of particularity will be required than is practicable under all the circumstances. It will be sufficient if the witness is clearly and definitely informed as to what he is required to produce.²

g. SWEARING THE WITNESS.—As a general rule a person who appears before the court in obedience to a subpœna *duces tecum* need not be sworn unless requested by the parties. His duty is performed if he attends and produces the document or gives a reasonable and valid excuse for not doing so,³ and it has been held that where the party requiring the production of the documents did not so desire, the witness need not be sworn, though the

he has not in his possession or control any such document as he is called upon to produce, material and necessary as evidence tending to prove the case of the party requiring his attendance. *Morgan v. Morgan*, 16 Abb. Pr. N. S. (N. Y.) 291.

But if he fails to show a good reason for the non-production of the papers specified, he will be liable to the aggrieved party for all the damages caused by his disobedience. *Lane v. Cole*, 12 Barb. (N. Y.) 680.

1. *Lee v. Angas*, L. R., 2 Eq. 59; *U. S. v. Hunter*, 15 Fed. Rep. 712; *U. S. v. Babcock*, 3 Dill. (U. S.) 566; *Ex p. Jaynes*, 70 Cal. 638; *Ex p. Brown*, 72 Mo. 83; 37 Am. Rep. 426; *O'Toole's Estate*, 1 Tuck. (N. Y.) 39.

2. In *U. S. v. Babcock*, 3 Dill. (U. S.) 566, 570, Dillon, J., said: "The papers are required to be stated or specified only with that degree of certainty which is practicable considering all the circumstances of the case, so that the witness may be able to know what is wanted of him and to have the papers on the trial so that they can be used if the court shall then determine that they are competent and relevant evidence."

In *Lee v. Angas*, L. R., 2 Eq. 59, it was held that a subpœna *duces tecum* requiring a solicitor not a party to the suit to produce all papers, etc., relating to all dealings and transactions between his firm and the plaintiffs or defendants, as the case might be, for a period of thirty years, without specifying any particular documents required, was too vague and the witness was entitled to refuse production.

But in *Morris v. Hannen*, 1 C. & M. 29; 41 E. C. L. 22, it was held that a notice to produce, served by the defendants on the plaintiffs, requiring the production of all letters written to and received by them between the years 1837 and 1841, both inclusive, or by any other person on their behalf, was good, and was not too general, although it did not specify the date of each particular letter.

3. *Summers v. Moseley*, 2 C. & M. 477; *Perry v. Gibson*, 3 N. & M. 462; 1 Ad. & El. 48; *Davies v. Dall*, M. & M. 514; *Sherman v. Barrett*, 1 McMull. (S. Car.) 163; *Martin v. Williams*, 18 Ala. 190; *Aikin v. Martin*, 11 Paige (N. Y.) 499.

In *People v. Dyckman*, 24 How. Pr. (N. Y.) 222, it was held that the duty of the witness was not fulfilled simply by producing the document or books required, but that after its production in court he might be compelled to read from them or explain their contents.

A subpœna *duces tecum* without being *ad testificandum* also, is good, and the party is bound to obey it by producing the document, but is not thereby made a witness. *Evans v. Moseley*, 2 Dowl. Pr. Cas. 364; and this doctrine seems to be sustained in *Summers v. Moseley*, 2 C. & M. 477; *Perry v. Gibson*, 1 Ad. & El. 48; 28 E. C. L. 32; *Davies v. Dale*, M. & M. 514; *Sherman v. Barrett*, 1 McMull. (S. Car.) 163. But in one case it has been held that a subpœna *duces tecum* is a void writ, unless it contains the words "to testify" as well as "to appear and produce" the document. *Murray v. Elston*, 23 N. J. Eq. 212.

adverse party might wish to cross-examine him.¹ But where a witness himself desires to be sworn in order to state under oath any objections which he may have to the production of the documents, he is entitled to compliance with his request.²

h. PRIVILEGED DOCUMENTS.—As a matter of course, where the contents of any writing or document are for some reason privileged from disclosure, the production of such writing or document cannot be compelled by a subpœna *duces tecum*.³

II. SUBPŒNA IN EQUITY—1. **Definition.**—A subpœna in equity is a writ issued by the court, in accordance with the prayer for process in a bill in equity, commanding, under a penalty, the person or persons to whom it is addressed to appear and answer the allegations of the bill, and to abide by the determination of the court in the action.⁴ The writ of subpœna is used for other purposes

The refusal of a witness to leave his books or papers in the custody of the court, where he is merely ordered to produce them, is not contempt. *Moreley v. Green*, 11 Paige (N. Y.) 240; 42 Am. Dec. 112; *Aikin v. Martin*, 11 Paige (N. Y.) 499; *Sudlow v. Knox*, 7 Abb. Pr. N. S. (N. Y.) 411.

1. *Aikin v. Martin*, 11 Paige (N. Y.) 499; *Sherman v. Barrett*, 1 McMull. (S. Car.) 163; *Rush v. Smith*, 1 C. M. & R. 94; 2 Dowl. Pr. Cas. 687.

Where a person called only to produce a document, is sworn as a witness by mistake, and a question is put to him which he does not answer, the opposite party has no right to cross-examine him. *Rush v. Smith*, 1 C. M. & R. 94.

2. *Aikin v. Martin*, 11 Paige (N. Y.) 502. In such case the production of the document should be required in order that the court may determine its materiality as evidence. *Boynton v. Boynton*, 16 Abb. Pr. (N. Y.) 87.

3. For a full treatment of this subject, see *PRODUCTION OF DOCUMENTS*, vol. 19, p. 227; *PRIVILEGED COMMUNICATIONS*, vol. 19, p. 121.

Telegrams in Possession of Company.—Efforts have been made by the officers of telegraph companies to withhold copies of messages when required as evidence on the ground of privileged communications, which, however, have been unsuccessful, and the rule is that they must be produced when required by a subpœna *duces tecum*. *Ex p. Brown*, 72 Mo. 83; 37 Am. Rep. 426; *U. S. v. Babcock*, 3 Dill. (U. S.) 566; *U. S. v. Hunter*, 15 Fed. Rep. 712; *Henisler v. Freedman*, 2 Pars. Sel. Cas. (Pa.) 274; *National Bank v. National Bank*, 7 W. Va. 544; *State v. Litch-*

field, 58 Me. 267; *Waddell's Case*, 8 Jur. N. S., pt. 2, 181; *Allen's Tel. Cas.* 496, note; *Ince's Case*, 20 L. T. N. S. 421; *Allen's Tel. Cas.* 497, note.

But in *England*, where the government owns and controls the telegraphic service, it is held that it has invited the confidence of private persons sending messages, which it would be against public policy to violate, and that, in such cases, the production of telegrams will not be enforced. *Stroud Case*, 2 O'Mally & H. (Elect. Pet. Rep.) 72; *Taunton Case*, 2 O'Mally & H. (Elect. Pet. Rep.) 112.

4. Bl. Com. 443; 1 Dan. Ch. Pr. (5th Am. ed.) 390, 439; 1 Barb. Ch. Pr. (2d ed.) 48; *Story Eq. Pl.*, § 44; 2 Bouv. Inst., §§ 4182, 4189; *Bisp. Eq.*, § 9; *Winter v. Ludlow*, 3 Phila. (U. S. C. C.) 464.

Origin of the Writ.—It has been generally supposed that the writ of subpœna to appear and answer in suits in equity was invented by John de Waltham, Bishop of Salisbury, and keeper of the rolls in the reign of Richard II. In the third year of Henry V., the commons complained to the king of subpœnas sued out of chancery for matters determinable at common law, saying that "they were never granted or used before the time of the late King Richard, when John Waltham, heretofore Bishop of Salisbury, of his craft, made, formed and commenced such innovations." 1 *Story's Eq. Jur.* (13th ed.), § 46, citing 3 *Reeves Hist.* 192-4; 3 Bl. Com. 52; *Bac. Abr.*, Ct. of Chancery, C.; *Parkes Hist. Chan.* 47; 1 *Woodes Lect. VI*, pp. 183, 184. But it is said that an instance of the writ has been found as early as the 37th year of Edward III. *Bisp. Eq.*, § 9, citing 1 *Spence Eq.* 338, note b.

in courts of equity;¹ but the subpoena *ad respondendum* is the object of this inquiry. It is to be observed that the procedure is largely statutory, and that many of the subjoined citations, therefore, are necessarily of local and limited application.

2. Present Extent of Its Use.—The writ of subpoena *ad respondendum* continued in use in *England* until the year 1852;² but now the English practice is to serve the defendant with a printed copy of the bill, stamped by one of the clerks of records and writs, and with an indorsement thereon directing the defendant to appear within eight days, on pain of having an appearance entered for him, of being arrested and imprisoned, and of having a decree made against him in his absence.³

The former English practice of issuing subpoenas in equity suits to compel the appearance of defendants is still adhered to in the *United States* courts and in the courts of many of the states which have not adopted the reformed code of procedure.⁴

A subpoena in chancery is not a summons, within the *Montana* territorial act regulating service of process. *Black v. Clendennin*, 3 Mont. 44.

1. The Subpoena to Hear Judgment.—This, under the former English practice was the writ employed to give notice to the adverse party of the day appointed for the hearing. 1 Dan. Ch. Pr. 967.

The writ is usually issued when the cause is set down for hearing. *Harvey v. Towle*, 4 Hare 166. If one of the defendants has the cause set down for hearing, he need serve only the plaintiff with a subpoena to hear judgment, and the plaintiff must give notice to the other defendants. *Clarke v. Dunn*, 5 Madd. 174; *Smith v. Wells*, 6 Madd. 193.

It is sufficient to serve this writ upon the solicitor of the opposite party, and if the solicitor refuses to admit service, he will be liable for the additional costs thereby caused. *Ross v. Wood*, 2 Dr. & Wal. 490.

Where no admission of service is indorsed on the writ, an affidavit of service must be produced and filed. *Rigg v. Wall*, 3 Myl. & C. 505; *Marsden v. Blundell*, 20 L. J. Ch., N. S. 104; *Calvert v. Booth*, 1 Jur. 378. See also *Evans v. Evans*, 2 Keen 604; *Frost v. Hilton*, 15 Beav. 432.

Subpoena for Costs.—When in the course of a proceeding, costs were awarded against either party, payment thereof might be enforced by means of the writ of subpoena, under the former English practice. 2 Dan. Ch. Pr. (5th Am. ed.) 1451. At the time the writ is served, a demand must be made for the

amount of the costs. *Hawkins v. Hall*, 4 Myl. & C. 280; and if payment thereof is refused or neglected, an attachment may be awarded to compel payment. 2 Dan. Ch. Pr. (5th Am. ed.) 1453.

Subpoena to Show Cause—Infants.—When a decree is made against an infant in a court of chancery, it is customary to give him a day, usually six months after he becomes of age, to show cause against it. *Dow v. Jewell*, 21 N. H. 470, citing *Price v. Carver*, 3 Myl. & C. 162 (per Lord Cottenham); *Atty. Gen'l v. Hamilton*, 1 Madd. 214; *Agar v. Fairfax*, 17 Ves. 545. See also *Coffin v. Heath*, 6 Met. (Mass.) 76; *Whitney v. Stearns*, 11 Met. (Mass.) 319. The process served upon him at his coming of age is the writ of subpoena, and if he does not appear within the time limited, the decree, upon proof of the service of the subpoena, will be made absolute. 1 Dan. Ch. Pr. (5th Am. ed.) 171-2. It was held in *Walsh v. Walsh*, 116 Mass. 377, that the rule was not applicable to infant trustees.

Subpoena to Name a Solicitor.—So under the former English practice, if the solicitor of one of the parties died, the other party might serve a subpoena upon him, requiring him to name a new solicitor. *Ratcliff v. Roper*, 1 P. Wms. 420; *Gibson v. Ingo*, 2 Phil. 502; *Ward v. Swift*, 6 Hare 309; *Butlin v. Arnold*, 1 H. & M. 715.

2. The writ was abolished by statute 15 and 16 Vict., ch. 86, except as to bills filed on or before Nov. 1, 1852.

3. 1 Dan. Ch. Pr. (5th Am. ed.) 440.

4. 1 Barb. Ch. Pr. 48; 1 Daniell's

3. How and by Whom Issued.—The writ of subpoena is the first process in equity. The prayer for process contained in a bill does not make the defendants therein named parties to the suit.¹ After the filing of the bill, or at the time of such filing,² the subpoena is issued by the clerk of the court as a matter of course.³ It is addressed to the defendants against whom it is issued.⁴ It

Ch. Pr. (5th Am. ed.) 440, n. 1; Barton's Suit in Equity 64.

By *United States Equity Rule 7* it is provided that "the process of subpoena shall constitute the proper mesne process in all suits in equity in the first instance, to require the defendant to appear and answer the exigency of the bill." And *Rule 12* provides that "whenever a bill is filed the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule day, or the next but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof."

The Supreme Court of the *United States* has power to issue process of subpoena in a suit by one state against another. *New Jersey v. New York*, 3 Pet. (U. S.) 461; *New Jersey v. New York*, 5 Pet. (U. S.) 284; *Rhode Island v. Massachusetts*, 7 Pet. (U. S.) 651; *Florida v. Georgia*, 11 How. (U. S.) 293.

1. *Bond v. Hendricks*, 1 A. K. Marsh. (Ky.) 594; *Huston v. McClarty*, 3 Litt. (Ky.) 274; *Verplanck v. Mercantile Ins. Co.*, 2 Paige (N. Y.) 438; *Lyle v. Bradford*, 7 T. B. Mon. (Ky.) 113.

2. The bill of complaint must be filed before the subpoena can issue. *Hoffman's Ch. Pr.* 101, n.; *Howe v. Willard*, 40 Vt. 654; *Hodgen v. Guttery*, 58 Ill. 431; *Crowell v. Botsford*, 16 N. J. Eq. 458.

When Issued Before Bill Is Filed.—To the rule that the bill must be filed before subpoena can issue there is an exception in the case of an injunction to stay waste, or to restrain an action at law, and in such case the bill may be filed on or before the day on which the writ is returnable. 1 *Smith's Ch. Pr.* 110; *Hines Ch. Pr.* 76; *Crowell v. Botsford*, 16 N. J. Eq. 458.

The irregularity of issuing a subpoena before the bill is filed is purely technical, and while, if promptly brought to the notice of the court, the subpoena will on motion be set aside and the complainant made liable to costs,

yet the irregularity is waived by an appearance. *Crowell v. Botsford*, 16 N. J. Eq. 458.

Subpoenas on the original bill should be served before a supplemental bill is filed. *Outwater v. Berry*, 6 N. J. Eq. 63. Upon a supplemental bill in chancery a subpoena is not required unless new parties are brought in; a rule to answer the supplemental bill, upon parties already served, is sufficient. *Shaw v. Bell*, 95 U. S. 10.

A mistake consisting in antedating a subpoena, when in fact it was not issued before the filing of the bill, may be corrected. *Dinsmore v. Westcott*, 25 N. J. Eq. 302.

It is irregular to antedate a subpoena and injunction, though the defendant, by appearing voluntarily, waives the irregularity as to the subpoena, but not as to the injunction. *Brodie v. Cronly*, 3 Edw. Ch. (N. Y.) 355.

3. *Barb. Ch. Pr.* 49; *Foster's Fed. Pr.*, § 92.

4. *Adams' Eq.* 310; 1 *Dan. Ch. Pr.* 440, n.; *Winter v. Ludlow*, 3 Phila. (U. S. C. C.) 464.

Names Contained in a Subpoena.—The subpoena must contain the names of all the defendants, and it is advisable, if not necessary, to name all complainants. 1 *Barb. Ch. Pr.* 49. *Butsee Levart v. Redwood*, 9 Port. (Ala.) 79. Where suit is brought by three, and the name of one plaintiff is omitted from the summons, such omission renders it defective, if the objection is taken in time. *Richardson v. Thompson*, 41 Ill. 202. *United States Equity Rule 12* provides that "where there is more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately, except in the case of husband and wife, defendants, or a joint subpoena may be issued for all the defendants." The same rule is prescribed in *Maryland. Maryland Chancery Rule 7*.

In *New Jersey*, by *Chancery Rule 5*, "the names of all the defendants to the suit shall be inserted in one subpoena, unless they reside in different counties, in which case the names of

should bear the seal of the court from whence it issues¹ and be signed by the clerk, and bear *teste* in the name of the chancellor or judge of the court,² and must be made returnable on a day certain.³

4. **Where the Writ May Run.**—The subpoena commanding the appearance of a defendant may run into any county of the state where the court from which the subpoena issues is held.⁴ The circuit and district courts of the *United States* have no authority to send process of subpoena into any other district than that in which they are located, unless specially authorized to do so by some act of Congress.⁵

5. **Service.**—*a.* BY WHOM MADE.—Service of the writ of subpoena issuing from state courts is made by the ministerial officer of such courts, usually the sheriff.⁶ In case of a subpoena issuing

all those residing in the same county shall be included in the same subpoena.⁷ This is the general rule prevailing in the several states. See *Illinois Rev. St.*, p. 185, § 8; *Howe's Ann. St. Michigan*, § 6630; *Tennessee Code*, § 5084.

The chancery practice does not prescribe the form of the subpoena, and it is sufficient if it informs the defendant that a suit is instituted against him, and a copy of the bill exhibited is furnished at the time of service. *Leverett v. Redwood*, 9 Port. (Ala.) 79.

1. *Rev. Stat. U. S.*, § 911. An objection for the want of a seal may not, for the first time, be made in the supreme court. *Wiggle v. Owen*, 45 Miss. 691.

2. *Rev. Stat. U. S.*, § 911, provides that writs "issuing from the supreme court or a circuit court shall bear *teste* of the chief justice of the *United States*; or, when that office is vacant, of the associate justice next in precedence, and those issuing from a district court shall bear *teste* of the judge; or, when that office is vacant, of the clerk thereof."

United States Equity Rule 14 provides that "whenever any subpoena shall be returned not executed, the plaintiff shall be entitled to another subpoena, *toties quoties*, against such defendant, if he shall require it, until due service is made."

3. *United States Equity Rule 12*, provides that the subpoena "shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof."

Rule 5, U. S. Supreme Court, provides that all process in that court, in any suit in equity, "shall be served on

the defendant sixty days before the return day of said process."

An amended bill is considered as an original bill, and a new subpoena to answer is not necessary when the defendant has not appeared. *Equitable L. Assur. Soc. v. Laird*, 24 N. J. Eq. 319; *Fitzhugh v. McPherson*, 9 Gill & J. (Md.) 51.

Errors Cured by Appearance.—Errors in the form and issuance of the writ may be cured by appearance of the defendant. *Segee v. Thomas*, 3 Blatchf. (U. S.) 11; *Hale v. Continental L. Ins. Co.*, 12 Fed. Rep. 359; *Buerk v. Imhaeuser*, 8 Fed. Rep. 457. See also *SUMMONS*, vol. 24.

4. *Orendorff v. Stanberry*, 20 Ill. 89; *Gill v. Hoblit*, 23 Ill. 473; *Briggs v. Briggs*, 6 Kulp. (Pa.) 490. See statutes of the various states.

5. *Ex p. Graham*, 3 Wash. (U. S.) 456; *Bourke v. Amison*, 32 Fed. Rep. 710; *Picquet v. Swan*, 5 Mason (U. S.) 35, 561. See *Rev. St. U. S.*, § 738.

Under the U. S. act of May 4th, 1858, ch. 27, and under the previous law and practice of the circuit courts of the *United States*, a subpoena issued from the circuit court in an equity suit for one district of a state, may run into the other district of the same state. *Winter v. Ludlow*, 3 Phila. (U. S. C. C.) 464.

6. See *SHERIFFS*, vol. 22, p. 525; *SERVICE OF PROCESS*, vol. 22, p. 107.

By Indifferent Parties.—In some of the states service may be made by an indifferent person, but in such case the service must be proved by affidavit of the person making it. *Trabue v. Holt*, 2 Bibb (Ky.) 393; *Barnett v. Montgomery*, 6 T. B. Mon. (Ky.) 327, 331; *West v. Smith*, 2 N. J. Eq. 309; *Hoye*

from a *United States* court, the service is by marshal or his deputy, or by some person appointed by the court.¹

b. TIME OF SERVICE.—As to the time of service of the subpoena, the statutes and rules of court and principles applicable to service of process generally may be referred to.²

c. MANNER OF SERVICE.—The statutory provisions of the several states concerning the manner of serving a subpoena vary but slightly, their general tenor being that where a defendant, residing within the jurisdiction of the court, can be found, service is effected by reading the process to him, or by personal delivery of a copy of the same;³ if residing within the jurisdiction, but inaccessible to the officer or other person making the service, a copy

v. Penn, 1 Bland (Md.) 29; *Taylor v. Gordon*, 1 Bland (Md.) 123, note; *Dalton, etc., R. Co. v. McDaniel*, 56 Ga. 191; *Stone v. Anderson*, 25 N. H. 221; *Thebaut v. Canova*, 11 Fla. 143.

In *Vermont*, service of a subpoena issuing from a chancery court cannot be made by an indifferent person who is not named in the subpoena. *Burlington Bank v. Catlin*, 11 Vt. 106.

Proof of Service.—Where a subpoena is served by the sheriff of the county, instead of the marshal or his deputy, the sheriff's certificate of the facts is sufficient without making such proof by affidavit. *Parker v. Dacres*, 1 Wash. 190.

1. *United States Equity Rule 15*; *Deacon v. Sewing Machine Co.* (U. S. C. C. 1882), 14 Rep. 43; *U. S. v. Montgomery*, 2 Dall. (U. S.) 335; *Jobbins v. Montague*, 5 Ben. (U. S.) 429; *Schwabacker v. Reilly*, 2 Dill. (U. S.) 127. "When the marshal or his deputy is a party in any cause, the writs and precept therein shall be directed to such disinterested person as the court, or any judge or justice thereof shall appoint." U. S. Rev. St., § 922. See *SERVICE OF PROCESS*, vol. 22, p. 107.

In any case where the laws of the state in which the *United States* court is sitting, allow the sheriff to appoint a person to perform special service, the marshal of such a court has the same authority under U. S. Rev. St., § 788. *Hyman v. Chales*, 12 Fed. Rep. 855.

2. See *SERVICE OF PROCESS*, vol. 22, p. 107. U. S. Supreme Court Rule 5 provides that service of subpoena must be made at least sixty days before the return day of the process.

In *Kennedy v. Brent*, 6 Cranch (U. S.) 187, it was held that the marshal of the *District of Columbia* must serve his subpoena as soon as he reasonably can after its issue.

The process in chancery must be served on the defendant twenty days before he is bound to appear in the *United States* courts. *Treadwell v. Cleaveland*, 3 McLean (U. S.) 283.

An injunction and a subpoena may be served upon a defendant at the same time, and such service may be made by the sheriff of a circuit other than that from which the writs issued. *Thebaut v. Canova*, 11 Fla. 143.

3. *Levert v. Redwood*, 9 Port. (Ala.) 79; *Cleveland v. Pollard*, 37 Ala. 556; *Florence v. Paschal*, 50 Ala. 28; *Townsend v. Griggs*, 3 Ill. 366; *Botsford v. O'Conner*, 57 Ill. 73; *Whitman v. Fisher*, 74 Ill. 148; *SERVICE OF PROCESS*, vol. 22, p. 107.

United States Courts.—The service of all subpoenas shall be by delivery of a copy thereof, by the officer serving the same, to the defendant personally, or, in case of husband and wife, to the husband personally, or by leaving a copy thereof at the dwelling house, or usual place of abode of each defendant, with some adult person, who is a member or a resident in the family. *United States Equity Rule 13*. See *O'Hara v. McConnell*, 93 U. S. 150.

Within the Jurisdiction.—Service of a subpoena must be within the jurisdiction of the court or else it is irregular. *Johnson v. Nagle*, 1 Moll. 245; *Hawkins v. Hall*, 1 Beav. 73; *Dunn v. Dunn*, 4 Paige (N. Y.) 425; *Erickson v. Nesmith*, 46 N. H. 375; *Pratt v. Bank of Windsor*, Harr. (Mich.) 254.

The court has no power to authorize service out of the jurisdiction, unless enabled to do so by statute. *In re Maughan*, 22 W. R. 748.

It has been held in *Tennessee* that where service has been made upon one material defendant in the proper district or county, a subpoena may be

of the writ may be left at his dwelling house or usual place of abode, with a member of the family or other person residing there.¹

d. SUBSTITUTED SERVICE.—In certain cases where it is not practicable to make personal service of the subpoena upon the defendant, the court may order a substituted service upon some one authorized to receive service or upon some one who, there is reasonable ground to believe, will communicate the fact of service to the defendant himself.²

served upon any other defendant out of the district or county. *University of N. Car. v. Cambreling*, 6 Yerg. (Tenn.) 79.

A defendant may appear voluntarily, or stipulate in writing, to accept service out of the jurisdiction, in which case it is regular. *Dunn v. Dunn*, 4 Paige (N. Y.) 425. Compare *Picquet v. Swan*, 5 Mason (U. S.) 35, 561. See also *SERVICE OF PROCESS*, vol. 22, p. 107.

1. *Southern Steam Packet Co. v. Roger*, 1 Cheves Eq. (S. Car.) 48; *Townsend v. Griggs*, 3 Ill. 365; *Boylard v. Boyland*, 18 Ill. 551; *O'Hara v. McConnell*, 95 U. S. 150.

The service must be made where the defendant actually resides and upon some one of suitable age and discretion there residing. *Johnston v. Macconnell*, 3 Bibb (Ky.) 1; *Hyslop v. Hopcock*, 5 Ben. (U. S.) 447; but it has been held that when a person is absent from home and no one can be found at his place of abode, the subpoena may be served on his clerk or servant at his store or place of business. *Smith v. Parke*, 2 Paige (N. Y.) 298.

The member of a family upon whom a subpoena is served, should be an inmate of the house. *Edgson v. Edgson*, 3 De G. & S. 629; *Townsend v. Griggs*, 3 Ill. 365.

The defendant and his family resided in his mother's house in *New Jersey* during the summer, his own house in New York City being open at the same time, and in charge of a servant. In October he returned to New York; it was held, that a copy of the subpoena left for him at his mother's house in September was a good service, it being "his dwelling house or usual place of abode." *Harrison v. Farrington*, 35 N. J. Eq. 4.

Where the defendant has no family, but boards with another family, the subpoena may be served upon either of the heads of the family at such place.

The place must, however, be his actual place of residence and he must be only temporarily absent. *People v. Craft*, 7 Paige (N. Y.) 325.

Service of a subpoena by delivering a copy of it to the husband of the defendant in the lower room of a building which is occupied below as a store and above as a dwelling, is a sufficient service upon the wife within the terms of the 13th Equity Rule. *Phoenix Mut. L. Ins. Co. v. Wulf*, 9 Blas. (U. S.) 285.

As to constructive service by posting a copy in some conspicuous part of defendant's "usual place of abode," see *SERVICE OF PROCESS*, vol. 22, p. 107.

Acknowledgment of Service.—Where service of a subpoena in chancery is acknowledged in writing, the signature to such acknowledgment must be proved. *Gatewood v. Racker*, 1 T. B. Mon. (Ky.) 22; and the record must show such proof. *Hackwith v. Damon*, 1 T. B. Mon. (Ky.) 239; *South v. Carr*, 7 T. B. Mon. (Ky.) 419. Unless a written acknowledgment of the service of a subpoena is accompanied by proof of its genuineness, it is not sufficient service to authorize a decree. *Jackson v. Speed*, 3 J. J. Marsh. (Ky.) 60.

A written acceptance, by the Commissioner of Patents at Washington, of service of a subpoena, issued by the circuit court of the *United States* for the district of *Vermont*, or a bill in equity filed in that court, has no other effect than service by the regular officer would have had, and waives no objection to jurisdiction, and gives no consent to be sued away from his residence or from the seat of government. *Butterworth v. Hill*, 114 U. S. 128. See *SERVICE OF PROCESS*, vol. 22, p. 107.

2. *Attorneys and Solicitors.*—In the *United States* courts, substituted service is allowed in two classes of cases, viz., in injunctions to stay proceedings at law and in cross-suits in equity where the plaintiff in the action at law

or the plaintiff in the original suit in equity resides beyond the jurisdiction of the court. In such cases, the subpoena may be served on the attorney of the plaintiff in the action at law in the one case, and upon the solicitor of the plaintiff in the original suit in equity in the other. *Eckert v. Bauert*, 4 Wash. (U. S.) 370; *Ward v. Sebring*, 4 Wash. (U. S.) 472; *Lowenstein v. Glidewell*, 5 Dill. (U. S.) 325; *Cortes Co. v. Tanhauser*, 9 Fed. Rep. 226; *Segee v. Thomas*, 3 Blatchf. (U. S.) 11; *Dunn v. Clarke*, 8 Pet. (U. S.) 1; *Doe v. Johnston*, 2 McLean (U. S.) 323; *Read v. Consequa*, 4 Wash. (U. S.) 174.

But when the judgment in an action at law has been enforced, the attorney's authority to represent the absent party is at an end, and no such order will be made. *Kamm v. Stark*, 1 Sawy. (U. S.) 547.

The attorney will be allowed a reasonable time after such service to communicate with his client. *Sawyer v. Gill*, 3 Woodb. & M. (U. S.) 97.

Service of the subpoena on solicitors and attorneys of persons before the court in a former suit is of no validity until an application to the court has first been made setting forth the circumstances which render such service proper, and an order obtained directing that service be made and that such service, when made, shall answer as a substitute for actual service on the parties so represented by the attorneys or solicitors. *Pacific R. Co. v. Missouri Pac. R. Co.*, 1 McCrary (U. S.) 647.

As against a resident defendant there can be no substituted service of a subpoena upon his solicitor to answer an amended bill. *McKim v. Odom*, 3 Bland (Md.) 407.

Service of the subpoena on a special attorney with power over only a portion of the property affected by the suit, is not a sufficient service to bind the principal. *Blake v. Baker*, 1 R. 1. 285.

In *England*, the same rule as to substituted service upon attorneys and solicitors obtains. *Anonymous*, 1 P. Wms. 523; *Jardine v. Hayes*, 7 Price 239; *Swanton v. Biggs*, 1 Hog. 447; *Woodall v. Walker*, 3 Hare 339; *Portugal v. Glyn*, 7 Cl. & F. 466; *Hammond v. Walker*, 3 Jur. N. S. 686; *Wattleworth v. Pitcher*, 2 Price 5; *East India Co. v. Collins*, 6 Price 404; *Wolfe v. Jackson*, 1 Moll. 250; *Rees v. Braidley*, 22 L. T. N. S. 470.

So also in bills of revivor and supplement where the defendant resides abroad, service may be made upon his solicitor in the original suit. *Hart v. Tulk*, 6 Hare 618; 18 L. J. Ch. N. S. 336; *Norton v. Hepworth*, 1 Macn. & G. 54; 1 H. & Tw. 158; *Scott v. Wheeler*, 13 Beav. 239; *Scott v. Corry*, 1 Hog. 477.

Upon Agents and Attorneys in Fact.—When a defendant residing beyond the jurisdiction of the court has a general agent or attorney in fact, who has charge of the matter in litigation and resides within the jurisdiction, the court may order service of the subpoena upon such agent or attorney. *Somers v. Connolly*, 1 Ir. Eq. Rep. 416; *Weymouth v. Lambert*, 3 Beav. 333; *Branwin v. Clark*, 7 L. J. Ch. N. S. 243; *Hobhouse v. Courtney*, 12 Sim. 140; *Murray v. Vipart*, 1 Ph. 521; 9 Jur. 173; *Bankier v. Poole*, 13 Jur. 800; 3 De G. & Sm. 375; *Jones v. Cargill*, 11 L. T. N. S. 566; *Jackson v. Shanks*, 13 W. R. 287; *Gauter v. Meinertshaagen*, 14 L. T. N. S. 56; *Barker v. Plele*, 11 W. R. 658; *Passmore v. Nicolls*, 1 Grant's Ch. (Ont.) 130.

Partners.—Where partnership property is involved in litigation and some of the co-partners are out of the jurisdiction or cannot be found, the court may order service to be made upon the other co-partners for them. *Carrington v. Cantillon*, Bunb. 107; *Snow v. Hole*, 10 L. J. Ch. N. S. 178; *Coles v. Gurney*, 1 Madd. 187; *Birdwood v. Hart*, 3 Price 176.

Infants.—Service of the subpoena upon the father of a minor defendant was held good, although the infant resided out of the jurisdiction. *Kirwan v. Kirwan*, 1 Hog. 264; *Loveday v. D'Esterre*, 1 Jones 561; and so of service on the father-in-law of an infant defendant. *Thompson v. Jones*, 8 Ves. 141.

Where a mother secreted her infant children, service of the subpoena upon her was held sufficient. *Smith v. Marshall*, 2 Atk. 70. See also *Baker v. Holmes*, Dick. 18; *Garnum v. Marshall*, Dick. 77.

Service of a subpoena to hear judgment should be made on the guardian *ad litem* of an infant. *Freeman v. Carnock*, Dick. 439; *Taylor v. Atwood*, 2 P. Wms. 643; *Lloyd v. Trimblestown*, 2 Moll. 329.

Service upon infants ought to be personal. *Massie v. Donaldson*, 8 Ohio 377; but where service is made on the parent for the child it ought to

6. Return of the Writ—See SERVICE OF PROCESS, vol. 22, p. 175.

7. Appearance of Defendant.—The defendant must enter his appearance, in compliance with the order contained in the writ, on or before the rule day to which the process is made returnable; or, if service shall not have been made within the requisite time before such rule day, then on the next rule day thereafter.¹ By continued default of such appearance, the plaintiff's bill may be taken *pro confesso*,² and in those cases where the appearance of the defendant is necessary, in order that complete justice may be rendered, such appearance may be compelled by process of attachment.³ If the defendant appears generally, he thereby

appear specifically by the officer's return that it was so made. *Hodges v. Wise*, 16 Ala. 509.

Husband and Wife.—As a rule, service of a subpœna on the husband for the wife and *vice versa* is good service. *Barlow v. Baker*, Cary 54; *Pilgrime v. Read*, Cary 78; *Brumley v. Bank of England*, 7 Jur. 120; *Pulteney v. Shelton*, 5 Ves. 147; *Kent v. Jacobs*, 5 Beav. 48; *Clark v. Greenhill*, Dick. 91; *Holcombe v. Trotter*, 9 Jur. 637; *Phoenix Mut. L. Ins. Co. v. Wulf*, 9 Biss. (U. S.) 285.

But where it is sought to bind the separate property of the wife by the decree, personal service of the subpœna must be made upon her. *Jones v. Harris*, 9 Ves. 486; *Salmon v. Green*, 8 Beav. 457; *Ferguson v. Smith*, 2 Johns. Ch. (N. Y.) 139.

Lunatics.—Service of process upon lunatics not found so by inquisition should be personal. Anonymous, 2 Jur. N. S. 324; *Morgan v. Jones*, 4 W. R. 381.

But where the medical officer of an asylum refuses to allow personal service to be made, subpœna may be served on him in place of such lunatic. *Raine v. Wilson*, 43 L. J. Ch. 469; *L. R.*, 16 Eq. 576.

And in case of a lunatic so found by inquisition where no committee has been appointed, the court may order substituted service upon the keeper of the asylum at which he resides. *Than v. Smith*, 27 W. R. 617.

If a committee has been appointed, it will be sufficient to serve the subpœna on the committee without making personal service upon the lunatic. *Brasher v. Van Courtlandt*, 2 Johns. Ch. (N. Y.) 242 (per Kent, Ch.); *Cates v. Woodson*, 2 Dana (Ky.) 452; *Sullivan v. Andoe*, 6 Fed. Rep. 641.

Prisoners.—When a defendant is confined in prison, a subpœna may be served on the keeper of the prison. *Newenham v. Pemberton*, 2 Colly 54; 9 Jur. 637; *Johnson v. Johnson*, Walk. Ch. (Mich.) 309, citing *Joyce v. Joyce*, 1 Hog. 121. Or on the prisoner personally, if he is not thereby deprived of an opportunity to make a meritorious defense. *Phelps v. Phelps*, 7 Paige (N. Y.) 150; *Davis v. Duffie*, 1 Abb. App. Dec. (N. Y.) 486; *affirming* 8 Bosw. (N. Y.) 617. See also SERVICE OF PROCESS, vol. 22, p. 107.

1. 4 Min. Inst. 1234-1235; *Bouvier's Inst.*, § 4193; *Foster's Fed. Pr.*, § 102; *Hayman v. Uhlman*, 34 Fed. Rep. 686; *O'Hara v. McConnell*, 93 U. S. 150.

But the court has power to extend the time for an appearance if special cause is shown for so doing. *Poultney v. Lafayette*, 12 Pet. (U. S.) 472.

2. *Foster's Fed. Pr.*, § 103; 4 Min. Insts. 1234-35; *Thomson v. Wooster*, 114 U. S. 104; U. S. Equity Rule 12.

3. 1 Dan. Ch. Prac. (5th Am. ed.) 488; *Foster's Fed. Pr.*, § 149; *Read v. Consequa*, 4 Wash. (U. S.) 180; *O'Hara v. McConnell*, 93 U. S. 152; *Pendleton v. Evans*, 4 Wash. (U. S.) 335.

In *Boudinot v. Symmes*, Wall. (C. C.) 139, an attachment was awarded, to compel obedience to the subpœna, which was returned *non est inventus*. A commission of rebellion was then issued, and that having failed to bring the defendant in, a writ of sequestration was issued.

If the plaintiff makes oath that a discovery is necessary, he is entitled to an order that the defendant answer the bill or be attached. *Stafford v. Brown*, 4 Paige (N. Y.) 360.

But a subpœna returnable on Sunday is irregular and will not warrant the issuance of an attachment for dis-

waives all irregularities in the form or service of the writ of subpoena.¹

8. Protection Afforded by the Writ.—The subpoena in equity affords the same protection to the person upon whom it has been served as does the subpoena to testify.²

SUBPOENA DUCES TECUM.—See SUBPOENA, vol. 24, p. 173.

SUBROGATION.—(See also SURETYSHIP.)

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I. DEFINITION AND GENERAL PRINCIPLES.—Subrogation is the substitution of another person in the place of a creditor or claimant, to whose rights he succeeds in relation to the debt or claim asserted,³ which has been paid by him not voluntarily, and contem-

obedience thereof. *Gould v. Spencer*, 5 Paige (N. Y.) 541.

1. See SERVICE OF PROCESS, vol. 22, p. 168 *et seq.*

2. *Alisbury v. Troughton*, 1 Ch. Rep. 92; *Meynel v. Cooper*, 1 Ch. Rep. 217; *Graves v. McCarthy*, 9 Jones 626; *Mahon v. Mahon*, 2 Ir. Eq. Rep. 440; *Ex p. Burt*, 2 M. D. & De G. 666.

3. This is a very slight amendment of the definition given by Bouvier, which wants precision in that the term

"creditor" employed by him to designate the class to whose rights subrogation may be had, can scarcely be considered to embrace a case where the right to which substitution is sought, is that of maintaining an action against a wrongdoer to recover damages for a loss; for example, the right of an insurance company to be substituted to the rights of the insured against a carrier on paying a loss occasioned by the carrier's negligence. The amendment

plates some original privilege on the part of him to whose place substitution¹ is claimed.

The cases most frequently occurring in which the right of subrogation is demanded and accorded, are those of a surety who pays the debt of his principal;² of a purchaser, who for his own protection, discharges an incumbrance on the purchased premises;³ or of a junior incumbrancer who, for the like reason, pays off a prior incumbrance;⁴ of a person who advances money for the purpose of discharging an incumbrance, with the understanding or agreement that he shall succeed to the rights of the incumbrancer;⁵ of a person lending money to a minor with which to pay for necessities;⁶ of a person acting in a representative,⁷ fiduciary,⁸ or official⁹ capacity, who pays a debt for which another is in the first instance bound; of a devisee,¹⁰ of an heir,¹¹ or of a

consists in the introduction of the words "or claimant" after the word "creditor" in Bouvier's definition.

In *Houston v. Branch Bank*, 25 Ala. 257, subrogation is defined as the substitution of a new for an old creditor, or, in its more general sense, the act of putting by transfer a person in the place of another, or a thing in the place of another thing. By this transfer the new creditor is subrogated to all the rights of the original creditor. And in *Knighton v. Curry*, 62 Ala. 408, the court, after quoting approvingly the above definition, said: "The principle upon which the whole doctrine of subrogation, not only as it is applied for the protection of sureties, but as it is applied to compel him who is primarily liable, or the thing which may be primarily liable, to bear a burthen, to continue to bear it for the relief of him, or another thing, secondarily liable, does not depend upon contract, but has its foundation in natural justice, and is said by Chancellor Kent to be recognized in every cultivated system of jurisprudence."

The term in the French law denotes the putting a third person who has paid a debt in the place of the creditor to whom he has paid it, so that he may exercise against the debtor all the rights which the creditor, if unpaid, might have had. It is of two kinds: First, conventional; second, legal; the former being where the subrogation is express by the acts of the creditor and the third person; the latter being, as in the case of sureties, where the subrogation is implied by law. Brown's L. Dict. See also *King v. Dwight*, 3 Rob. (La.) 2.

1. *Kirkham v. Dupont*, 14 Cal. 565.

2. *Hayes v. Ward*, 4 Johns. Ch. (N. Y.) 123; 8 Am. Dec. 554. See *infra*, this title, *Sureties*.

3. *Gibson v. McCormick*, 10 Gill & J. (Md.) 65. See *infra*, this title, *Persons Interested in Encumbered Estate*.

4. *Davis v. Winn*, 2 Allen (Mass.) 111. See *infra*, this title, *Persons Interested in Encumbered Estate*.

5. *King v. McVickar*, 3 Sandf. Ch. (N. Y.) 192. See *infra*, this title, *Persons Advancing Money to Discharge Encumbrances*.

6. A person who lends money to a minor to pay a debt incurred for necessities will be subrogated to the rights of the original creditor, and the minor will be liable to him. *Harris v. Lee*, 1 P. Wms. 482; *Martin v. Gale*, 4 Ch. Div. 428; *Marlow v. Pittfield*, 1 P. Wms. 558; *Darby v. Boucher*, 1 Salk. 279; *Ellis v. Ellis*, 1 Ld. Raym.; *Clarke v. Leslie*, 5 Esp. 38; *Conn v. Coburn*, 7 N. H. 368; *Price v. Sanders*, 60 Ind. 310. See also *Randall v. Sweet*, 1 Den. (N. Y.) 460; *Haine v. Tarrant*, 2 Hill (S. Car.) 400.

7. *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 312. See *infra*, this title, *Personal Representatives, Fiduciaries, and Officers*.

8. *Hebb v. Moore*, 66 Md. 167. See *infra*, this title, *Personal Representatives, Fiduciaries, and Officers*.

9. *Rellows v. Allen*, 23 Vt. 169. See *infra*, this title, *Personal Representatives, Fiduciaries, and Officers*.

10. *Redmond v. Burroughs*, 63 N. Car. 242. See *infra*, this title *Beneficiaries, Heirs, Devisees, Legatees, and Widows*.

11. *Taylor v. Taylor*, 8 B. Mon. (Ky.)

legatee,¹ who satisfies a liability existing against the estate to which he is heir or legatee for which others are equally liable with himself; of an insurance company paying a loss in full and claiming the rights of the insured, either against such of the insured property as may be available,² or against one by whose fault the loss occurred,³ of a carrier satisfying losses,⁴ or paying charges⁵ for which others are primarily liable; and in any case in which one person, other than a volunteer,⁶ pays a debt or demand which in equity or good conscience should have been satisfied by another;⁷ or whenever one person is compelled for his own protection or that of some inter-

419; 48 Am. Dec. 400. See *infra*, this title, *Beneficiaries, Heirs, Devisees, Legatees, and Widows*.

1. Mollan v. Griffith, 3 Paige (N. Y.) 402. See *infra*, this title, *Beneficiaries, Heirs, Devisees, Legatees, and Widows*.

2. Sun Mut. Ins. Co. v. Hall, 104 Mass. 507. See *infra*, this title, *Insurance Companies*.

3. Hall v. Nashville, etc., R. Co., 13 Wall. (U. S.) 367. See *infra*, this title, *Insurance Companies*.

4. Hagerstown Bank v. Adams Express Co., 45 Pa. St. 419; 84 Am. Dec. 499. See *infra*, this title, *Insurance Companies*.

5. See FREIGHT, vol. 8, p. 927.

A carrier of goods who advances to forwarding agents charges on goods for freight and storage, will be subrogated to the rights of the agents against the consignee and owner of the goods. White v. Van, 6 Humph. (Tenn.) 70; 44 Am. Dec. 294; Briggs v. Boston, etc., R. Co., 6 Allen (Mass.) 246; Wells v. Thomas, 27 Mo. 20; 72 Am. Dec. 228. A common carrier delivering goods to a connecting carrier acts as forwarding agent of the consignee. Story on Bailm., §§ 502, 537; Briggs v. Boston, etc., R. Co., 6 Allen (Mass.) 246; Western Transp. Co. v. Hoyt, 69 N. Y. 230; 25 Am. Rep. 175; Steamboat Virginia v. Kraft, 25 Mo. 76, limiting the right of subrogation to charges for transportation only; Guesnard v. Louisville, etc., R. Co., 76 Ala. 453, where the carrier paid custom duties on goods; Wolfe v. Crawford, 54 Miss. 514, where the carrier advanced money to pay levee taxes on cotton.

6. Sanford v. McLean, 3 Paige (N. Y.) 117; 23 Am. Dec. 773. See *infra*, this title, *Volunteers and Strangers*.

7. McNeil v. Miller, 29 W. Va. 480; Cole v. Malcolm, 66 N. Y. 363; Harnsberger v. Yancy, 33 Gratt. (Va.) 527;

Barker v. Parker, 4 Pick. (Mass.) 505; New Bedford Sav. Inst. v. Fairhaven Bank, 9 Allen (Mass.) 175; Hauser v. King, 76 Va. 731; Keene Five Cents Sav. Bank v. Herrick, 62 N. H. 174.

If the liability of one be discharged out of a fund belonging to another, that other will be subrogated to any security for the payment of such liability held by him to whom payment was made. Foley v. Gibson (Ky. 1891), 15 S. W. Rep. 780.

If lands be sold clear of dower, and the proceeds paid to the heirs without deducting the share to which the widow was entitled in lieu of dower, she will be substituted to the benefit of any other fund in court arising from the sale of her husband's real estate. McCubbin v. Cromwell, 2 Har. & G. (Md.) 460.

When the state funds bonds issued to an association of planters, it will be subrogated to the rights of the bondholders. Lessassier v. Board of Liquidation, 30 La. Ann. 611.

If a husband uses the separate property of his wife to redeem a pledge of his own property, without her consent, she will be subrogated to the rights of the pledgee against the husband. Greiner v. Greiner, 58 Cal. 115.

If a partner misappropriates the partnership funds in discharging a lien on his individual property, the other partner will be subrogated to the rights of the lienholder for reimbursement. Shinn v. Macpherson, 58 Cal. 596.

The assignee of an imperfect and irregular school warrant issued in lieu of a valid warrant, will be subrogated to all the rights of his assignor, in the original security, and will be entitled to demand and receive possession thereof, and to have the same reformed by the proper authorities. Goldsmith v. Stewart, 45 Ark. 149.

If a carrier, failing to deliver goods by reason of a wrongful attachment,

est which he represents, to pay a debt for which another is primarily liable.¹ It will be enforced wherever a denial thereof would be contrary to equity and good conscience.² It will not be allowed if it would do substantial wrong, nor when the surety is indebted to the principal in a greater sum than that paid on his account, nor when the surety has in fact been reimbursed and has sustained no loss,³ nor until the person to whose place substitution is claimed has been fully satisfied.⁴ Subrogation cannot be

be held liable to the consignee, he will be subrogated to the rights of the consignee against the attaching officers. *Holmes v. Balcom*, 84 Me. 226.

A father conveyed a tract of land to a trustee for the benefit of lien creditors, and then conveyed the balance of his lands to his children, except one tract, which he reserved for a daughter. Being pressed by his creditors he sold this tract and paid the creditors, having at the time a parol agreement with the trustee that the tract held by him should be conveyed to the daughter in the place of that which was sold. After the death of the father, the daughter claimed this tract by substitution to the rights of the judgment creditors who had been satisfied from the proceeds of the land intended for her, but it was decided that a resulting trust arose in favor of the father's heirs as to that land, and that she was not entitled to subrogation. *Dover v. Rhea*, 108 N. Car. 88.

If a receiver of a railroad company issues certificates in excess of the amount authorized by the court, and the proceeds of such overissue be used in paying interest coupons on the mortgage bonds of the company, the purchasers of the certificates will be subrogated to the rights of the holders of the coupons so paid. *Newbold v. Peoria, etc., R. Co.*, 5 Ill. 367.

Warehousemen who guarantee payment of advances made by a trust company on stored goods, will be subrogated to the rights of the lender, on payment of the amount loaned, and may hold the goods for their reimbursement. *Kilpatrick v. Dean*, 3 N. Y. Supp. 60.

An agent who, under the terms of his contract with his principal, becomes liable for goods sold to an insolvent person, will be subrogated to the rights of his principal against such person. *Nichols v. Wadsworth*, 40 Minn. 547.

An attorney who has become liable to his client for failing to collect his client's money from a sheriff, who had

collected it on execution, will be subrogated to the client's rights against the sheriff. *Governor v. Raley*, 34 Ga. 173.

Where a county pays the expenses of a pauper lunatic in the state asylum, it seems that the county will be subrogated to the rights of the asylum against the district of the pauper's settlement. *Danville, etc., Poor Dist. v. Montour County*, 75 Pa. St. 35.

One who as agent for another deposits money in a bank and is compelled to make good the loss thereof through the bank's insolvency, will be subrogated to the rights of his principal against the bank. *Stoller v. Coates*, 88 Mo. 514.

Stockholders in an insolvent bank who pay claims against the bank will be subrogated to all the rights of the creditors paid against the assignee of the bank. *Macon Bank v. Crossland*, 65 Ga. 734.

1. *Cockrum v. West*, 122 Ind. 372; *Weiss v. Guerineau*, 109 Ind. 438; *Lowery v. Byers*, 80 Ind. 443. In this case it was said that "Subrogation takes place where one pays a debt which another was justly liable to pay, and the payment is made to discharge the property of the person paying from an incumbrance." *Edinburg, etc., Land Mortgage Co. v. Latham*, 88 Ind. 88; *Wallace's Appeal*, 5 Pa. St. 103; *Forest Oil Co's Appeal*, 118 Pa. St. 138.

2. *Philbrick v. Shaw*, 61 N. H. 356; *Shotwell v. Jefferson Ins. Co.*, 5 Bosw. (N. Y.) 263; *Mosier's Appeal*, 56 Pa. St. 76; 93 Am. Dec. 783; *Cassidy v. Keely*, 13 Phila. (Pa.) 112.

3. *Mosier's Appeal*, 56 Pa. St. 76; 93 Am. Dec. 783; *Bleakley's Appeal*, 66 Pa. St. 187; *Bailey v. Brownfield*, 20 Pa. St. 45; *Avery v. Patten*, 7 Johns. Ch. (N. Y.) 211; *Mason v. Lord*, 20 Pick. (Mass.) 447; *Bezzell v. White*, 13 Ala. 422; *Himes v. Kellar*, 3 W. & S. (Pa.) 401; *Eaton v. Hasty*, 6 Neb. 419; 29 Am. Rep. 365; *Gerdone v. Gerdone*, 70 Ind. 62.

4. *Carter v. Neal*, 24 Ga. 346; 71

enforced against a *bona fide* purchaser for value without notice; thus, if a judgment binding lands be discharged by a surety, he will have no right of subrogation to the lien thereof as against a purchaser of the land, relying upon an entry of satisfaction of the judgment on the judgment docket, and without notice of the rights of the surety.¹ But there are decisions denying this rule upon the ground that the law does not require that the records shall show by whom satisfaction was made.²

Subrogation is an equitable and not a legal right,³ and can be enforced only by a proceeding in equity,⁴ in such of the states as still maintain a separate equitable procedure. Being the creature of equity, it will not be enforced where it will work an injustice to the rights of those having equal equities.⁵ Nor is the right in

Am. Dec. 136. See *infra*, this title, *When Right to Subrogation Becomes Complete*.

1. *Persons v. Shaeffer*, 65 Cal. 79; *Richards v. Griffith*, 92 Cal. 493. See also *Guy v. Du Uprey*, 16 Cal. 196; 76 Am. Dec. 518; *Bunn v. Lindsay*, 95 Mo. 250; 6 Am. St. Rep. 48.

In *Gaskill v. Wales*, 36 N. J. Eq. 527, a stranger advanced money to pay off existing mortgages on land, he taking a new mortgage for the security, which, it was agreed, should stand as a first incumbrance on the land. The money advanced was applied to the old mortgages, and they were cancelled of record by the mortgagee. Before the new mortgage was executed, but after the making of the old mortgages, mechanics' liens were filed against the property, which was sold thereunder, the purchasers having no notice of the right of a new mortgagee to be substituted to the lien of the old mortgages. The court, by Runyon, Ch., reversing the decree of the court below in favor of the new mortgagee, said: "The old mortgages were cancelled of record and the purchasers under the executions had no notice of any kind of the existence of any claim to the equity; they had no notice except what the records afforded. To give the respondent's mortgage priority over lien claims would, therefore, manifestly be highly unjust to the purchasers who bought in ignorance of any right or claim to such priority. In the absence of any other notice, they, of course, had a right to rely on the condition of the records, and having done so they cannot be defeated or prejudiced by a latent equity."

The principle that a surety in equity is entitled to the benefit of any secu-

rity which a creditor may have taken from the principal, cannot be applied as against a *bona fide* purchaser. *Sanders v. Reed*, 12 N. H. 558.

2. In *Mississippi*, it has been held that the entry of the word "settled" on the judgment docket by the plaintiff's attorney, without showing by whom the payment was made, would not defeat the surety's right of subrogation, even as against a purchaser for value relying upon such entry, in the absence of anything to show that the entry was made at the instance or under the direction of the surety. The court, by Wood, J., said: "The fact of payment by the indorser (surety) was not a matter requiring to be put on record, and the failure of the record to show this fact does not affect the rights of the indorser who paid the judgment." *Yates v. Mead*, 68 Miss. 787. The extreme hardship of this case suggests the necessity of a legislative provision, that when payment of a judgment is made by some person other than the principal, that fact shall be made to appear in the entry of satisfaction.

3. *Allen v. Wood*, 3 Ired. Eq. (N. Car.) 386.

4. *Allen v. Wood*, 3 Ired. Eq. (N. Car.) 386; *Smith v. Harrison*, 33 Ala. 706. See *infra*, this title, *Loss and Enforcement of Right*.

5. *McCormick v. Irwin*, 35 Pa. St. 111; *Keely v. Cassidy*, 93 Pa. St. 318; *Miller v. Jacobs*, 3 Watts (Pa.) 477; *McGinniss' Appeal*, 16 Pa. St. 445; *Reilly v. Mayer*, 12 N. J. Eq. 55; *Bunch v. Grave*, 111 Ind. 351; *Prindle v. Page*, 21 Vt. 94; *Fletcher v. Grover*, 11 N. H. 368; 35 Am. Dec. 497.

Subrogation to the benefit of securities held by the creditor, will be permitted if it can be done without preju-

any manner founded on contract,¹ though it may be modified or extinguished by contract.² It will be enforced in favor of the claimant, though he assumed his obligation in ignorance of the right,³ or without the request or privity of him against whom the right is claimed.⁴

The substitute must be put in all respects in the place of the party to whose rights he succeeds;⁵ but the right cannot be extended beyond the rights of him under whom it is claimed.⁶ Nor will the right be allowed to one whose claim has been defeated at law.⁷

Subrogation will not be permitted in favor of one who is ultimately or really liable for the debt discharged;⁸ nor in favor of

dice to the rights of those to whom payment is made, or to the superior rights of others. *Platt v. Brick*, 35 Hun (N. Y.) 121.

1. *Kyner v. Kyner*, 6 Watts (Pa.) 221; *Cottrell's Appeal*, 23 Pa. St. 294; *Mosier's Appeal*, 56 Pa. St. 80; 93 Am. Dec. 783; *Miller v. Stout*, 5 Del. Ch. 259; *Etna Life Ins. Co. v. Middleport*, 124 U. S. 534; *Memphis, etc., R. Co. v. Dow*, 120 U. S. 287; *Matthews v. Fidelity Title, etc., Co.*, 52 Fed. Rep. 687; *Hill v. King*, 48 Ohio St. 75; *McNeil v. Miller*, 29 W. Va. 480; *Lee v. Swepson*, 76 Va. 173; *Cheesebrough v. Millard*, 1 Johns. Ch. (N. Y.) 409; 7 Am. Dec. 494; *Gans v. Thieme*, 93 N. Y. 232; *Hughes v. Littlefield*, 18 Me. 400; *Hughes v. Hartford, F. Ins. Co.*, 17 Ill. 520; *Philbrick v. Shaw*, 61 N. H. 356.

The right of the surety who pays the debt of his principal to be subrogated to the rights and securities of the creditor, is not founded in contract, but rests upon equitable principles. Therefore the surety is entitled to subrogation, though not in privity with his principal; as where he guarantied the payment of a note, though not at the request of the maker. *Mathews v. Aiken*, 1 N. Y. 595; *Gowing v. Bland*, 2 How. (Miss.) 813.

2. *Hughes v. Hartford Fire Ins. Co.*, 17 Ill. App. 518.

3. The surety's right to subrogation is not affected by the fact that he made no stipulation for subrogation at the time of payment of the debt of his principal, nor by the fact that he was then ignorant of the existence of such right. *Dempsey v. Bush*, 18 Ohio St. 376; *Hill v. King*, 48 Ohio St. 75.

4. *Mathews v. Aiken*, 1 N. Y. 595.

5. *Wyckoff v. Noyes*, 36 N. J. Eq. 227; *Ohio L. Ins., etc., Co. v. Winn*, 4 Md. Ch. Dec. 253.

6. *Knapp v. Sturges*, 36 Vt. 721; *Franklin Sav. Bank v. Taylor*, 131 Ill. 376; *Dunn v. Missouri Pac. R. Co.*, 45 Mo. App. 29. Thus, a garnishee who pays over money to the garnisheeing creditor which the debtor is entitled to hold exempt from legal process, cannot be subrogated to the creditor's rights against the debtor. *Dunn v. Missouri Pac. R. Co.*, 45 Mo. App. 29.

7. *Fink v. Mahaffy*, 8 Watts (Pa.) 384; *Bank of Pa. v. Potius*, 10 Watts (Pa.) 148. In these cases the surety was held not entitled to substitution, on the ground that the principal in the one case had, and in the other might have, availed himself of the Statute of Limitations in an action at law by the surety for money paid to the use of the principal.

8. See *infra*, this title, *Sureties on Obligations to Government*; *Williams v. Thurlow*, 31 Me. 392; *Wright v. Patterson*, 45 Mich. 261; *Wilson v. Burton*, 52 Vt. 394; *Reid v. Sycks*, 27 Ohio St. 285; *Atkins v. Emison*, 10 Bush (Ky.) 9; *Walsh v. Wilson*, 130 Mass. 124; *Thompson v. Heywood*, 129 Mass. 401; *Carlton v. Jackson*, 121 Mass. 592; *Butler v. Seward*, 10 Allen (Mass.) 466; *Smith v. Cornell*, 52 N. Y. Super. Ct. 499; *Heim v. Vogel*, 69 Mo. 529; *Lauderdale County v. Alfred*, 65 Miss. 63; *Williams v. Thurlow*, 31 Me. 392; *Wadsworth v. Williams*, 100 Mass. 126; *Kilborn v. Robbins*, 8 Allen (Mass.) 466; *Putnam v. Collamore*, 120 Mass. 454; *Kneeland v. Moore*, 138 Mass. 198; *Probstfield v. Cizek*, 37 Minn. 420; *Russell v. Pistor*, 7 N. Y. 171; 57 Am. Dec. 509; *Mickles v. Townsend*, 18 N. Y. 575; *Mickles v. Dillaye*, 15 Hun (N. Y.) 296; *McGIVEN v. Wheelock*, 7 Barb. (N. Y.) 22; *Munroe v. Crouse*, 59 Hun (N. Y.) 248; *Stiger v. Mahone*, 24 N. J. Eq. 426; *Jerome v.*

one who would thereby be permitted to derive an advantage from, or to establish his claim through his own wrong or negligence, or inequitable or illegal conduct.¹

Seymour, Harr. (Mich.) 357; Frey v. Vanderhoof, 15 Wis. 397; Tompkins v. Halstead, 21 Wis. 118; Converse v. Cook, 8 Vt. 164; Bolton v. Lambert, 72 Iowa 483; Sharp v. Collins, 74 Mo. 266; Dargan v. McSween, 33 S. Car. 324.

One who sells land with warranty against incumbrances, and afterwards pays off a judgment binding the land for which he was liable under his warranty, cannot claim to be subrogated to the lien of the judgment against the land. McLure v. Melton, 34 S. Car. 377.

A purchaser who assumes the payment of liens on the purchased property cannot, on paying the same, be subrogated to the benefit thereof against the vendor. Robbins v. Clark, 127 U. S. 622; Caley v. Morgan, 114 Ind. 350; Crowley v. Harrader, 69 Iowa 83; Ely v. McNight, 30 How. Pr. (N. Y.) 97; Fretland v. Mack, 76 Iowa 434; Winans v. Wilkie, 41 Mich. 264; Wright v. Patterson, 45 Mich. 261.

A person making a payment in respect of which he claims subrogation, must be a third person in respect to the obligee of the debt, and not the original debtor himself. New Orleans Nat. Bank v. Eagle Cotton Warehouse, etc., Co. (La. 1891), 9 So. Rep. 442.

1. Milwaukee, etc., R. Co. v. Soutter, 13 Wall. (U. S.) 517; Wilkinson v. Babbitt, 4 Dill. (U. S.) 207; German American Bank v. U. S., 148 U. S. 573; 26 Ct. of Cl. 198; Farmers' Loan, etc., Co. v. Carroll, 5 Barb. (N. Y.) 613; Guckenheimer v. Angevine, 81 N. Y. 394; Drake v. Paige, 52 Hun (N. Y.) 292; Wiley v. Boyd, 38 Ala. 625; Griffith v. Townley, 69 Mo. 13; 33 Am. Rep. 476.

Rowley v. Towsley, 53 Mich. 329, where a guardian making an illegal investment of the money of his ward, after a compulsory accounting to the ward, claimed to be subrogated to the benefit of the investments himself.

The right of subrogation will be denied to one who, but for his own negligence, would not have been compelled to resort thereto, if the enforcement of such right would result in injury to others. Moore v. Holcombe, 3 Leigh (Va.) 597; 24 Am. Dec. 683. See *infra*, this title. *Waiver*; Conner v. Welch, 51 Wis. 431; Wall v. Mason, 102 Mass. 313; Bussey v. Page, 13 Me. 459.

A purchaser who is guilty of fraud in preventing competition in bidding at a guardian's sale, and who afterwards pays off a mortgage on the land, will not, if the sale is set aside, be subrogated to the benefit of the mortgage so as to be entitled to the high rate of interest which it carries. Devine v. Harkness, 117 Ill. 147.

One cannot be subrogated to the benefit of an usurious agreement. Perkins v. Hall, 105 N. Y. 539; Tribble v. Nichols, 53 Ark. 271.

One who advances money at an usurious rate of interest for the purpose of satisfying a prior lien, will not be subrogated to the benefit of such lien. Baldwin v. Moffett, 94 N. Y. 82; *distinguishing* Patterson v. Birdsall, 64 N. Y. 294. Compare Giveans v. McMurry, 16 N. J. Eq. 468.

"It is only to prevent fraud and subserve justice that equity ingrafts the wholesome provisions of subrogation or of equitable lien upon a transaction, and it should never be done where it would work injustice." Kelly v. Kelly, 54 Mich. 47; Dwight v. Scranton, etc., Lumber Co., 82 Mich. 624.

One who wrongfully alters a mortgage in a material respect cannot be subrogated to the benefit of the mortgage. Johnson v. Moore, 33 Kan. 90.

Banks purchasing government bonds from an administrator under circumstances putting them upon inquiry as to the authority of the seller, and failing to make such inquiry, cannot be subrogated to the rights, if any, of the estate, or beneficiaries, against the government for improperly transferring the bonds. German Bank, etc. v. U. S., 148 U. S. 573; 26 Ct. of Cl. 198. The rule approved in this case, that one who has been held liable for a breach of trust or a tort, cannot avail himself of the principles of subrogation, does not seem to have been observed in Huff v. Hatch, 2 Disney (Ohio) 63, where a banker, who, by his neglect, had caused the discharge of an indorser of a note, was subrogated to the rights of the holder against the estate of a maker.

In Hagerstown Bank v. Adams Express Co., 45 Pa. St. 419; 84 Am. Dec. 499, a carrier who had paid over the amount of bank notes destroyed

A creditor, whose means of recovery against the debtor have been destroyed or impaired by the tort of a third person,¹ or whose obligations as a contractor have been increased by such tort,² may not be subrogated to the rights of the debtor against the wrongdoer. Nor can the creditor have the benefit of any indemnity which the wrongdoer may have taken for any liability which he might incur by reason of the tort.³ Nor will one who has satisfied damages caused by the negligence of his servant be subrogated to the rights of the persons injured against the servant.⁴

II. WHO ENTITLED—1. Sureties—*a. GENERAL PRINCIPLES.*—The general rule is that a surety, who pays the debt of his principal, will be subrogated to all the securities, liens and equities, rights, remedies, and priorities held by the creditor against the principal, and entitled to enforce them against the latter in a court of equity or of equitable jurisdiction.⁵ The right springs up at the time

through his negligence, was held to be subrogated to the rights of the owner and entitled to recover from the bank the amount so paid.

Notwithstanding the principle that one claiming the equity of subrogation must do equity, it has been held in *New York*, that a person contracting to sell land subject to a mortgage may, by paying off the mortgage himself and claiming the benefit thereof by subrogation, defeat the right of his vendee to compel specific performance of the contract. *Arnold v. Green*, 116 N. Y. 566.

1. *Green v. Kimble*, 6 Blackf. (Ind.) 552; *Cunningham v. Brown*, cited in *Dale v. Grant*, 34 N. J. L. 142 *q. v.*

2. *Anthony v. Slaid*, 11 Met. (Mass.) 290.

3. *McGay v. Keilback*, 14 Abb. Pr. (N. Y.) 142.

4. *Smith v. Foran*, 43 Conn. 244; 21 Am. Rep. 647.

5. *Hayes v. Ward*, 4 Johns. Ch. (N. Y.) 123; 8 Am. Dec. 554; *Bullock v. Boyd*, Hoffm. (N. Y.) 294; *New York State Bank v. Fletcher*, 5 Wend. (N. Y.) 85; *Van Horne v. Everson*, 13 Barb. (N. Y.) 526; *Lewis v. Palmer*, 28 N. Y. 271; *Cheesebrough v. Millard*, 1 Johns. Ch. (N. Y.) 409; 7 Am. Dec. 494; *King v. Baldwin*, 2 Johns. Ch. (N. Y.) 554; *Clason v. Morris*, 10 Johns. (N. Y.) 524; *Ottman v. Moak*, 3 Sandf. Ch. (N. Y.) 431; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Stanwood v. Clamplitt*, 23 Miss. 372; *Dozier v. Lewis*, 27 Miss. 679; *Conway v. Strong*, 24 Miss. 665; *Bank of England v. Tarleton*, 23 Miss. 173; *Parchman v. Conway*, 23 Miss. 85; *McMullen v. Hinkle*, 39 Miss.

142; *Wilson v. Burney*, 8 Neb. 39; *Johnson v. Bartlett*, 17 Pick. (Mass.) 477; *Rice v. Southgate*, 16 Gray (Mass.) 142; *Dick v. Moon*, 26 Minn. 309; *Allison v. Sutherland*, 50 Mo. 274; *Arnot v. Woodburn*, 35 Mo. 99; *Sweet v. Jeffries*, 48 Mo. 279; *Miller v. Woodward*, 8 Mo. 169; *Cole County v. Angney*, 12 Mo. 132; *Wade v. Green*, 3 Humph. (Tenn.) 547; *Bittick v. Wilkins*, 7 Heisk. (Tenn.) 307; *Henry v. Compton*, 2 Head (Tenn.) 549; *Scanland v. Settle*, Meigs (Tenn.) 169; *Rodes v. Crockett*, 2 Yerg. (Tenn.) 346; 24 Am. Dec. 489; *McClung v. Beirne*, 10 Leigh (Va.) 394; 34 Am. Dec. 739; *Miller v. Pendleton*, 4 Hen. & M. (Va.) 436; *Edmunds v. Venable*, 1 Patt. & H. (Va.) 121; *Leake v. Ferguson*, 2 Gratt. (Va.) 419; *Chrisman v. Harman*, 29 Gratt. (Va.) 494; 26 Am. Rep. 387; *Towe v. Newbold*, 4 Jones Eq. (N. Car.) 212; *Smith v. McLeod*, 3 Ired. Eq. (N. Car.) 390; *Heart v. Bryan*, 2 Dev. Eq. (N. Car.) 147; *Kesler v. Linker*, 82 N. Car. 456; *Wilson v. Phillips*, 27 Tex. 543; *James v. Jacques*, 26 Tex. 320; 82 Am. Dec. 613; *Mitchell v. De Witt*, 25 Tex. Supp. 180; 78 Am. Dec. 561; *Budd v. Olver* (Pa. 1892), 23 Atl. Rep. 1105; *Cochran v. Shields*, 2 Grant's Cas. (Pa.) 437; *Cornwell's Appeal*, 7 W. & S. (Pa.) 305; *Greiner's Estate*, 2 Watts (Pa.) 414; *Cottrell's Appeal*, 23 Pa. St. 294; *E. & P. Ware*, 5 Rich. Eq. (S. Car.) 473; *Schultz v. Carter*, Speers Eq. (S. Car.) 534; *Dearborn v. Taylor*, 18 N. H. 153; *Low v. Blodgett*, 21 N. H. 121; *Rochester Bank v. Gowdy*, cited 21 N. H. 127; *Young v. Vough*, 23 N. J. Eq. 325; *Irick v. Black*, 17 N. J. Eq. 189; *Frank v. Traylor*, 130 Ind. 145; *Rooker*

v. Benson, 83 Ind. 250; Lowry v. Smith, 97 Ind. 466; Hill v. King, 48 Ohio St. 75; Groves v. Steel, 2 La. Ann. 480; Scott v. Featherston, 5 La. Ann. 306; West v. Creditors, 3 La. Ann. 529; Davidson v. Carroll, 20 La. Ann. 199; Howe v. Frazer, 2 Rob. (La.) 424; Winder v. Diffenderffer, 2 Bland Ch. (Md.) 166; Tuck v. Calvert, 33 Md. 209; Sasscer v. Young, 6 Gill & J. (Md.) 243; Colegate v. Frederick Town Sav. Inst., 11 Gill & J. (Md.) 114; Semmes v. Naylor, 12 Gill & J. (Md.) 358; Merryman v. State, 5 Har. & J. (Md.) 423; Ghiselin v. Ferguson, 4 Har. & J. (Md.) 522; Burk v. Chrisman, 3 B. Mon. (Ky.) 50; Highland v. Anderson (Ky. 1892), 17 S. W. Rep. 866; Black v. Bush, 7 B. Mon. (Ky.) 212; Cullum v. Emanuel, 1 Ala. 23; 34 Am. Dec. 757; Dunlap v. O'Bannon, 5 B. Mon. (Ky.) 393; Storms v. Storms, 3 Bush (Ky.) 77; Lumpkin v. Mills, 4 Ga. 343; Davis v. Smith, 5 Ga. 274; 47 Am. Dec. 279; Pence v. Armstrong, 95 Ind. 191; Thomas v. Stewart, 117 Ind. 50; Manford v. Firth, 68 Ind. 83; State Bank v. Davis, 4 Ind. 653; Ottawa Bank v. Dudgeon, 65 Ill. 11; Billings v. Sprague, 49 Ill. 509; Lochenmeyer v. Fogarty, 112 Ill. 572; Keokuk v. Love, 31 Iowa 119; Sears v. Laforce, 17 Iowa 473; Searing v. Berry, 58 Iowa 20; Belcher v. Hartford Bank, 15 Conn. 381; Highland v. Highland, 5 W. Va. 63; McDowell v. Wilmington Bank, 1 Harr. (Del.) 369; Hardcastle v. Commercial Bank, 1 Harr. (Del.) 374, n.; Hurd v. Spencer, 40 Vt. 581; Foster v. Trustees, 3 Ala. 302; Fawcetts v. Kimmey, 33 Ala. 261; Brown v. Lang, 4 Ala. 50; Colvin v. Owens, 22 Ala. 782; Newton v. Field, 16 Ark. 216; Talbot v. Wilkins, 31 Ark. 411; *In re* Lawrence, 5 Fed. Rep. 347; Hunter v. U. S., 5 Pet. (U. S.) 173; Dennis v. Rider, 2 McLean (U. S.) 451; U. S. Bank v. Winston, 2 Brock. (U. S.) 252; Union Trust Co. v. Morrison, 125 U. S. 591; Mayhew v. Crickett, 2 Swan. 191; Gammon v. Stone, 1 Ves. 339; Harberton v. Bennett, Beatty 386; Copis v. Middleton, T. & R. 224; Simpkins v. Poulet, 2 L. J. Ch. 81; Yonge v. Reynell, 9 Hare 809; Newton v. Chorlton, 10 Hare 646; Forbes v. Jackson, 19 Ch. Div. 615; Pearl v. Deacon, 24 Beav. 186; Drew v. Lockett, 32 Beav. 499; Lake v. Brutton, 8 De G. M. & G. 440; Praed v. Gardiner, 2 Cox 86; Goddard v. White, 2 Giff. 449; Wooldridge v. Norris, L. R., 13 6 Eq. 410; Heyman v. Dubois, L. R., 13 Eq. 158; Mara v. Ryan, 2 Jones 715.

The following observations of Lord Brougham, in *Hodgson v. Shaw*, 3 Myl. & K. 183, have been quoted and approved frequently: "The rule here is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement. It is hardly possible to put this right of substitution too high, and the right results more from equity than from contract or *quasi* contract; unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication. The doctrine of the court in this respect was luminously expounded in the argument of Sir Samuel Romilly in *Craythorne v. Swinburne* (14 Ves. 160); and Lord Eldon, in giving judgment in that case, sanctioned the exposition by his full approval: 'A surety, to use the language of Sir S. Romilly's reply, will be entitled to every remedy which the creditor has against the principal debtor; to enforce every security, and all means of payment; to stand in the place of the creditor not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having a right to have those securities transferred to him though there was no stipulation for that, and to avail himself of all these securities against the debtor.'"

The surety of a bankrupt will take the place of a creditor of the bankrupt whose claim he satisfies. *Watkins v. Worthington*, 2 Bland Ch. (Md.) 509.

Sureties entitled to subrogation may maintain a bill to set aside a fraudulent conveyance executed by their principal. *Tatum v. Tatum*, 1 Ired. Eq. (N. Car.) 113.

If the security be to indemnify the surety, and also to secure to him an absolute debt, it will be applied to both debts *pro rata*. *Ross v. Wilson*, 7 Smed. & M. (Miss.) 753; *Moore v. Moberly*, 7 B. Mon. (Ky.) 299, *distinguishing* *Moore v. Moore*, 4 Hawks (N. Car.) 358; 15 Am. Dec. 523; *Helm v. Young*, 9 B. Mon. (Ky.) 394; *contra*, *Ten Eyck v. Holmes*, 3 Sandf. Ch. (N. Y.) 428; *accord*, *First Congregational Soc. v. Snow*, 1 Cush. (Mass.) 510; *McCune v. Belt*, 45 Mo. 174; *Brown v. Ray*, 18 N. H. 102; 45 Am. Dec. 361; *Miller v. Sawyer*, 30 Vt. 412.

In *Hall v. Hoxsey*, 84 Ill. 616, it was

intimated that if the surety of a tenant pays the rent due the landlord, he may be subrogated to all the rights of the landlord as to the unexpired term, including the right to distrain.

In *Person v. Perry*, 70 N. Car. 697, it appeared that several judgment creditors of a common principal debtor agreed that his lands should be sold and the proceeds divided ratably among themselves. There was a surety for the debt of one of these creditors, who (the creditor), but for the agreement in question, would have had no resort to such fund for the payment of his debt. It was decided that this surety was entitled to be subrogated to all the rights of the creditor under that agreement.

The estate of a surety paying the debt of the principal will have the same right of subrogation as the surety himself. *Ward's Appeal*, 100 Pa. St. 289.

A new firm assuming the indebtedness of the old firm will be subrogated to the right of the old firm to set aside a fraudulent conveyance executed by a debtor of the old firm. *Rudy v. Austin* (Ark. 1892), 19 S. W. Rep. 111.

Bail of a partner who have paid a judgment against him for a partnership debt, cannot be subrogated to the rights of the judgment creditor against the other partners. *Bowman v. Blodgett*, 2 Met. (Mass.) 308, citing the analogous cases of *Osborn v. Cunningham*, 4 Dev. & B. (N. Car.) 423, and *Carter v. Black*, 4 Dev. & B. (N. Car.) 425, in which it was held that if two joint obligors be sued and one of them gives bail, such bail cannot, upon being compelled to pay the debt, maintain an action against the other obligor for money paid, there being no privity between the bail of one obligor and his co-obligor. See also *Hinton v. Odenheimer*, 4 Jones Eq. (N. Car.) 406, a case standing upon somewhat similar principles.

A surety paying an admiralty bond under decree of court will be subrogated to the rights of the original libellants, but the effect of the bond being to release the lien of the original libellants, he cannot be reimbursed out of the proceeds of the boat sold under his execution, while there are liens thereon already existing. *Carroll v. Steamboat T. P. Leathers*, 1 Newb. Adm. 432.

A surety will not be entitled to subrogation against a subsequent guarantor of the principal's debtor. *Longley*

v. Griggs, 10 Pick. (Mass.) 121; *Hamilton v. Johnston*, 82 Ill. 39.

A person paying money under the mistaken idea that he is a surety, cannot be subrogated to the benefit of a lien on the lands of his supposed principal. *Dawson v. Lee*, 83 Ky. 49.

The surety is entitled to the benefit of all collaterals held by the creditor, in the right of the principal debtor. *Newton v. Chorlton*, 10 Hare 64. In this case the question was whether the creditor lost his remedy against the surety, by allowing collaterals for the debt to get back into the hands of the principal debtor, where they were lost as security. The vice-chancellor observed that such a case had not theretofore arisen and been decided. The surety was discharged. See also *Kirkman v. Bank of America*, 2 Coldw. (Tenn.) 397; *Atwood v. Vincent*, 17 Conn. 575; *Kennedy v. Bossiere*, 16 La. Ann. 445.

In *Johnson v. Bartlett*, 17 Pick. (Mass.) 477, the court, by Shaw, C. J., said: "Where sureties have paid, or are held liable to pay, the debt of their principal, they have a right in equity to the benefit of all funds and assets, so far as they can be specifically reached, which their principal held as specifically applicable to the debt which the sureties have paid, and to have them placed in such condition as to be made available for that purpose." *Wooldrige v. Norris*, L. R., 6 Eq. 410.

A surety who pays the purchase price of property, the title to which was reserved by the selling creditor, will be subrogated to the right of the creditor to hold the property until he is reimbursed, and to recover the same from a vendee of the principal. *Myers v. Yapple*, 65 Mich. 403.

The sureties of a person owning bank stock who are compelled to pay advances made by the bank to him on the faith of such stock, will be subrogated to all the rights of the bank, and entitled to enforce its lien on the stock. *Klopp v. Lebanon Bank*, 46 Pa. St. 88. See also *Young v. Vough*, 23 N. J. Eq. 325.

In *Perrine v. Fireman's Ins. Co.*, 22 Ala. 575, it was held that if the company did not actually fix its lien upon the stock of its debtor stockholder by refusing to permit a transfer, and the surety did not request the company to refuse to make the transfer, the lien was not consummated, and the surety acquired no right of subrogation.

the suretyship is contracted, and is consummated when the surety pays the debt.¹ The surety, upon the failure of his principal to pay or perform promptly, may not compel him to turn over his property to a receiver to be applied to the satisfaction of his undertaking—he must first perform the obligation, and then sue for indemnity.²

A surety who pays the debt of his principal is entitled not only to all the equities of the creditor as against the principal, but also against all persons claiming under him. All persons who take securities to which the creditor is entitled, with notice of his rights, whether from the principal debtor, or from the creditor, must hold them for the benefit of the surety.³ The right of the surety to follow such securities in the hands of a person chargeable with notice of his rights is not affected by the fact that the surety, when he entered upon his obligation, did not know of the

An undertaking to pay the holders of a note any deficiency not exceeding a given sum which may exist after exhausting certain collaterals furnished by an indorser of the note, creates a separate and independent responsibility, and gives the undertaker no right of subrogation to the benefit of the collaterals. *Tracy v. Pomeroy*, 120 Pa. St. 14.

If A borrows money for the use of B, and both execute a mortgage to secure the lender, A's land must be first sold to satisfy the debt, but he will be subrogated to the rights of the mortgagee against B. *Canady v. Boliver*, 25 S. Car. 547.

A surety who pays a note secured by deed of trust or mortgage is entitled to have the security enforced for his benefit. *Taylor v. Tarr*, 84 Mo. 420; *Atkinson v. Stewart*, 46 Mo. 510; *Wolff v. Walter*, 56 Mo. 292; *Hall v. Morgan*, 79 Mo. 47.

If a debtor deposits collateral securities with the creditor, and afterwards obtains further advances from the creditor for which he provides a surety, the latter will be entitled to the benefit of any surplus of such securities remaining after the original loan has been repaid. *Wright v. Morley*, 11 Ves. 21; *Heyman v. Dubois*, L. R., 13 Eq. 158; *Præd v. Gardiner*, 2 Cox 86.

A person who charges his own property with the debt of another, will, on payment of that debt, be subrogated to the benefit of any securities of the principal debtor held by the creditor. *McNeale v. Reed*, 7 Ir. Eq. 251; *Lewis v. Palmer*, 28 N. Y. 271; *Vartie v. Underwood*, 18 Barb. (N. Y.) 561.

Sureties on a bond to stay execution

upon appeal, who, after affirmance, are compelled to make good a loss of the property levied on, will be subrogated to the benefit of the judgment appealed from. *Gifford v. Rising* (Supreme Ct.), 12 N. Y. Supp. 430.

Sureties in an appeal bond who pay the same, have no equities superior to those of incumbrancers subsequent to the lien of the plaintiff in the judgment appealed from but prior to the undertaking of the sureties themselves. *Powell v. Allen*, 11 Ill. App. 129.

A surety who pays a judgment after it has been affirmed on appeal will be subrogated to the rights of the judgment creditor against the lands of the principal in the hands of one who purchased from the principal pending the appeal, and will have priority over an assignee of a mortgage given by such purchaser to secure the purchase money. *Hill v. King*, 48 Ohio St. 75.

The surety in a delivery bond is substituted to the rights of the creditor, and may resort to a court of equity to compel such an application of the property embraced in the bond as will protect his interests. *Dechard v. Edwards*, 2 Sneed (Tenn.) 93. See also *infra*, this title, *Successive Sureties in Judicial Proceedings*.

1. *Wayland v. Tucker*, 4 Gratt. (Va.) 268; 50 Am. Dec. 76.

2. *McElroy v. Hatheway*, 44 Mich. 399.

3. *Drew v. Lockett*, 32 Beav. 499; *Atwood v. Vincent*, 17 Conn. 575; *Greene v. Ferrie*, 1 Desaus. Eq. (S. Car.) 164. Compare *Williams v. Owen*, 13 Sim. 597; *Bowker v. Bull*, 1 Sim. (U. S.) 29; *Farebrother v. Wodehouse*, 23 Beav. 18.

existence of such securities, nor rely thereon.¹ The surety cannot require the creditor, before proceeding against him, to exhaust collaterals deposited by the principal as security for the debt;² he must first discharge the debt—then he may enforce the securities himself.³

If the securities held by the creditor have been applied to the debt of the principal as far as they will go, leaving a deficiency; or if the debt be paid by the principal himself, there will be no right of subrogation.⁴ Nor will the surety be entitled to the benefit of any other securities or rights of the creditor than those applicable to the contract on which he is bound.⁵

1. 1 Story Eq. § 638; Aldrich v. Cooper, 8 Ves. 388; Chitty Cont. (10th Am. ed.) 584; Wheatley v. Barstow, 7 De G. M. & G. 279; Cheesebrough v. Millard, 1 Johns. Ch. (N. Y.) 413; 7 Am. Dec. 494; Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 430; 7 Am. Dec. 499; Hayes v. Ward, 4 Johns. Ch. (N. Y.) 130; 8 Am. Dec. 554; Lidderdale v. Robinson, 2 Brock. (U. S.) 160; 12 Wheat. (U. S.) 596; Atwood v. Vincent, 17 Conn. 583; New Hampshire Sav. Bank v. Colcord, 15 N. H. 119; 41 Am. Dec. 685; Lichtenthaler v. Thompson, 13 S. & R. (Pa.) 157; 15 Am. Dec. 581.

A surety is entitled to the benefit of a security given without his knowledge by the debtor to the creditor at a different time, to secure another demand in addition to that for which he became surety. Scott v. Knox, 2 Jones 778.

One who executes a note as collateral security for a note secured by a lien on real estate, will, if compelled to pay such collateral note, be subrogated to the lien in question, though he did not know of its existence when he made his note, and was informed of an assignment of the original note by the creditor to a third person. Hevener v. Berry, 17 W. Va. 474.

2. Dougherty v. MacKenzie, 34 Mo. 462; Kochler v. Farmers', etc., Bank, 51 Hun (N. Y.) 418; Buffalo Bank v. Wood, 71 N. Y. 405; Geddis v. Hawk, 1 Watts (Pa.) 280; Brough's Estate, 71 Pa. St. 460; Hardy v. Overman, 36 Ind. 549; Armstrong v. Poole, 30 W. Va. 666.

In Gary v. Cannon, 3 Ired. Eq. (N. Car.) 64, it was held that whether a surety to a debtor can or cannot in any case require the creditor to resort to a collateral security which he has obtained from the principal debtor, he certainly may not require him to look to such security in the first instance, if

it is not plainly a valid security under which the creditor may have speedy, direct, and certain redress. See also SURETYSHIP, vol. 24.

3. Brick v. Freehold Nat. Banking Co., 37 N. J. L. 307; Hall v. Hoxsey, 84 Ill. 616.

Joint Debtors—Suretyship—Subrogation.—In Roberts v. Jeffries, 80 Mo. 115, one of three joint debtors gave security to another by way of indemnity against the debt. A third, who stood in the relation of surety to both, insisted that the security should be exhausted before the creditor proceeded against him, but the claim was denied, his only right in respect to the security being to be subrogated to its benefit, and this would not arise until he had paid the debt.

4. Belcher v. Hartford Bank, 15 Conn. 381; Kinley v. Hill, 4 W. & S. (Pa.) 426; Shackleford v. Stockton, 6 B. Mon. (Ky.) 390; Tarbell v. Parker, 101 Mass. 165.

The surety cannot require the creditor, before proceeding against him, to exhaust collaterals deposited by the principal as security for the debt. See SURETYSHIP, vol. 24.

5. Trent v. Calderwood, 2 La. Ann. 942; Old v. Chambliss, 3 La. Ann. 205; Tardy v. Allen, 3 La. Ann. 66; Houston v. Branch Bank, 25 Ala. 250; Downing v. Linville, 3 Bush (Ky.) 472; Hutchins v. McCauley, 2 Dev. & B. (N. Car.) 399; Osborn v. Cunningham, 4 Dev. & B. (N. Car.) 423; Bowman v. Blodgett, 2 Met. (Mass.) 308; Brazier v. Clark, 5 Pick. (Mass.) 96; Towne v. Ammidown, 20 Pick. (Mass.) 535; Tom v. Goodrich, 2 Johns. (N. Y.) 213; Carter v. Black, 4 Dev. & B. (N. Car.) 425; Wade v. Coope, 2 Sim. 155; South v. Bloxam, 2 H. & M. 457; Ex p. Rushforth, 10 Ves. 409.

See Stafford v. New Bedford Sav. Bank, 132 Mass. 315, for a case in which

The surety will be entitled to the actual possession of all securities held by the creditor for the payment of the principal's debt, immediately upon his satisfaction thereof;¹ and it has been held that the court may direct a transfer of such securities to the surety before rendition of judgment against him for the debt of his principal.² The creditor, after receiving payment of his debt from a surety, may not discharge or cancel any security from or on account of the principal without the consent of the surety.³

A surety for an installment, or part only, of a debt, will not be entitled to the benefit of a security given by the debtor for another installment or part of the debt at a different time.⁴

It has been held that a surety will not be subrogated to the rights of the creditor, unless necessary for his protection.⁵ Subrogation will not be enforced in favor of a surety so as to defeat an interest acquired and held by a third party, when that interest, though subordinate to that of the creditor, is prior in date to the surety's undertaking.⁶ The surety will not be entitled to any greater rights than the person to whose place he is substituted.⁷

a surety of a bankrupt corporation was held not entitled to the benefit of stock taken by the creditor, a bank, in a new corporation composed of the creditors of the old bankrupt corporation, such stock being in no manner collateral security for the indebtedness of the old corporation.

As the liability of a surety is limited to the express terms of his contract, so his right of subrogation is confined to the rights and securities of the contract for which he is surety. *Flannary v. Utley* (Ky. 1887), 3 S. W. Rep. 413.

1. *Klopp v. Lebanon Bank*, 46 Pa. St. 88; *Loundes v. Chisholm*, 2 McCord Eq. (S. Car.) 455; *Murray v. Catlett*, 4 Greene (Iowa) 108; *Jacques v. Fackney*, 64 Ill. 87; *Smith v. Schneider*, 23 Mo. 447; *Loughridge v. Bowland*, 52 Miss. 546.

If the security consists of a chattel mortgage, the surety will, on payment of the debt, be entitled to the possession of the chattels. *Torp v. Gulseth*, 37 Minn. 135.

2. *Knoblauch v. Foglesong*, 37 Minn. 320.

3. *Ottawa Bank v. Dudgeon*, 65 Ill. 11; *Woods v. People's Nat. Bank*, 83 Pa. St. 57; *Chrisman v. Harman*, 29 Gratt. (Va.) 494; 26 Am. Rep. 387.

4. To allow the surety on payment of the installment to have the benefit of the security provided for the other part of the debt, might, in effect, require the creditor, instead of the principal debtor, to indemnify the surety.

Grubbs v. Wysors, 32 Gratt. (Va.) 127; *Wade v. Coope*, 2 Sim. 155; *Crunip v. McMurtry*, 8 Mo. 408. Compare *Lynch v. Hancock*, 14 S. Car. 66.

5. Thus, the application of a surety of a railroad company who had been compelled to pay for land condemned by the company, to be subrogated to the landowner's right to an injunction to prevent the use of the road over the land, was denied, on the ground that it was not necessary to his protection to prevent such use, there being nothing to be gained by him through such injunction; the company being insolvent and its affairs in the hands of a receiver, and the road being operated for the accommodation of the public, by a trustee of holders of bonds of the company, with a view to a more advantageous sale of the property on foreclosure. *In re Hewitt*, 25 N. J. Eq. 210. See also *Joliet, etc., R. Co. v. Healy*, 94 Ill. 416, where it is said that equity will not do that which will be of no benefit to the party asking it, and only a hardship upon the party coerced—or, as the maxim is, the law does not require any one to do vain or useless things.

6. *Patterson v. Pope*, 5 Dana (Ky.) 243; *Johnson v. Morrison*, 5 B. Mon. (Ky.) 106; *Farmers', etc., Bank v. Sherley*, 12 Bush (Ky.) 304; *Fishback v. Bodman*, 14 Bush (Ky.) 117.

7. 3 Pom. Eq., § 1417; *Walsh v. McBride*, 72 Md. 45, where one of two joint purchasers, who had paid off the

b. WHEN RIGHT TO SUBROGATION BECOMES COMPLETE.—The creditor is entitled to full satisfaction of the debt before the right of subrogation may be invoked; the surety may not meddle with any of his rights and securities so long as any portion of the debt remains unsatisfied.¹ It seems, however, that an exception will

entire purchase money, claimed the benefit of the vendor's lien as against his co-purchaser. It was denied on the ground that the lien was extinguished by payment to the vendor in full. *Barton v. Brent*, 87 Va. 385; *Hopewell v. Cumberland Bank*, 10 Leigh (Va.) 206; *Stephenson v. Taverners*, 9 Gratt. Va. 398; *Morsell v. Baden*, 22 Md. 391; *Heth Tp. v. Lewis*, 114 Ind. 508; *Schur v. Schwartz*, 140 Pa. St. 53.

In *Kilpatrick v. Dean*, 15 Daly (N. Y.) 182, warehousemen, who had guaranteed the payment of advances made by third parties to the owner of goods stored in the warehouse, and secured by a pledge of the goods, were compelled to pay to the lenders the amounts due them. It was held that the warehousemen thereupon became subrogated to the rights of the lenders as pledgees in respect to the property, but that having converted the property to their own use by a sale not authorized under the conditions of the pledge, this operated as a payment of the debt to the extent of the value of the property, and its value exceeding the amount of the debt, the warehousemen were liable in damages for the market value of the property, less the amount of the debt.

1. *Bank of Pa. v. Potius*, 10 Watts (Pa.) 148; *Brough's Estate*, 71 Pa. St. 460; *New Jersey Midland R. Co. v. Wortendyke*, 27 N. J. Eq. 658; *People's Ins. Co. v. Straehle* (Ohio), 2 Cinn. Super. Ct. Rep. 186; *Ex p. Rushforth*, 10 Ves. 409; *Farebrother v. Wodehouse*, 23 Beav. 18; *Cooper v. Jenkins*, 32 Beav. 337; *Davies v. Humphreys*, 6 M. & W. 153; *Copis v. Middleton, T. & R.* 224; *Hodgson v. Shaw*, 3 Myl. & K. 183; *Ewart v. Latta*, 4 Macq. H. & L. Cas. 983; *Gannett v. Blodgett*, 39 N. H. 150; *Field v. Hamilton*, 45 Vt. 35; *Wilcox v. Fairhaven Bank*, 7 Allen (Mass.) 270; *Child v. New York, etc., R. Co.*, 129 Mass. 170; *Richardson v. Washington Bank*, 3 Met. (Mass.) 536; *Swan v. Patterson*, 7 Md. 164; *Neptune Ins. Co. v. Dorsey*, 3 Md. Ch. 334; *Bullock v. Campbell*, 9 Gill (Md.) 182; *Com. v. State*, 32 Md. 501; *Lawson v. Sny-*

der, 1 Md. 79; *Hopkinsville Bank v. Rudy*, 2 Bush (Ky.) 326; *Glass v. Pulen*, 6 Bush (Ky.) 346; *Rice v. Downing*, 12 B. Mon. (Ky.) 44; *Cason v. Westfall*, 83 Tex. 26; *Jamies v. Day*, 37 Iowa 164; *Magee v. Leggett*, 48 Miss. 139; *Lee v. Griffin*, 31 Miss. 632; *Gilliam v. Esselman*, 5 Sneed (Tenn.) 86; *Hall v. Hall*, 10 Humph. (Tenn.) 352; *Harlan v. Sweeny*, 1 Lea (Tenn.) 682; *Delaney v. Tipton*, 3 Hayw. (Tenn.) 15; *McConnell v. Beattie*, 34 Ark. 113; *Schoonover v. Allen*, 40 Ark. 132; *Pickett v. Bates*, 3 La. Ann. 627; *Bridges v. Nicholson*, 20 Ga. 90; *Darst v. Bates*, 51 Ill. 439; *Conwell v. McCowan*, 53 Ill. 363; *Williams v. Williams*, 5 Ohio 444; *Vert v. Voss*, 74 Ind. 566; *Covey v. Neff*, 63 Ind. 391. *Compare Zook v. Clemmer*, 44 Ind. 15, and *Rooker v. Benson*, 83 Ind. 250; *accord*, *Opp v. Ward*, 125 Ind. 241; 21 Am. St. Rep. 220; *In re Church*, 16 R. I. 231; *Barton v. Brent*, 87 Va. 385.

The creditor's rights must be entirely divested before another may be substituted in his place so as to have them vest in him. *Stamford Bank v. Benedict*, 15 Conn. 437; *Union Bank v. Edwards*, 1 Gill & J. (Md.) 346.

In *Kyner v. Kyner*, 6 Watts (Pa.) 227, the court said: "There shall be no interference with the creditor's rights or securities which by possibility might prejudice or embarrass him in the collection of the residue of his debt. The surety must satisfy first his entire debt."

Payment of part of the debt by the surety will not entitle him to an assignment of the creditor's securities *pro tanto*. *Hollingsworth v. Floyd*, 2 Har. & G. (Md.) 87.

If lands devised subject to a charge in favor of legatees, be divided among the devisees, and the portion of one in the hands of his mortgagee be applied to the charge, the mortgagee cannot be subrogated to the benefit thereof, unless the charge has been paid in full. *Alleghany Nat. Bank's Appeal* (Pa. 1887), 7 Atl. Rep. 788.

A groom of a stallion who gives his note for the horse's keep, will not be entitled to subrogation to the innkeeper's lien, unless it appears that the note has been fully paid, or accepted

be made to this rule when necessary to prevent a needless multiplicity of suits, no detriment resulting thereby to the creditor.¹ And should the creditor permit the surety to resort to the right of subrogation before the debt has been entirely paid, neither the principal debtor nor any creditor may complain.²

The creditor is entitled to actual payment of the debt³—a ten-

by the innkeeper as payment in full. *Hoover v. Epler*, 52 Pa. St. 522.

If judgment be recovered on one of several notes secured by mortgage, and execution be issued, and a surety on a stay of such execution pays the judgment, he cannot be subrogated to the benefit of the mortgage unless he pays the other notes secured thereby. *Rice v. Morris*, 82 Ind. 204.

The surety of a person indebted to the government, who pays such indebtedness, does not succeed to the government's right of priority if there be any further indebtedness of his principal to the government, though on a different account. *Reg. v. O'Callaghan*, 1 Ir. Eq. 439.

In *Williams v. Tipton*, 5 Humph. (Tenn.) 66; 42 Am. Dec. 420, it is held that a judgment creditor has a right in equity to set aside a fraudulent conveyance, and a surety who has satisfied a part of the judgment of such creditor will be substituted to the rights of such judgment creditor to the extent of his payment.

And in *Bowen v. Barksdale*, 33 S. Car. 142, it was held that where a surety on a mortgage note pays part of it, he is entitled to be subrogated to the right of the mortgagee and to receive payment before subsequent judgment creditors.

In *Iowa* it is held that where sureties, who are claiming in a court of equity the right of subrogation, have not paid the demand of the creditor, the court, in the exercise of its equitable power to declare future rights and duties, should order that the sureties be subrogated to the rights of the creditor when they shall have paid the debt of their principal. *Keokuk v. Love*, 31 Iowa 119.

1. Thus, where a father was guardian of his minor children, and after his death they brought suit against the sureties on his bond as guardian to recover a balance due them, it was decided that they, being heirs of their father and liable for his debts to the extent of assets received from him, the sureties should be subrogated to their

rights as wards and allowed to offset the one liability against the other. *Luck v. Atkins*, 53 Ark. 303. See also *Rice v. Rice*, 108 Ill. 199; *State v. Hopper*, 3 Bush (Ky.) 179.

2. *Gedye v. Matson*, 25 Beav. 310; *Motley v. Harris*, 1 Lea (Tenn.) 577; *Spaulding v. Crane*, 46 Vt. 292.

In *Motley v. Harris*, 1 Lea (Tenn.) 577, the court, while recognizing the general rule that a surety is not entitled to the remedies of the creditor upon property conveyed in trust by his principal until the debt is fully satisfied, and that in such cases the creditor alone is entitled to hold and control the debt and the remedies for its recovery, decided that the creditors in a trust deed, other than the one to whom the surety is bound, may not object to any arrangement between such creditor and surety, by which the latter is substituted to the rights and remedies of the creditor under the assignment, whether the surety has entirely satisfied the debt or not.

"The general rule that subrogation will not be allowed for partial payment extends only so far as its reason goes. The reason is that the creditor cannot equitably be compelled to split his security, and give up control of any part until he is fully satisfied. It accords with the limitation that subrogation will not be enforced against a superior equity. But if the debt as to the creditor be satisfied, he has no equity left to be displaced; he has gone out and no one else has any right to object." *Eakin, J., in Schoonover v. Allen*, 40 Ark. 132. The same is intimated in *McConnell v. Beattie*, 34 Ark. 113.

3. *Pigon v. French*, 1 Wash. (U. S.) 278; *Judah v. Judd*, 1 Conn. 309; *Grieff v. Steamboat Stacy*, 12 La. Ann. 8.

The fact that judgment has been recovered against the surety is not sufficient to entitle him to subrogation, he must have paid the judgment. *First Nat. Bank v. Crawford* (Ohio), 2 Cinn. Super. Ct. Rep. 125.

In *Moore v. Topliff*, 107 Ill. 241, it was held that a surety against whom alone judgment had been obtained,

der of the amount accompanied with conditions will not suffice.¹ But it is not necessary that the entire debt should be paid by the surety alone—part may be paid by the surety and part by the principal.² Nor is it necessary that the payment be in money; the note of the surety, though unpaid,³ or anything else that the creditor accepts as an equivalent and in satisfaction of the debt will confer the right of subrogation.⁴

One who is surety for part only of a debt may pay the whole and succeed to the creditor's rights and remedies against those liable for the other part.⁵

c. SURETY A CREDITOR OF PRINCIPAL.—The surety is in equity regarded as a creditor of the principal, and, upon the insolvency of the latter, may retain for his protection, even as against a *bona fide* purchaser, any assets in his hands belonging to his principal; otherwise a surety in such a case would be wholly without remedy, when the plainest principles of justice are in his

might, before paying the debt, file a bill bringing both the principal and the creditors into court, and obtain the benefit of a mortgage executed by the principal to secure the creditors. *Compare* Darst v. Bates, 51 Ill. 439, and Connell v. McCowan, 53 Ill. 363. See also SURETYSHIP, vol. 24.

1. Thus a lessee of lands cannot by tendering the amount of a judgment thereon and demanding an assignment of the judgment entitle himself to subrogation. A tender, in order to amount to payment, must be unconditional. *Forest Oil Co.'s Appeal*, 118 Pa. St. 138.

2. In *Magee v. Leggett*, 48 Miss. 139, the court, in referring to the general rule, said: "We do not understand the rule as requiring that, the 'surety' must make entire payment. It is enough if the creditor has been fully paid, part by the principal debtor and part by the surety. In such case, subrogation will accrue *pro tanto* to the extent of his payment. Such would be the effect if two or more sureties contributed in equal or unequal amounts to the payment." See also *Comins v. Culver*, 35 N. J. Eq. 94; *Vert v. Voss*, 74 Ind. 565, and cases cited in note 1, page 200.

3. *Brandt Sur.*, § 249; *Owen v. McGehee*, 61 Ala. 440; *Pinkston v. Taliaferro*, 9 Ala. 547; *Bausman v. Credit Guarantee Co.*, 47 Minn. 377.

But it is otherwise where it does not appear that the note was received by the creditor as payment, nor even that it was negotiable, so that a presumption might arise that it was received as payment. In such case the right of

subrogation will not arise until payment of the note. *Hoover v. Epler*, 52 Pa. St. 522.

4. *Knighon v. Curry*, 62 Ala. 404; *Keokuk v. Love*, 31 Iowa 119; 2 *Brandt Sur. Ed.* 1891, § 301. See also cases cited in note 1, page 200.

"It is not essential to this right (of subrogation) that the surety should have paid the full amount of the debt in money, provided the creditor be satisfied. If he has discharged the burden, leaving in the creditor nothing further to demand, he will be entitled to subrogation, but only for indemnity to the extent of the money paid or value of the property applied. He may not speculate upon the principal." *Eakin, J.*, in *Schoonover v. Allen*, 40 Ark. 132.

If a surety for a debt on which judgment has been obtained, becomes administrator of the estate of the judgment creditor, he will be considered to have paid the judgment, and will be entitled to foreclose a mortgage executed for his indemnity. *Lane v. Westmoreland*, 79 Ala. 372.

5. *Gerber v. Sharp*, 72 Ind. 553. See generally cases cited in note 1, page 200.

In *Missouri* (contrary to the general doctrine), it is held that a surety for the payment of part of the indebtedness of his principal, by paying that sum, becomes entitled to a proportionate share with the other creditors of the proceeds arising from the sale of the principal debtor's property, and for that purpose may be subrogated to all the rights of the remaining creditors so as to have the benefit of all the securi-

favor.¹ And this relation of debtor and creditor between principal and surety, so as to entitle the latter to avoid a voluntary conveyance by the former, commences at the date of the obligation of suretyship, and not from the time of payment of the debt, though until the latter event he has no technical cause of action against the principal, and consequently no right to be subrogated to the securities held by the creditor.² If the surety is himself indebted to the principal, neither he nor his creditor will be subrogated to the rights of the creditor against the principal, so long as such indebtedness exists,³ but the principal will not be permitted to collect the debt, without first indemnifying the surety, especially if he is shown to be insolvent.⁴ The fact that the surety releases his right of contribution from his co-sureties does

ties in their hands. *Allison v. Sutherland*, 50 Mo. 274.

1. *Battle v. Hart*, 2 Dev. Eq. (N. Car.) 31; *Williams v. Helme*, 1 Dev. Eq. (N. Car.) 151; 18 Am. Dec. 580; *Williams v. Washington*, 1 Dev. Eq. (N. Car.) 137; *Ex p. Reynolds*, 16 Nat. Bankr. Reg. 158; *McKnight v. Bradley*, 10 Rich. Eq. (S. Car.) 557; *Abbey v. Van Campen*, 1 Freem. Ch. (Miss.) 273; *Scott v. Timberlake*, 83 N. Car. 382; *Loughridge v. Bowland*, 52 Miss. 546; *McMillan v. Bull's Head Bank*, 32 Ind. 11; *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398; *Crafts v. Mott*, 5 Barb. (N. Y.) 305; *aff'd* 4 N. Y. 604; *Beaver v. Beaver*, 23 Pa. St. 167; *Moorhead's Appeal*, 32 Pa. St. 297; *McKee v. Sco-bee*, 80 Ky. 124.

2. *Lougridge v. Bowland*, 52 Miss. 546; *Keel v. Larkin*, 72 Ala. 493; *Bragg v. Patterson*, 85 Ala. 233; *Sargent v. Salwood*, 27 Me. 539; *Hatfield v. Merod*, 82 Ill. 113; *Choteau v. Jones*, 11 Ill. 300; 50 Am. Dec. 460. See also *Howe v. Ward*, 4 Me. 195; *Thompson v. Thompson*, 19 Me. 244; 36 Am. Dec. 751; *Carlisle v. Rich*, 8 N. H. 44. See also SURETYSHIP, vol. 24.

3. *Coates' Appeal*, 7 W. & S. (Pa.) 99; *Wright v. Crump*, 25 Ind. 339; *Lewis v. Lewis*, 92 Ill. 237. Compare *Barney v. Grover*, 28 Vt. 391.

But the surety's right of subrogation will not be affected by the fact that the principal has become surety on a note of the surety which was given only for the purpose of raising money to pay the original principal's debt. *Owen's Appeal*, 11 W. N. C. (Pa.) 488.

4. *Mattingly v. Sutton*, 19 W. Va. 19. And it was further held that the assignees of an award made by arbitrators, upon a reference made by a consent-order of the court in a pending case of

the principal against the surety, and upon which award judgment is entered by the court in which the case is pending in favor of the principal against his surety for the amount of such award and costs of suit, stand in no better condition, as against the equities of the surety for indemnity, or his right to apply the amount of such judgment to his relief as such surety upon a liability incurred by him prior to said award, than the principal. In a case of this kind, equity, when the principal is insolvent, may award an injunction to restrain the collection of such judgment, on the application of the surety, though the surety has not paid the debt for which he is such surety; and under certain circumstances the court may perpetuate the injunction. And it would be error to dissolve the injunction, unless it appeared that the principal had discharged and satisfied the liability of the surety, or procured the release and discharge of his surety from such liability, in any event. And when it appears to the court that the surety has paid and discharged his liability and that the amount so paid by him is equal to or greater than the judgment of his principal against him, the court will offset the amount so paid by the surety against the judgment of his principal and perpetuate the injunction.

In *Walker v. Dicks*, 80 N. Car. 263, it was held that a surety, before he has suffered from his suretyship, may use his liability as such as an equitable counterclaim against the debt due from him to his insolvent principal. And this defense will avail him equally against an assignee of the note past due when assigned, or assigned with notice. In the opinion of the court by Ashe, J., it was said: "Our equity

not affect his right to retain funds of the principal in his hands; the sureties may agree among themselves as to how their liabilities shall be shared, without affecting their rights against the principal.¹

d. WHETHER PAYMENT BY SURETY EXTINGUISHES SPECIALTY.—According to the early English rule a bond or other specialty or a judgment, is not extinguished by the payment thereof by the surety, but is in equity preserved for his benefit and protection.² But by the modern rule in *England* the security is deemed *ipso facto* extinguished by the act of payment, thereby preventing the subrogation of the surety thereto—the claim of the latter against the principal being deemed a mere *assumpsit*

courts have been liberal in extending their aid to creditors, and although a surety is not a creditor before he pays his liabilities as such, yet the rights of a creditor have been accorded to him by the beneficent jurisdiction which the courts of equity in this state have assumed on this subject." See also *Scott v. Timberlake*, 83 N. Car. 382.

In *Abbey v. Van Campen*, 1 Freem. Ch. (Miss.) 273, the surety filed his bill in chancery to restrain the collection of a judgment at law against him in favor of the administrator of his principal until the notes on which he was surety were paid. The injunction was granted, and the chancellor, in his opinion at page 275, says: "A court of equity would not permit a plaintiff at law to enforce against the defendant the collection of a debt, when the defendant stood as surety for the plaintiff to an amount greater than that sued for, unless the plaintiff would fully indemnify the defendant against his liability as his surety, and especially if the plaintiff were shown to be insolvent. It would be rank injustice to permit a principal to collect a debt from his surety and at the same time leave his surety to pay a debt for him, without the most distant hope of reimbursement."

But where a surety is liable for several different debts of the same principal, the latter has the right to assign a debt due him by his surety, for the security of any such debt as he may think proper, so that it be equal in amount to the one assigned. And where a surety is privy to a deed of trust which includes as a part of the fund a debt due by him to the trustor, and the deed being greatly to his advantage, makes no objection to the insertion of the debt at the time, he is held to have waived, for a compensa-

tion, any equity he may have had against the insertion of it as part of the trust fund. *Miller v. Cherry*, 4 Jones Eq. (N. Car.) 197.

1. *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274; *Water Power Co. v. Brown*, 23 Kan. 676.

2. *Early English Doctrine.*—In *Ex p. Crisp*, 1 Atk. 133, Lord Hardwicke, said: "Where a surety pays off a debt he is entitled to have from the creditor an assignment of the security to enable him to obtain satisfaction for what he has paid beyond his proportion."

In *Morgan v. Seymour*, 1 Ch. 64, it was decreed that the creditor should assign over his bond to the two sureties to enable them to help themselves against the principal debtor. *Parsons v. Briddock*, 2 Vern. 608, is a very strong case. Here the principal had given bail in an action and judgment was recovered against the bail. Subsequently the surety to the original debt was called upon and paid it, and it was held that he was entitled to an assignment of the judgment against the bail. So that, although the bail was but a surety, as between him and the principal debtor, yet coming in the room of the principal, as to the creditor, it was held that he likewise came in the room of the principal debtor as to the surety. This case establishes that the surety has precisely the same rights that the creditor has and shall stand in his place—a case of entire subrogation. The doctrine of this case received express recognition by the chancellor in *Wright v. Morley*, 11 Ves. 21.

In *Robinson v. Wilson*, 2 Madd. 434, there is a *dictum* that "a surety who pays off a specialty debt shall be considered as a creditor by specialty of his principal."

for money paid to his use and benefit.¹ At present, however, the early rule again prevails by force of act of Parliament.² The principle of the Civil law is absolute and unrestricted substitution; by that law, the debt in favor of the surety is treated, not

1. Modern English Doctrine.—The modern English rule denying the right of the surety to a cession of the debt itself, and to a perfect substitution for the creditor, rests chiefly upon two cases, determined by two of the ablest chancellors of *England*, namely, *Copis v. Middleton*, T. & R. 224, per Lord Eldon, and *Hodgson v. Shaw*, 3 Myl. & K. 183, per Lord Brougham. Neither of these cases questions the rule that a surety is entitled to an assignment of the collateral securities in the hands of the creditor. In the former case, it is said: "It is the general rule in equity that the surety is entitled to the benefit of all the securities which the creditor has against the principal; but then the nature of those securities must be considered. When there is a bond merely, if an action was brought upon the bond, it would appear upon oyer of the bond that the debt was extinguished. The general rule must be qualified, therefore, by considering it to apply to such securities as continue to exist and do not get back upon payment to the person of the principal debtor." In the second case, it is said: "Thus the surety paying is entitled to every remedy which the creditor has. But can the creditor be said to have any specialty, or any remedy on any specialty, after the bond is gone by payment? The surety may enforce any security which the creditor has, but by the supposition, there is no security to enforce, for the payment has extinguished it." And at another place, the court says: "When a person pays off a bond in which he is co-obligor or bound *subsidiaris*, he has at law an action against the principal for money paid to his use, and he can have nothing more. The joint obligation towards the creditor is held to give the principal notice of the payment and also to prove his consent or authority to the making that payment, but beyond this claim, which is on simple contract merely, there exists none against the principal by the surety who pays the debt; nor, when the matter is closely viewed, ought there to exist any other. The obligation by specialty is incurred not towards the surety, even in the event of his paying, but only towards

the obligee; and there is no natural reason why, because I bind myself under seal to pay another's debt, the creditor requiring security of that high nature, I should therefore have his high security against the principal debtor. If I had chosen to demand it I might have taken a similar obligation when I became so bound, and if I omitted to do so I can only be considered as possessing the rights which arise from having paid money for him which I had voluntarily and without consideration undertaken to pay."

Comments on Modern English Doctrine.—The doctrine of the two English cases just stated was examined and repudiated by Nisbet, J., in a most able opinion in *Lumpkin v. Mills*, 4 Ga. 343. In this opinion many cases are reviewed and distinguished. See also *Smith v. Rumsey*, 33 Mich. 183, in which Graves, J., for the court, says, that the reasoning which was attempted to support that view is not satisfactory in itself, nor in harmony with the principles on which the equities of sureties rest, or with the general maxims of the courts; that there are not only individual cases, but classes of cases, in *England*, within the range of the doctrine laid down in the two cases, in which it has been disregarded. And see generally the cases maintaining the contrary view, cited below.

2. Mercantile Law Amendment Act.—Mercantile Law Amendment Act, 19 & 20 Vict., ch. 97, § 5, provides expressly that in all cases where the surety pays off the debt of another, he shall be entitled to an assignment, and shall be entitled to stand in the place of the creditor in any action or other proceeding at law or in equity. This act applies to a contract entered into before its passage, provided a breach of it has taken place, and payment has been made by the surety, after the passage. *In re Cochran's Estate*, L. R., 5 Eq. 209. In this case W, as surety, joined in a bond with C in 1854. The act in question was passed in July, 1856, and in December of this year the condition of the bond was broken and the surety paid the amount due on the bond the following year.

as a paid, extinguished debt, but as sold to him—all its original obligatory force continuing against the principal.¹ In this country, while there are authorities on either side of the question, the decided preponderance of judicial opinion favors the view that the security is not extinguished, but is, in equity, kept alive for the benefit of the surety. In some of the states there must be an actual assignment of the security; in others this is unnecessary, as the surety being considered, upon equitable principles, entitled to an assignment, equity will consider that as done which ought to have been done, and if necessary for his protection, will decree an assignment to be made. Again, in some jurisdictions the assignment may be made either to the surety or to a third person for his benefit; in others, it must be made to a third person, and if made to the surety himself will operate as an extinguishment of the security. The whole subject, with all the distinctions, and the statutory modifications and regulations, is fully set out under a convenient arrangement in the notes.²

It was held that the surety was entitled to rank as a specialty creditor of the principal debtor. And the right of a co-surety thereunder, who has satisfied a judgment obtained by the creditor against the debtor and his sureties, to stand in the place of the judgment creditor, is not affected by the circumstance that he has not obtained actual assignment of the judgment. *In re M'Myn, L. R.*, 33 Ch. Div. 575.

1. 1 Domat Civ. Law (Cush. ed.) B. III, tit. 1, § 3, arts. 6, 7. This rule is adopted in all the countries which derive their jurisprudence from the Civil law.

Of the reasoning upon which the Civil law goes, Mr. Story says: "The reasoning may seem a little artificial, but it has a deep foundation in natural justice." 1 Story Eq. Jur. (13th ed.), ch. 8, § 500.

2. **Specialty or Judgment Not Extinguished by Payment.**—The rule that a bond or other specialty, or a judgment, paid by a surety is not extinguished, but is preserved for his benefit, has been declared or admitted in the following cases:

Arkansas.—*Newton v. Field*, 16 Ark. 216; *Schoonover v. Allen*, 40 Ark. 132.

Delaware.—*Merriken v. Godwin*, 2 Del. Ch. 236; *Dodd v. Wilson*, 4 Del. Ch. 399.

Georgia.—*Lumpkin v. Mills*, 4 Ga. 344, is a leading case on this subject. It was there held that a surety who has paid the debt of his principal due upon an instrument under seal, will in equity, upon the settlement of the es-

tate, be substituted to the rights and position of the creditor, so as to go in as a creditor under that instrument, and not merely as a creditor by open account.

But the security is preserved in equity only and not at law. *Griffin v. Thomas*, 21 Ga. 108; *Elam v. Rawson*, 21 Ga. 139; *Knight v. Morrison*, 79 Ga. 55; *Davenport v. Hardeman*, 5 Ga. 580; *McDougald v. Dougherty*, 14 Ga. 674.

This right of the surety is now affirmed and regulated by statute. *Thomason v. Wade*, 72 Ga. 160; *Burke v. Lee*, 59 Ga. 165.

Illinois.—The surety upon paying the judgment may have the same assigned to a third party to be kept alive for his benefit. *Chandler v. Higgins*, 109 Ill. 602; *Katz v. Moessinger*, 110 Ill. 372; *Rice v. Rice*, 108 Ill. 199; *Allen v. Powell*, 108 Ill. 584. Or he may treat the judgment as satisfied and discharged and resort to an action against his principal, and in the event of his choosing the latter course it is immaterial that there is a formal assignment of the judgment which he had procured to be made. Notwithstanding such assignment the surety may still treat the judgment as discharged and resort to his action. *Katz v. Moessinger*, 110 Ill. 372.

Indiana.—In *Gerber v. Sharp*, 72 Ind. 553, it was said that payment by one who stands in the relation of surety, although it may extinguish the remedy, or discharge the security, as respects the creditor, has not that effect as between the principal debtor

and the surety. And in *Manford v. Firth*, 68 Ind. 83, the court, by Scott, J., said: "It is quite immaterial whether there is in point of fact an assignment of the debt or security or not. For if upon equitable principles the surety is entitled to it, a court of equity would consider that as done which ought to have been done, and if necessary for the protection of the surety, will decree an assignment to be made."

It is in this state, however, expressly provided by statute that the payment of a judgment by a surety shall not discharge the same, but it shall remain in force for the use, etc., of the surety. Civil Code of *Indiana*, 1852, § 676, re-enacted as § 740, Civ. Code, 1881, and known as § 1214, "Revised Statutes, *Indiana*, 1881." See *Jones v. Tinch*, 15 Ind. 308. But the remedy thus prescribed is not available where the judgment is joint, against two defendants—as both are regarded as principals—until the question of suretyship has been ascertained and determined in a judicial proceeding. *Laval v. Rowley*, 17 Ind. 36; *Kane v. State*, 78 Ind. 103; *Shields v. Moore*, 84 Ind. 440; *Johnson v. Amana Lodge*, 92 Ind. 150; *Smith v. Harbin*, 124 Ind. 434. Compare *Stout v. Duncan*, 87 Ind. 383. See also *Scherer v. Schutz*, 83 Ind. 543; *Montgomery v. Vicory*, 110 Ind. 211.

Iowa.—At law a judgment may not be enforced against the principal debtor by execution for the benefit of the surety who has paid it. *Drefahl v. Tuttle*, 42 Iowa 177; *Bones v. Aiken*, 35 Iowa 534. But in the latter case the court says that a surety on making a proper case might perhaps be entitled in equity to be subrogated to the rights of the judgment plaintiff. So in *Searing v. Berry*, 58 Iowa 20, it was held that the surety is entitled to an assignment of the judgment to himself or to another for his benefit, and equity will regard the lien as still subsisting, and will aid the surety in its enforcement. And it was further held that where a surety pays a judgment and receives an assignment of the same, it will be presumed that he paid the full sum due at the time, and that the payment was made on the day that the assignment bears date.

To the same effect is *Johnson v. Bel-den*, 49 Iowa 301. See also *Hollingsworth v. Pearson*, 53 Iowa 53.

And in *Braught v. Griffith*, 16 Iowa 26, it was held that a surety who pays

the debt upon which he is liable, after the creditor has "stated, sworn to, and filed the same" as a claim against the estate of the principal debtor, who has deceased, as required by Rev. Sts. of *Iowa*, § 2393, stands in the place of the creditor as to the steps already taken to enforce the claims against the estate, and is subrogated to his right to prosecute the same to an allowance and to demand payment of the administrator in the class in which it was placed by the original filing.

And in *Schleissman v. Kallenberg*, 72 Iowa 338, it was held that where a judgment is rendered upon a promissory note against the maker, and one who indorsed the note after the payee, and such indorser pays the judgment and takes an assignment thereof to himself, it is not thereby extinguished, but he is subrogated to the rights of the judgment creditor, and may enforce the judgment against the property of the maker. See this case also for a distinction taken between the cases of mere surety and an indorser.

Kansas.—*Harris v. Frank*, 29 Kan. 200 (by statute).

Kentucky.—A surety who has paid a fiduciary debt for his principal is entitled to stand in the place of his principal, and if the debt were a preferred debt under the statute of 1839 for the settlement of estates (3 Stat. Laws, *Kentucky* 340), the surety has the right in equity to the benefit of such preference. But to authorize the substitution there must be proof of the payment of the debt, and that it was paid in discharge of a legal liability. *Schoolfield v. Rudd*, 9 B. Mon. (Ky.) 201; *Muldoon v. Crawford*, 14 Bush (Ky.) 125. Prior to this statute a surety having paid a specialty or judgment debt, did not become a specialty or judgment creditor but was a simple contract creditor and entitled to recover only as such. *Buckner v. Morris*, 2 J. J. Marsh. (Ky.) 121; *Mason County v. Lee*, 1 T. B. Mon. (Ky.) 247.

Section 8, ch. 97, 2 Stanton's Rev. Sts. *Kentucky*, p. 398, entitles the surety on paying a judgment to demand an assignment thereof to himself from the plaintiff or his attorney, and on his refusal to do so may by proper proceedings compel him to make it. And it may be, after the case has gone off the docket and the parties are out of court, the court could make the necessary orders to vest in the surety the right to control the judg-

ment to which the statute entitles him. But it is necessary to the validity of the order that the principal have notice of the application therefor and opportunity to defend and show cause against it. *Veach v. Wickersham*, 11 Bush (Ky.) 261.

A surety is entitled to the assignment as above on demand, but the law does not *per se* make the assignment, and if the assignment is made five years after the payment it will be within the operation of the Statute of Limitations. *Joyce v. Joyce*, 1 Bush (Ky.) 474. The statute just referred to has not been repealed by §§ 479-484, inclusive, of the Civil Code *Kentucky*, referring to the mode of proceeding by motion by sureties against their principals and co-sureties, but is in full force. And where the attorney of the plaintiff acknowledges satisfaction of the judgment by the surety it is proper for the court to order the transfer. *Alexander v. Lewis*, 1 Metc. (Ky.) 407.

Antecedently to the enactment of § 8, ch. 97, 2 Stan. Rev. Sts. *Kentucky*, p. 398, a surety by special contract with the creditor might, in consideration of his payment of the debt, entitle himself to stand in the creditor's place as to both the remedy and dignity of the debt, but without such express contract he stood only as creditor of his principal on an implied contract for reimbursement and was entitled to his principal's incidental equities. *Morrison v. Page*, 9 Dana (Ky.) 433; *Morris v. Evans*, 2 B. Mon. (Ky.) 86; 36 Am. Dec. 591; *Joyce v. Joyce*, 1 Bush (Ky.) 474.

In *Roberts v. Bruce* (Ky. 1891), 15 S. W. Rep. 872, the defendant became surety on his brother's note to enable him to raise money to discharge a judgment against him. Twenty-four days after the payment of the judgment it was assigned to defendant by the judgment creditor in pursuance of an agreement that he should hold it as security. It was held that the judgment was not extinguished by such payment.

Louisiana.—*Sprigg v. Beamen*, 6 La. 63; *Trent v. Calderwood*, 2 La. Ann. 942; *Tardy v. Allen*, 3 La. Ann. 66; *McKee v. Amonett*, 6 La. Ann. 207; *Fluker v. Bobo*, 11 La. Ann. 609; *Connely v. Bourg*, 16 La. Ann. 108. The rule of the Civil law as to subrogation is embodied in the civil code of this state.

Maryland.—While at law payment of a bond by the surety operates as an extinguishment thereof, *Crisfield v.*

State, 55 Md. 192, in equity it operates an assignment of the debt and all legal proceedings upon it, and gives the surety the right to call upon the creditor for an assignment of all securities, and in favor of the surety the debt and all its obligations and incidents are considered as still subsisting. *Hollingsworth v. Floyd*, 2 Har. & G. (Md.) 87; *Norwood v. Norwood*, 2 Har. & J. (Md.) 238; *Southern v. Reed*, 4 Har. & J. (Md.) 307; *Merryman v. State*, 5 Har. & J. (Md.) 423; *Orem v. Wrightson*, 51 Md. 44; *Lawson v. Snyder*, 1 Md. 79; *Grove v. Brien*, 1 Md. 438; *Creager v. Brengle*, 5 Har. & J. (Md.) 234; 9 Am. Dec. 516; *Crisfield v. State*, 55 Md. 192.

Michigan.—*Smith v. Rumsey*, 33 Mich. 183.

Minnesota.—*Folsom v. Carli*, 5 Minn. 333; 80 Am. Dec. 429 (holding that a surety may take an assignment of the judgment and enforce the same against the principal). To the same effect is *Kimmel v. Lowe*, 28 Minn. 265.

For the purpose of indemnity the surety is entitled to be subrogated to all the rights, remedies, and securities of the creditor, and to enforce all his liens, priorities, and means of payment as against the principal. Payment by a surety, although it extinguishes the remedy and discharges the security as respects the creditor, does not have that effect as between the surety and his principal, as between the latter it is in the nature of a purchase by the surety from the creditor. It operates in equity as an assignment of the debt and securities. *McArthur v. Martin*, 23 Minn. 74.

Mississippi.—In *Mississippi*, formerly, a surety paying a judgment against his principal was substituted to all the rights of the plaintiff in the judgment only in equity. *Dinkins v. Bailey*, 23 Miss. 284; *Conway v. Strong*, 24 Miss. 665; but by Code of *Mississippi*, 1871, § 2258, this right is protected at law also. *Swan v. Smith*, 57 Miss. 548. And payment by the surety operates *per se* as a transfer of the judgment. *Dibrell v. Dandridge*, 51 Miss. 55. But in this case it was intimated that the statute did not cover cases in which indorsers had made payment for the principal debtor of a judgment jointly rendered against the debtor and indorser. So to meet this opinion, § 1140, *Mississippi* Code 1880, extends the benefits of, § 2258 Code 1871, now, § 998 Code 1880, to such a

case. *Yates v. Mead*, 68 Miss. 787. In this case it was also held that such subrogation takes place by operation of law upon payment by the surety, and no entry upon the judgment roll or elsewhere showing the payment is necessary. And although upon payment of the execution by the surety the plaintiff's attorney marks the judgment "settled" upon the judgment roll and execution docket, and a third person, though in ignorance of such payment and relying upon the entry, buys land of the principal debtor, this will not defeat the right of the surety to enforce the judgment lien in his own favor against the land, provided the entries were made without his consent and authority.

Missouri.—A surety paying off a judgment is entitled to an assignment of the same. *Benne v. Schnecko*, 100 Mo. 250; *Berthold v. Berthold*, 46 Mo. 557; *Campbell v. Pope*, 96 Mo. 468. He is considered as at once subrogated to all the rights, remedies and securities of the creditor—as substituted in the place of the creditor—and entitled to enforce all his liens, priorities, and means of payment as against the principal. *Furnold v. State Bank*, 44 Mo. 336; *Miller v. Woodward*, 8 Mo. 169; *McCune v. Belt*, 38 Mo. 28; *Seely v. Beck*, 42 Mo. 143.

Nebraska.—*Eaton v. Lambert*, 1 Neb. 339; *Wilson v. Burney*, 8 Neb. 39; *Potvin v. Myers*, 27 Neb. 349.

New Hampshire.—*Low v. Blodgett*, 21 N. H. 121; *Rockingham v. Claggett*, 29 N. H. 292; *Brewer v. Franklin Mills*, 42 N. H. 292; *Edgerly v. Emerson*, 23 N. H. 555; 55 Am. Rep. 207. *Compare Robinson v. Leavitt*, 7 N. H. 99.

New Jersey.—*Durand v. Trusdell*, 44 N. J. L. 597 (by statute).

New York.—The right of the surety is not only that of subrogation pure and simple, but a right to an assignment or effectual transfer of the debt and of the bond or other instrument evidencing the same. *Fielding v. Waterhouse*, 40 N. Y. Super. Ct. 424; *Ellsworth v. Lockwood*, 42 N. Y. 98; *Townsend v. Whitney*, 75 N. Y. 431; *Spieglemyer v. Crawford*, 6 Paige (N. Y.) 252; *New York State Bank v. Fletcher*, 5 Wend. (N. Y.) 85; *Eno v. Crooke*, 10 N. Y. 60. And in his hands a judgment against the principal and surety for the original debt is a subsisting obligation and may be enforced against the principal. Accordingly,

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where a surety paid a judgment recovered against himself and principal and took an assignment thereof for his benefit, it was held that such payment did not extinguish the judgment, but that after the death of the principal, payment of it according to its priority of date out of the assets of the principal debtor might be decreed by the surrogate. *Goodyear v. Watson*, 14 Barb. (N. Y.) 481; and similar decisions were made in *Alden v. Clark*, 11 How. Pr. (N. Y.) 209; *Harger v. McCullough*, 2 Den. (N. Y.) 119 and *Corey v. White*, 3 Barb. (N. Y.) 12; *overruling Bank of Salina v. Abbot*, 3 Den. (N. Y.) 181, and *explaining and questioning Ontario Bank v. Walker*, 1 Hill (N. Y.) 652.

In *Lewis v. Palmer*, 28 N. Y. 271, *Wright, J.*, laid down the rule thus broadly: "It is a well settled principle that a surety who pays a debt for his principal is entitled to be put in the place of the creditor, and to all the means which the creditor possessed to enforce payment against the principal debtor."

In *Clason v. Morris*, 10 Johns. (N. Y. 255, *Spencer, J.*, said: "That a surety who pays a debt for his principal has a right to be put in the place of the creditor and to avail himself of every means the creditor had to enforce payment against the principal debtor, is a principle which I had supposed incontestable."

In *Cheesebrough v. Millard*, 1 Johns. Ch. (N. Y.) 413; 7 Am. Dec. 494, *Chancellor Kent*, observed: "If a creditor to a bond exacts his whole demand of one of the sureties, that surety is entitled to be substituted in his place, and to a cession of his rights and securities as if he were a purchaser, either against the principal debtor or the co-surety." And alluding to this language, *Nisbet, J.*, in *Lumpkin v. Mills*, 4 Ga. 343, says: "Now this *dictum* asserts more than that the surety is entitled to a cession of the collateral securities and to the rights of the creditor thereon. It declares the principle of the civil law that he is to be considered as a purchaser from the creditor of the debt. It, therefore, denies the position of Lord Eldon (in *Copis v. Middleton*, T. & R. 224) that the payment by the surety is an extinguishment of the debt, and, of course, all the conclusions drawn from that position. To show that *Chancellor Kent* is to be understood as going that far, I advert to the fact that

he, in this case, quotes and comments on approvingly, both the Roman law and the old English cases of *Ex p. Crisp*, 1 Atk. 133, and *Morgan v. Seymour*, 1 Ch. 64.³⁷ See also the language of Chancellor Walworth, in *Cuyler v. Ensworth*, 6 Paige (N. Y.) 32, which is more explicit, if possible, than that of Chancellor Kent.

North Carolina.—In order to keep the security on foot when it is a bond or judgment, it is necessary to take an assignment to a third person. *Hanner v. Douglass*, 4 Jones Eq. (N. Car.) 263; *Brown v. Long*, 1 Ired. Eq. (N. Car.) 191; 36 Am. Dec. 43; *Hodges v. Armstrong*, 3 Dev. (N. Car.) 254; *Newbern v. Dawson*, 10 Ired. (N. Car.) 436. In this last case the commissioners of Newbern recovered a judgment against the sheriff and his sureties for the amount of the taxes due the town which he had failed to pay over. Subsequently one of the sureties had the money paid and an assignment made to a third party of the judgment by the attorney of the commissioners, which was afterwards ratified by the commissioners, and a receipt was given by the treasurer of the board to the sheriff to enable him to renew his bond. It was held that the payment of the money and the assignment to a third party of the judgment did not amount in law to a payment and satisfaction of the judgment as against the sureties therein. If such an assignment of the security is taken, the surety may have his redress upon it immediately, in the name of the creditor. *Hodges v. Armstrong*, 3 Dev. (N. Car.) 253.

But if the surety takes an assignment of the judgment to himself, it is thereby satisfied, and his claim is reduced to a simple contract debt. *Briley v. Sugg*, 1 Dev. & B. Eq. (N. Car.) 366; 30 Am. Dec. 172; *Sherwood v. Collier*, 3 Dev. (N. Car.) 380; 24 Am. Dec. 264, and is barred by the period named in the Statute of Limitations in reference to simple contract debts. *Bledsoe v. Nixon*, 68 N. Car. 521.

The 4th section of the Rev. Stats. of *North Carolina*, ch. 113, conferring on the claim of a surety paying the debt for which he is surety, the dignity in the administration of the assets of the principal, which the debt if unpaid would have had, applies to such claim, whether the payment be made before or after the death of the principal. *Drake v. Coltraine*, Busb. (N. Car.) 300.

Ohio.—Where a surety in a judg-

ment against himself and principal pays it to the judgment creditor with the understanding and agreement that the judgment shall continue in force and be assigned to him by the creditor, and procures the assignment accordingly, he may maintain an action to be subrogated to the rights of the creditor in the judgment, and when it becomes dormant, to revive and enforce it in his favor against the principal debtor. *Neal v. Nash*, 23 Ohio St. 483. See also *Dempsey v. Bush*, 18 Ohio St. 376; *Neilson v. Fry*, 16 Ohio St. 552; 91 Am. Dec. 110. This right of the surety is now affirmed and regulated by statute, *Ohio Act*, Feb. 6, 1871 (68 Ohio Laws, §§ 17, 18), which provides in substance that in any case in which a judgment has been, or may be rendered in any court, whether a court of record or not, against two or more persons, in which it is certified that one or more of such persons against whom such judgment is rendered, is or are surety or sureties, such surety or sureties, if he or they shall pay or have paid, such judgment or any part thereof shall, to the extent of such payment, stand in the place of, and have all the rights and remedies against, the principal debtor or debtors that the plaintiff therein had at the time of such payment, and if the judgment at the time of such payment is or shall thereafter become dormant, the sureties so paying shall have the same right to revive it that the plaintiff would have, had the payment not been made. Under this statute, it was held that where, in the record of a judgment against three persons, it appears that on motion and by consent of the parties the judgment is to stand against one as a surety only, this is a sufficient certificate that he is such surety to authorize him to maintain an action to revive such judgment after it has become dormant. The statute was passed and took effect after payment by such surety, and after the judgment became dormant, but before the right in equity to be subrogated was barred by the ten-year limitation prescribed by the civil code. It was held that such surety could maintain an action to revive the same in his own name to the same extent as the plaintiff in the judgment could if it had not been paid, notwithstanding more than ten years had elapsed since payment by the surety. *Peters v. McWilliams*, 6 Ohio St. 155.

And in *Hill v. King*, 48 Ohio St. 75,

it was held that a surety who pays off a judgment against himself and principal has the right, though not certified as such in the record of the judgment, to be substituted to the rights of the creditor against the principal and all others standing in his place. And this right is not affected by *Ohio* R. St., § 5836; the purpose of that statute was, not to limit, but to enlarge the rights of the surety.

Pennsylvania.—*Springer v. Springer*, 43 Pa. St. 518; *Himes v. Keller*, 3 W. & S. (Pa.) 401; *Erb's Appeal*, 2 Pen. & W. (Pa.) 296; *King v. Blackmore*, 72 Pa. St. 347; 13 Am. Rep. 684; *Duffield v. Cooper*, 87 Pa. St. 443; *Brown v. Black*, 96 Pa. St. 482.

Although actual payment discharges a bond, judgment, or other incumbrance at law, it does not in equity when justice requires that it be kept alive for the safety of the paying surety. *Fleming v. Beaver*, 2 Rawle (Pa.) 128; 19 Am. Dec. 629; *Wright v. Grover*, etc., *Sewing Mach. Co.*, 82 Pa. St. 80; *Morris v. Oadford*, 9 Pa. St. 498; *Cottrell's Appeal*, 23 Pa. St. 294; *Hess' Estate*, 69 Pa. St. 272; *McCormick v. Irwin*, 35 Pa. St. 111.

The surety may pay the debt and take an equitable assignment and keep it on foot and collect it from the principal debtor. *Cochran v. Shields*, 2 Grant's Cas. (Pa.) 437.

An actual assignment is unnecessary. The right of substitution is the substantial thing; the actual substitution is unimportant. The right of substitution being shown, and the surety having paid the debt, succeeds by operation of law to the rights of the creditor. *Wright v. Grover*, etc., *Sewing Mach. Co.*, 82 Pa. St. 80; *Fleming v. Beaver*, 2 Rawle (Pa.) 128; 19 Am. Dec. 629; *Duffield v. Cooper*, 87 Pa. St. 443.

In *Bailey v. Brownfield*, 20 Pa. St. 41, it is held that a surety who has paid a debt secured by judgment against the principal, and who is in other respects entitled to subrogation, may revive the judgment without first obtaining a decree of substitution and may have his right tried on the *scire facias*. To the same effect is *Richter v. Cummings*, 60 Pa. St. 441.

In *Gossin v. Brown*, 11 Pa. St. 527, it was said that while payment by a surety with intent to discharge the security may operate to extinguish it in equity as well as at law, yet such an intent is not to be presumed without

proof of its existence. It is difficult in any case to conceive the object of a surety to be extinguishment in detriment of his own interest, and therefore payment by him is *prima facie* to be accepted as intended for personal relief, leaving his remedy untouched. To this effect are all our authorities; and from them may be deduced the general rule, that where there are no special circumstances manifesting a determination to obliterate the original obligation, and to destroy the securities taken for its payment, equity will regard the debt as still existing at the option of the surety.

South Carolina.—*Thomson v. Palmer*, 3 Rich. Eq. (S. Car.) 139; *Smith v. Swain*, 7 Rich. Eq. (S. Car.) 112; *Wilson v. Wright*, 7 Rich. (S. Car.) 399; *King v. Aughtry*, 3 Strobb. Eq. (S. Car.) 149; *E* p. Ware*, 5 Rich. Eq. (S. Car.) 473; *Lenoir v. Winn*, 4 Desaus. (S. Car.) 65; *Kinard v. Baird*, 20 S. Car. 377; *Sutton v. Sutton*, 26 S. Car. 33; *Garvin v. Garvin*, 27 S. Car. 472. But see *Pride v. Boyce*, *Rice's Eq.* (S. Car.) 275; 33 Am. Dec. 78.

In *Perkins v. Kershaw*, 1 Hill Eq. (S. Car.) 235, separate judgments were obtained against the principal and surety for the same debt, and the latter paid the judgment against himself and thereupon the sheriff entered satisfaction on both executions, and the surety was allowed to set aside the entry of satisfaction on the judgment against the principal, and to set it up as a lien on his estate. Although in this case no judgment was rendered to the extent that a surety may be substituted for the creditor as to the identical debt paid, nevertheless the court employed language so general and sweeping as to imply that position. It said: "The surety who pays the debt of his principal has the right to be remitted to all the rights and securities of the creditor. He is, in equity, substituted for the creditor."

Tennessee.—While the surety paying off a judgment is not substituted to the rights of the judgment creditor in such a sense as that an execution may issue upon the judgment in his favor as an assignee of the judgment, *Uzzell v. Mack*, 4 Humph. (Tenn.) 319; 40 Am. Dec. 648; *Miller v. Porter*, 5 Humph. (Tenn.) 294; *Topp v. Branch Bank*, 2 Swann (Tenn.) 184, yet a surety who pays money for his principal may be substituted to the lien which the creditor had on the property

of the principal debtor, and to all the rights of the judgment creditor. *McNairy v. Eastland*, 10 Yerg. (Tenn.) 310; *Wade v. Green*, 3 Humph. (Tenn.) 547; *Blittick v. Wilkins*, 7 Heisk. (Tenn.) 307; *Rodes v. Crockett*, 2 Yerg. (Tenn.) 346; 24 Am. Dec. 489.

A judgment creditor has the right in equity to set aside a fraudulent conveyance, and a surety who has satisfied a part of the judgment of such creditor may be substituted to the right of such judgment creditor to the extent of his payment. *Williams v. Tipton*, 5 Humph. (Tenn.) 66; 42 Am. Dec. 420. And when a judgment is had against principal and surety and the execution issues against both, the surety may pay off the execution and by contract with the creditor cause to be enforced the execution upon the judgment against the principal debtor; but if held up by the surety to hinder and delay other creditors of the principal debtor, it will be fraudulent and void as to creditors. *Floyd v. Goodwin*, 8 Yerg. (Tenn.) 484; 29 Am. Dec. 130.

Texas.—The surety is entitled upon payment of the debt not only to have the full benefit of all the collateral securities both of an equitable and legal nature which the creditor has taken as an additional pledge for his debt, but he is entitled to be substituted as to the very debt itself to the place of the creditor, and to have it assigned to him, and equity considers that as done already which ought to be done where it is necessary to sustain the action. *Sublett v. McKinney*, 19 Tex. 438; *Jordan v. Hudson*, 11 Tex. 82; *Tutt v. Thornton*, 57 Tex. 35; *overruling Holliman v. Rogers*, 6 Tex. 97; *Murphy v. Gage* (Tex. 1893), 21 S. W. Rep. 396.

Virginia.—*Rodgers v. McCluer*, 4 Gratt. (Va.) 81; 47 Am. Dec. 715; *Leake v. Ferguson*, 2 Gratt. (Va.) 419; *Watts v. Kinney*, 3 Leigh (Va.) 272; 23 Am. Dec. 266; *Hill v. Manser*, 11 Gratt. (Va.) 522; *Carr v. Glascock*, 3 Gratt. (Va.) 343; *Miller v. Pendleton*, 4 Hen. & M. (Va.) 436; *Tinsley v. Oliver*, 5 Munf. (Va.) 419; *Tinsley v. Anderson*, 3 Call (Va.) 329; *Coffman v. Hopkins*, 75 Va. 645; *Bank of Old Dominion v. Allen*, 76 Va. 200.

The leading case in *Virginia* is *Lidderdale v. Robinson*, 2 Brock. (U. S.) 253, determined by Marshall, C. J., on the circuit, and later taken up to the supreme court. The case was this: R. and S. were joint indorsers for one T. on a

bill of exchange drawn by him. They took up the bill and S. paid more than his moiety. His administrators filed a bill to compel R. to reimburse him the excess of his payment over and above his moiety. R. being largely in debt and his assets being likely to prove insufficient to pay the whole, the right of priority became a question among the creditors. Under a statute of *Virginia* protested bills after the death of the drawer or indorser were made of equal dignity with judgments, and under this statute, and also upon equitable principles, the executors of S. claimed to be, by substitution for the creditor, let in to the dividend as a judgment creditor of R. to the extent of his payment above one-half of the debt. It was contended that he was entitled merely as a creditor by open account. It will be perceived that the statute did not affect this question; that only gave the bill the dignity of a judgment. It did not affect the question of substitution. Chief Justice Marshall held that the surety was subrogated to the rights of the creditor on the bill of exchange, and that he was entitled to share in the distribution of R.'s assets as a judgment creditor. He placed his opinion upon the broad ground of equity springing out of the relationship of the parties to the bill of exchange, and the fact of payment by the surety, irrespective of any assignment, or of any idea about the extinguishment of the debt. "The claim of the surety," says that eminent judge, "is clothed in equity with the legal garb with which the original contract is invested." Upon a division of the district bench this case went up to the supreme court, *Lidderdale v. Robinson*, 12 Wheat. (U. S.) 594, which unanimously sustained the decision of Chief Justice Marshall. There is a well-known rule of the supreme court, that if the law of the state is well settled, to determine questions originating altogether in that state according to that law (See *United States Courts*); a uniform course of decisions in *Virginia* might have been considered by the supreme court as settling a local rule upon this subject. Doubtless they did consider the law as established there, but to show that the decision was not founded upon the local law alone, the court says: "That this, then, is the settled law of the state in which this contract and this cause originated cannot be doubted. But we

feel no inclination to place our decision upon that restricted ground, since we are well satisfied with its correctness on a general principle, and on authority of great respectability in other states."

In *Eppes v. Randolph*, 2 Call (Va.) 125, the surety of a bond debtor discharged the debt but took no assignment of the bond and filed his bill to charge the real estate of his principal upon the ground that he succeeded to all the rights of the creditor by the mere fact of payment. The right was resisted upon the ground that he had taken no assignment of the bond. The court decided that he was entitled, and decreed accordingly.

Tucker, J., in delivering the opinion of the court in *Powell v. White*, 11 Leigh (Va.) 309, says: "We do not, in our courts, place the surety in the shoes of the bond creditor where he has paid off the bond in his principal's lifetime. We still consider him a creditor by simple contract. There is at that time no superior dignity in one debt over the other. There is no right, no privilege of the creditor to which the surety can be subrogated, for though the bond should bind the heirs, yet during the debtor's life it cannot affect the realty. And as to his personalty, as well as realty, all creditors have, during his life, the same privilege. Substitution or assignment is, therefore, useless. . . . We apply the principle only where the payment is after the principal's death." Quoted and followed in *Kendrick v. Forney*, 22 Gratt. (Va.) 748. Also followed in *Cromer v. Cromer*, 29 Gratt. (Va.) 280, where it was held that a bond on which principal and surety are both bound, once paid by the surety in the lifetime of the principal without assignment by the creditor or agreement to assign, is forever dead as a security as well in equity as at law; there can be no subrogation in such a case.

Wisconsin.—*German Am. Sav. Bank v. Fritz*, 68 Wis. 390 (especially if the surety has taken an assignment of the judgment).

Payment by Surety Extinguishes the Security.—The following authorities hold that the surety on paying the debt of the principal will be entitled only to the collateral securities held by the creditor; that by the payment of the judgment or specialty by the surety, it is extinguished.

United States Circuit Court.—*Find-*

lay v. U. S. Bank, 2 McLean (U. S.) 44; *Dennis v. Rider*, 2 McLean (U. S.) 451; *McLean v. Lafayette Bank*, 3 McLean (U. S.) 587; *U. S. v. Preston*, 4 Wash. (U. S.) 486.

Alabama.—In an early case it was held that an execution would be enforced for the benefit of a surety who had paid it. *Clemens v. Prout*, 3 Stew. & P. (Ala.) 345. See also *Lyon v. Bolling*, 9 Ala. 463; 44 Am. Dec. 444. But later it was held that the surety cannot avail himself of the instrument on which he is surety by its payment—by that act the security is discharged; it ceases to exist and the payment will not, even in equity, be considered an assignment; the surety merely becomes the creditor of his principal to the amount paid for him. *Foster v. Trustees of the Athenaeum*, 3 Ala. 302; *Morrison v. Marvin*, 6 Ala. 797; *Sanders v. Watson*, 14 Ala. 199; *Houston v. Branch Bank*, 25 Ala. 250; *Smith v. Harrison*, 33 Ala. 706. Even though he takes an assignment. *Preslar v. Stallworth*, 37 Ala. 402. See also *Bartlett v. McRae*, 4 Ala. 688; *Hogan v. Reynolds*, 21 Ala. 56; 56 Am. Dec. 236. But by § 3157, *Alabama Code*, when a surety has paid a judgment rendered against his principal and himself and taken an assignment of it to himself, he may assert in law or equity any lien or right against the principal debtor which the plaintiff might have asserted had the debt not been paid. And this includes the right to file a bill in equity to set aside a fraudulent conveyance executed by the principal debtor and to subject the property conveyed to the payment of the debt. *Bragg v. Patterson*, 85 Ala. 233. See also *Lewis v. Faber*, 65 Ala. 460.

But the assignment, to confer the statutory right, must be in writing, made by the plaintiff in the judgment, or his agent or attorney of record. *Blackman v. Joiner*, 81 Ala. 344.

And the statute, being in derogation of the principles of the common law, must be strictly construed as to the rights created by it. Accordingly where the payment was made by the surety before its enactment, it was held to operate an extinguishment of the judgment, giving the surety no standing in a court of equity as a judgment creditor. *Vanderveer v. Ware*, 65 Ala. 606.

Maine.—In *Norton v. Soule*, 2 Me. 341, it was held that the payment by a surety of money due from his princi-

c. SUBROGATION TO RIGHT OF SET-OFF.—(See also SET-OFF, vol. 22, p. 326).—Any right of set-off accruing to the principal may be availed of by the surety, if it grows out of the transaction in respect of which his obligation was assumed;¹ but it is otherwise if it grows out of a separate transaction.² But the

pal did not extinguish the security, but entitled the surety to succeed to all the rights of the creditor against the principal. But a contrary doctrine seems now to obtain in this jurisdiction. *Whittier v. Heminway*, 22 Me. 238; *Morse v. Williams*, 22 Me. 17; 38 Am. Dec. 309.

Massachusetts.—*Adams v. Drake*, 11 Cush. (Mass.) 504; *Hammett v. Wyman*, 9 Mass. 138; *Brackett v. Winslow*, 17 Mass. 153; *Pray v. Maine*, 7 Cush. (Mass.) 253.

Nevada.—*Frevert v. Henry*, 14 Nev. 191.

Vermont.—Payment of the debt by the surety extinguishes all liens or securities created or obtained in the proceedings to enforce its collection at law. *Moore v. Campbell*, 36 Vt. 361. But it seems that the surety may procure a third party to purchase the debt and take an assignment, and this will keep the debt on foot so as to enable him to get the benefit of the security. *Ætna Ins. Co. v. Wires*, 28 Vt. 93; *Bradley v. French*, Super. Ct., Windsor County, not reported.

1. *Hiner v. Newton*, 30 Wis. 640; *McDonald Mfg. Co. v. Moran*, 52 Wis. 203, declaring indorser of a note subrogated to rights of maker for breach of warranty of a chattel for which the note was given; *McHardy v. Wadsworth*, 8 Mich. 350; *Waterman v. Clark*, 76 Ill. 428; *Murphy v. Glass*, L. R., 2 P. C. 408; *Bechervaise v. Lewis*, L. R., 7 C. P. 372; *Cole v. Justice*, 8 Ala. 793; whether legal or equitable, *Jarratt v. Martin*, 70 N. Car. 459; *Baines v. Barnes*, 64 Ala. 375; *accord*, *Springer v. Dwyer*, 50 N. Y. 19; *Lyon v. Tallmadge*, 14 Johns. (N. Y.) 501; *Gill v. Morris*, 11 Heisk. (Tenn.) 614; 27 Am. Rep. 744; *Rubey v. Watson*, 22 Mo. App. 428; *Harrison v. Phillips*, 46 Mo. 520; *Homer v. Savings Bank*, 7 Conn. 478; *Rodes v. Crockett*, 2 Yerg. (Tenn.) 346; 24 Am. Dec. 489; *Slayback v. Jones*, 9 Ind. 470; *Turner v. Simpson*, 12 Ind. 413; *Myers v. State*, 45 Ind. 160; *Newell v. Salmons*, 22 Barb. (N. Y.) 647; *Stewart v. Levis*, 42 La. Ann. 37.

And the principal may set off a sub-

sequent liability to him on the part of the surety, against the surety's demand for subrogation; as, when the principal afterwards becomes surety for his surety and as such discharges a liability of the latter. *Harrington v. Fulton*, 5 Del. Ch. 492.

A note signed by a principal and his surety may be set off against a note payable to the principal alone; the debt in such case being considered that of the principal only. *Brown v. Warren*, 43 N. H. 435; *Boardman v. Cushing*, 12 N. H. 119; *Andrews v. Varrell*, 46 N. H. 17.

If a stranger procures an injunction to a foreclosure and gives an injunction bond conditioned to pay the mortgage debt, and the injunction be dissolved, he cannot claim to be subrogated to defenses which the mortgagor might make against the mortgage, nor any other defense except performance of the covenants or such legal defense as would overthrow the bond itself. *Lewis v. City Nat. Bank*, 72 Ill. 543.

An executor who is charged with the *devastavit* of his co-executor, and satisfies the same, will be subrogated to any demands on the part of such co-executor against the estate. *Albro v. Robinson* (Ky. 1892), 19 S. W. Rep. 587.

One who, as surety, has been compelled to pay a bond of an intestate, will, if judgment has been recovered against him on a debt due by him to the intestate, be entitled to subrogation to the rights of the bond creditor against the estate of the intestate, and to set off against the judgment such sum as the bond creditor would have been able to collect from the estate if it had been solvent. *Dorsheimer v. Bucher*, 7 S. & R. (Pa.) 9.

In an action against a surety on a guardian's bond, he may make any defense which the guardian might make. *Hughart v. Spratt*, 78 Ky. 313.

2. *Gillespie v. Torrance*, 25 N. Y. 306; 82 Am. Dec. 355; *aff'd* 4 Bosw. (N. Y.) 36; *La Farge v. Halsey*, 1 Bosw. (N. Y.) 171; *Lasher v. Williamson*, 55 N. Y. 619; unless the principal is insolvent, *Morgan v. Smith*, 70 N.

"separate transaction" rule does not apply if the principal has availed himself of the set-off in a joint action against himself and the surety.¹ This privilege has been held not to extend to equitable defenses accruing to the principal by reason of the creditor's breach of contract—*e. g.*, a vendor's breach of his contract to convey good title.²

f. HOW FAR SUBROGATION WILL BE CARRIED.—Indemnification and not profit is the measure of the surety's recourse against his principal—he will not be permitted to speculate in the obligations of his principal.³ Accordingly, if he compromises with the creditor and settles the debt by payment of a part,⁴ or pays it in depreciated currency, warrants, or notes of banks or other institutions, the general rule is that he will be entitled to claim from the principal only the actual amount paid.⁵ And in the cases of depreciated currency, warrants, and notes, it will be assumed that he paid only what is shown to be their market value, unless he proves the contrary.⁶ Where the sureties in an action by the creditor against them, plead and have allowed a set-off to a part of his claim, their right of subrogation will not be limited to the amount of the judgment against them for the balance, but will extend to the whole amount of the creditor's

Y. 537; *Coffin v. McLean*, 80 N. Y. 560; *accord*, *Emory v. Baltz*, 22 Hun (N. Y.) 434; *Vastine v. Dinan*, 42 Mo. 269; *State v. Modrell*, 15 Mo. 421; *Thalheimer v. Crow*, 13 Colo. 397.

1. *Crist v. Brindle*, 2 Rawle (Pa.) 121; *Wartman v. Yost*, 22 Gratt. (Va.) 595; *Woods v. Carlisle*, 6 N. H. 27; *Mahurin v. Pearson*, 8 N. H. 539; *citing* *Bourne v. Benett*, 4 Bing. 423; 13 E. C. L. 27; and *Ex p. Hanson*, 12 Ves. 349; *Himrod v. Baugh*, 85 Ill. 435; *Concord v. Pillsbury*, 33 N. H. 310; *Brundridge v. Whitecomb*, 1 Chip. (Vt.) 180; *Harris v. Rivers*, 53 Ind. 216; *Springer v. Dwyer*, 50 N. Y. 19; *Bathgate v. Haskin*, 59 N. Y. 533; *Waterman, Set-off*, § 237.

2. *Lewis v. McMillen*, 41 Barb. (N. Y.) 420; *Henry v. Daley*, 17 Hun (N. Y.) 210; *Putnam v. Schuyler*, 4 Hun (N. Y.) 166; *Ross v. Woodville*, 4 Munf. (Va.) 324; *Lyon v. Leavitt*, 3 Ala. 430.

3. *Schoonover v. Allen*, 40 Ark. 132. See also cases cited in the succeeding notes.

4. *Pickett v. Bates*, 3 La. Ann. 627.

5. *Dinkgrave's Succession*, 31 La. Ann. 703; *Gillespie v. Creswell*, 12 Gill & J. (Md.) 36; *Martindale v. Brock*, 41 Md. 571; *Blake v. Traders' Bank*, 149 Mass. 250; *Kendrick v. Forney*, 22 Gratt. (Va.) 748; *Scott v. Scott*, 83 Va.

251; *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 457; *Crozier v. Grayson*, 4 J. J. Marsh. (Ky.) 514; *Jordan v. Adams*, 7 Ark. 348; *Feamster v. Withrow*, 9 W. Va. 296; *Butler v. Butler*, 8 W. Va. 674. In this last case, *Moore, J.*, for the court, said: "Repeated adjudications by the highest courts, both at law and in equity, have established the principle, recognized by standard text writers as founded upon reason and justice, that a surety who, without fault of his own, pays the debt of his principal, has a right to reimbursement by the principal. But the surety is not entitled to recover from the principal a greater amount than he has paid for him, because it is his duty to make the best terms he can for him; and it would be in violation of reason and justice to permit him to speculate upon the debt of his principal. Although the surety, in paying the debt, acts *ex necessitate*, he, nevertheless, acts in behalf of his principal for whom he became liable, and upon the like principle of agency, in settling the debt, he cannot demand more than he has paid, with interest from the time of payment, and necessary costs."

6. *Dinkgrave's Succession*, 31 La. Ann. 703; *Butler v. Butler*, 8 W. Va. 674; *Feamster v. Withrow*, 9 W. Va. 296.

claim.¹ This subject is fully treated elsewhere in this work, to which reference is now made.²

g. VARIOUS INSTANCES OF SURETYSHIP.—(1) *Sureties of Fiduciaries*.—The sureties of a fiduciary who are compelled to satisfy a liability occasioned by his default, *devastavit*, or breach of trust, will be subrogated to all the rights and remedies of the *cestuis que trustent*, creditors or other beneficiaries, against the fiduciary and those participating in the default, *devastavit*, or breach of trust.³ And although the general rule is, that the right

1. *Keokuk v. Love*, 31 Iowa 119.

2. See the article SURETYSHIP, where there is a full collection of cases and many illustrations.

3. *Fox v. Alexander*, 1 Ired. Eq. (N. Car.) 340; *Walker v. Crowder*, 2 Ired. Eq. (N. Car.) 478; *Wilson v. Doster*, 7 Ired. Eq. (N. Car.) 231; *Harris v. Harrison*, 78 N. Car. 202; *Thompson v. Humphrey*, 83 N. Car. 416; *Pierce v. Holzer*, 65 Mich. 263; *Edmunds v. Venable*, 1 Patt. & H. (Va.) 121; *McClelland v. Davis*, 4 Lea (Tenn.) 97; *Wernecke v. Kenyon*, 66 Mo. 275.

In *Blake v. Traders' Nat. Bank*, 145 Mass. 13, the trustee pledged to a bank, shares of stock, the property of the trust estate, as security for the payment of an individual debt due from him to the bank. The certificate and assignment of the shares showed that they were held in trust. The bank was afterwards organized as a national bank, and received the shares of stock, and by the request of the trustee sold them and applied the proceeds to his debt; the trust estate receiving no benefit therefrom. The trustee was removed and a new one appointed in his stead. A surety on the first trustee's bond was compelled, in an action upon the bond brought in the name of the probate judge, to make good to the trust estate the value of the stock. It was held that the surety was entitled to be subrogated to the rights of the new trustee and of the *cestuis que trustent*, and could maintain a bill in equity against the national bank to recover the amount so paid by him. See also *Pinckard v. Woods*, 8 Gratt. (Va.) 140.

The surety of a defaulting administrator, being compelled by the succeeding administrator to pay the amount of notes belonging to the estate which were illegally transferred, is entitled to be subrogated to the rights of such succeeding administrator (*de bonis non*) to an amount equal to the payment made

by him upon the said judgment, with interest. *Cowgill v. Linville*, 20 Mo. App. 138.

In *North Carolina*, where an administrator, being about to leave the state, deposits the funds of the estate with a person in trust to pay the next of kin of the intestate, the sureties of such administrator against whom recoveries have been had by the next of kin, may call upon this trustee for an account of the funds so deposited with him, and be subrogated to the rights of such next of kin as have made them responsible. *Kennedy v. Pickens*, 3 Ired. Eq. (N. Car.) 147.

In *Arkansas*, the sureties on a deceased guardian's bond who are compelled to make good to the ward his money in the hands of the guardian at the time of his death, are entitled to be subrogated to the ward's remedies against the heirs and representatives of the deceased guardian, and subject, as he might have done, the guardian's homestead to the satisfaction of the demand. *Gilbert v. Neely*, 35 Ark. 25; *State v. Atkins*, 53 Ark. 303.

A surety for the trustees of a church on their note for the payment of money advanced to build the church, who pays the obligation of the trustees, is entitled to be subrogated to their rights to enforce payment of the debt against the church. *Bushong v. Taylor*, 82 Mo. 660.

Sureties of an administrator who are compelled to pay to his successor a judgment against them for property of the estate which came to their principal's hands, will be subrogated to the rights of their insolvent principal, and of the heirs who have been paid in full by their principal, in assets in the hands of the successor—no decree of distribution having been made—and to receive the amount of such moneys due to their principal and the heirs. After the debts of the estate have been paid up, a bill in equity may be main-

to subrogation does not arise until the default of the principal has been made good, yet it seems that if he is insolvent, or there has been fraud, subrogation will be enforced before payment.¹

tained for this purpose. The rights of the sureties in such moneys are superior to the rights of the principal and his assignee, and of the heirs who have received their share of the estate, and such moneys in the hands of the subsequent administrator are in the nature of a trust fund for the sureties. *Stetson v. Moulton*, 140 Mass. 597.

If an administrator, who is also a residuary devisee of lands charged with the payment of testator's debts, sells the lands and fails to pay the debts, and payment by the surety on his official bond be compelled, such surety will be subrogated to all the rights of the creditors against the purchaser chargeable with notice of the creditors' rights. *Scott v. Patchin*, 54 Vt. 251.

The surety of an administrator who pays a debt of the intestate which the administrator had become bound to pay, is entitled to the same lien on the estate which the administrator would have had, had he paid the debt. *Gowing v. Bland*, 2 How. (Miss.) 813.

In *Wheeler v. Hawkins*, 116 Ind. 515, an assignee in a voluntary assignment, without authority, but in good faith, paid out of the general fund interest due on a mortgage on the trust estate, upon the parol agreement that if the general creditors or the court declined to ratify it, the money should be refunded. It was held that this use of the fund was a *devastavit* of the estate for which the trustee was liable on his bond to the general creditors, and upon payment thereof by his sureties they were entitled to be substituted to the rights of the creditors and the assignee, and to enforce the agreement, which was supported by sufficient consideration, against the mortgagee, and for such purpose could properly be admitted as co-plaintiffs with the assignee and recover a joint judgment against the mortgagee.

The surety of an administrator who has been compelled to answer to the creditors and distributees, or either, for the default of his principal resulting from a misapplication of the funds of the estate, is entitled to be subrogated to their rights against one who has knowingly contributed to the default by taking from the administrator the assets *mala fide* or without value.

Rhame v. Lewis, 13 Rich. Eq. (S. Car.) 269.

In *McNeil v. Morrow*, Rich. Eq. (S. Car.) 172, it was held that where a guardian takes a conveyance of property to himself in satisfaction of a debt due to his ward, or to himself, as guardian, and of other debts, the ward may treat it as so much money received if he chooses, but he has also an equity to have satisfaction of his debt out of the property itself. And if he elects to treat it as a receipt by his guardian of so much money, and upon the default of the guardian, exacts payment thereof from the latter's surety, the surety is entitled to be subrogated to the ward's rights against the guardian, and may set up for his indemnity "the claim which the ward had from the receipt of the property in satisfaction of a debt belonging to him," and to enforce it against the guardian and his individual creditors.

But the administrator of a surety on a guardian's bond, having satisfied it, is not entitled to a dividend from the assignee of the guardian under an assignment for benefit of creditors made before the breach of his bond to the probate court, by substitution to the rights of the probate court; the court not being a creditor at the time of the assignment. *In re Church*, 16 R. I. 231.

In *Massachusetts* the sureties of an administrator who have been compelled to pay a judgment recovered on his bond by the heirs, cannot maintain an action against an agent of the administrator to subject moneys belonging to the estate in his hands, because the heirs themselves could not maintain such an action, their remedy being confined to an action on the administrator's bond. *Winslow v. Otis*, 5 Gray (Mass.) 360.

In *Clark v. Williams*, 70 N. Car. 679, it was held that a surety on an administration bond who pays one-half of a debt recovered against the insolvent administrator, will not be subrogated to the rights of the creditor whose debt he has discharged, but to the rights of the administrator for whom the debt was paid. See *supra*, this title, *When Right to Subrogation Becomes Complete*.

1. The sureties of an insolvent fidu-

The surety of a guardian who is compelled to make good to the ward or his personal representative the defalcation of his principal, will, in equity, be subrogated to the ward's right to enforce a resulting trust against the guardian, arising out of the purchase by the latter of land with the funds of the ward, and may have such lands sold for his reimbursement.¹

Where a trustee *bona fide* incurs expense, or pays out money in behalf of the trust fund, to realize on same, and the surety has to make good the expenditure, the latter is entitled to be subrogated to the rights of the trustee to reimbursement out of the trust fund.²

It has been held that when the surety is bound to make good, money owing by the guardian upon his bond, he need not wait until judgment or execution, but may pay at once and succeed to all the securities of the creditors or beneficiaries in the bond, and also to all the securities in the hands of his co-sureties, although they were intended for the latter's indemnification alone, unless he consented that they might be given to his exclusion. But in such a case the surety, by paying voluntarily, undertakes the burden of establishing the fact of his obligation to pay.³

(2) *Sureties on Official Bonds*.—The sureties on the official bond of a sheriff, upon paying a judgment against him for making an erroneous seizure, will be subrogated to his rights in respect of an indemnity bond demanded and received by him of the judgment creditor before making the levy.⁴ And the sureties, upon pay-

ciary, upon a breach of trust by their principal, will in equity be entitled to all the remedies and securities that were in the power of the *cestuis que trustent*, or creditors, against one who co-operated in the breach of trust, and this even before they have paid to the *cestuis que trustent* or creditors the amount misapplied by their principal. *Bunting v. Ricks*, 2 Dev. & B. Eq. (N. Car.) 130; 32 Am. Dec. 699; *Powell v. Jones*, 1 Ired. Eq. (N. Car.) 337.

In *Davidson v. Crisp* (Tenn. Jackson, April term, 1874), a guardian had received money on a life policy on the father as the fund of his wards. Certain creditors of the father induced the guardian to appropriate this fund to the payment of debts held by them against the father. It was charged and shown to have been a fraudulent misappropriation of the funds; and the sureties of the guardian when sued for an account, the guardian being insolvent, asked to have this fund thus fraudulently converted, collected and appropriated to their exoneration, which was done. The principle applied was, that the sureties were entitled to all the remedies for their in-

demnity that the creditor, the ward in this case, might have enforced in their favor, the guardian being insolvent. The money was decreed to be collected from the parties who had fraudulently obtained it, and applied to their exoneration before payment on their part.

Sureties of a guardian are entitled to be subrogated to all the remedies of the ward against their principal even before payment, where the principal is insolvent, but they stand no higher than the ward, and must take his remedies with all the equities and limitations existent against him. *Adams v. Gleaves*, 10 Lea (Tenn.) 367.

For the general rule as stated above, see *supra*, this title, *General Principles; When Right to Subrogation Becomes Complete*.

1. *Rice v. Rice*, 108 Ill. 199.

2. *Boyd v. Myers*, 12 Lea (Tenn.) 175.

3. *Fishback v. Weaver*, 34 Ark. 569.

4. *People v. Schuyler*, 4 N. Y. 173.

Default of Deputy Sheriff—Right of His Sureties Against Creditor Occasioning Same.—So, where the sureties of a deceased deputy sheriff are compelled to make good his default in not levying the proper execution, they will be sub-

ing a judgment against the sheriff for seizing and delivering to the plaintiff in the execution property not liable thereto, as, for instance, property of a third party, are entitled to be subrogated to the rights of the owner against such plaintiff.¹ Where the sheriff fails to make due return of an execution, and his sureties make good the default, they will be subrogated to the rights of the original judgment creditor against the defendants in the execution.² If the

rogated to his rights against the judgment creditor, at whose instance the default was occasioned, and to resort to a bond taken by the deputy from him, as an indemnity against the consequences of such default. *Philbrick v. Shaw*, 61 N. H. 356. In this case one Smith recovered judgment against one K, upon which execution was duly issued and placed in the hands of the deputy sheriff for collection, with orders to levy it on certain personal property belonging to K. At the same term the defendant (Shaw) recovered judgment against K, upon which an execution issued and was committed to the deputy sheriff with directions to levy it on the same property. The defendant (Shaw) gave the deputy sheriff a bond in the usual form to indemnify him for levying his execution. Thereupon the deputy made the levy and applied the proceeds of the property on the defendant's execution and returned that of Smith unsatisfied. The deputy having died insolvent, Smith brought suit against the sheriff of the county for the default of his deputy in applying the proceeds of the property on the defendant's execution, and recovered judgment against him, which he paid. Thereupon the sheriff brought suit against the plaintiff, *Philbrick*, who was a surety on the deputy's official bond, for the amount so paid, and judgment was rendered against him, which he paid. It was held that *Philbrick*, the surety of the deputy, was entitled to be subrogated to the latter's rights against the judgment creditor, *Shaw*.

1. *Skiff v. Cross*, 21 Iowa 459.

2. *Bittick v. Wilkins*, 7 Heisk. (Tenn.) 327. In this case H., the creditor of W., obtained judgment against him, upon which execution was issued and put into the hands of the sheriff, who neglected to serve the same. And upon motion, judgment was rendered against him and the sureties on his official bond; the latter having paid the judgment, filed their bill in equity to have a debt due from the county to the original defendant W. applied towards the

satisfaction of the amount paid by them on his debt to the judgment creditor H. It was held that as H. had the right upon his judgment, upon which execution had issued, to file his bill to subject the debts due to W. to the satisfaction of the judgment, upon payment of the debt by the sureties of the sheriff, they were entitled to be subrogated to this right of H.

In *Saint v. Ledyard*, 14 Ala. 244, it was held that the sureties of the sheriff paying a judgment against them for the default of their principal in not paying over the money which, by his return he acknowledged to have received, are entitled to be subrogated to all the rights of the execution plaintiff, both against the sheriff and the defendant in execution.

In *Mississippi*, by statute, where a sheriff fails to make due return of an execution, and the plaintiff moves against him and his sureties and obtains judgment, and recovers from him the amount thereof, he is entitled to sue out a new execution on the original judgment and collect the money for his own use; but the statute does not authorize the sureties of the sheriff who have paid money for him, he being dead, to pursue the same course. *Dillon v. Cook*, 5 Smed. & M. (Miss.) 773.

A, a mortgage creditor of B, obtained a decree against him subjecting the mortgaged premises to sale for the satisfaction of his debt. The sheriff falsely claiming to have in his hands an order of sale issued in the cause, obtained from C, the purchaser of the equity of redemption, full payment of the decree and costs. Subsequently an order of sale was regularly issued and delivered to the sheriff who indorsed thereon the full payment previously made, but failed to make due return of the writ. For this delinquency A (the mortgage creditor) obtained judgment against him and the sureties on his bond for the amount of the debt which was collected from D, one of the sureties, and the latter thereupon instituted an action to be subro-

sureties are compelled to make good, money which the deputy sheriff collects but fails to account for, they will be subrogated to the rights of the sheriff against the deputy's sureties.¹

Sureties on bonds of government officials, upon being compelled to make good the default of their principal, will be subrogated to the position of the government, in respect of all its securities, liens, and priorities, for the purpose of enforcing reimbursement from their principal,² or contribution from their co-

gated to the rights of A under his decree, and to have an order of sale issued thereon for his benefit. He did not allege in his pleadings that the sheriff had, before the writ came to his hands, or before the indorsement of payment thereon, converted to his own use the money so paid and indorsed. It was held that the payment having been properly applied by the sheriff in full satisfaction of the writ, it operated as a satisfaction of the decree under which it was issued, and that A had no further right under the decree to which B could be subrogated. *Wright v. Fitzgerald*, 17 Ohio St. 635.

Sale of Lands in Partition by Sheriff—Rights of His Sureties Paying Note Taken for the Purchase Price.—The sureties of a sheriff were compelled to pay over to certain heirs the amount due them by him on the sale of lands in partition, for the purchase price of which he took a note payable to himself for the benefit of the heirs. It was held that the sureties were entitled to succeed to the rights of the beneficiaries of the note. *Sweet v. Jeffries*, 48 Mo. 279.

1. *Brinson v. Thomas*, 2 Jones Eq. (N. Car.) 414; 67 Am. Dec. 224.

In *Blalock v. Peake*, 3 Jones Eq. (N. Car.) 323, it was held that where the sureties of the sheriff are compelled to pay money for the default of a deputy in not taking a bail bond from a defendant in a writ, they are entitled to be subrogated to the rights of the sheriff against such deputy, and to resort to a fund which he had secured from the defendant in the original writ to indemnify himself against the consequences of such default.

In *West Virginia*, by statute, if a party as surety for a sheriff, has to pay the amount of a decree or judgment in whole or in part, on account of the default of a deputy sheriff, he may obtain a decree or judgment against the deputy and his sureties and their personal representative for the amount so

paid by him. *Nebergall v. Tyree*, 2 W. Va. 474.

2. *Hunter v. U. S.*, 5 Pet. (U. S.) 173; *Miller v. Woodward*, 8 Mo. 169; *Dias v. Bonchaud*, 10 Paige (N. Y.) 445; *Knighton v. Curry*, 62 Ala. 404; *West v. His Creditors*, 3 La. Ann. 529.

In *Hook v. Richeson*, 115 Ill. 431, it was held that if a judgment in favor of the state, or a county, against a collector and the sureties on his official bond, is paid either voluntarily or by sale of the property of the surety, the latter may maintain a bill to be subrogated to the liens and securities held by the state or the county, or by his co-sureties that might by them or either of them have been enforced for the payment of the judgment; and such surety may enforce such lien to reimburse himself for the sum paid by him with accruing interest.

In *Irby v. Livingston*, 81 Ga. 281, it was held that where the comptroller-general issues execution against a defaulting collector of taxes and his sureties for money due the state for taxes collected but not paid over, the sureties have the right to pay off the execution or the balance due thereon, and to control the same as against the property of the collector, or property which he owned at the time of the execution of the bond; that when the sureties pay off the execution and take control of the same they are subrogated to the rights of the state, and entitled to the same lien that the state has on all the property of the principal at the time of the execution of his bond.

In *Pennsylvania*, a surety on the bond of a county treasurer, upon being compelled to make good the default of his principal, will be subrogated to the rights of the county upon the bond, and without any formal order of substitution may claim thereon a dividend out of the assigned estate of the treasurer. In such a case the dividend is to be awarded, not upon the penalty named in the bond, but upon the amount the surety has been compelled to pay; the

sureties.¹ And it is immaterial how the government's right of priority originated — whether out of common-law prerogative, positive statute, or contract; once established that it is entitled to rank as a preferred creditor, the same preference will be upheld by way of subrogation for the benefit of the surety.²

And this rule of substitution for the purpose of enforcing contribution between co-sureties, is too firmly established in equity jurisprudence to be set aside by implication of less force than an express statutory denial. To illustrate: If a statute provides for the substitution of the surety to the government's priority against

latter being the real debt. *Boltz's Estate*, 133 Pa. St. 77. See also *supra*, this title, *How Far Subrogation Will be Carried*.

By the *Alabama Code*, 1876, the surety of a defaulting tax collector who satisfies the judgment obtained by the state against his principal, is entitled to an assignment of the judgment and to be subrogated to the rights of the state and county and to enforce for his own indemnity the lien created by the bond, by suit in his own name. *Schussler v. Dudley* (Ala. 1887),² So. Rep. 526.

Sureties not Entitled to Subrogation When Payment Made is of Their Own Debt and Not That of Principal.—But where, under an execution issued on a judgment at law obtained against a defaulting tax collector and his sureties, in the name of the proper officer, for the use of the state, lands of the collector were levied on and sold by the sheriff and purchased by the sureties at a sum sufficient to satisfy the judgment, which they paid, the sheriff making them a conveyance, and returning the execution satisfied, it was held, on a bill in equity filed by the sureties against a subsequent mortgagee to enjoin an action of ejectment instituted against them for the recovery of the land, to be subrogated to the lien which the state had in priority of the mortgage and to quiet their title—that the payment made by the sureties to the sheriff was not of the debt of their principal, but of their own debt for the purchase money, which, when received by the officer, was a satisfaction of the execution, a discharge of the bond, and an extinguishment of the lien incident thereto, although the only interest obtained by them under the sale was the collector's equity of redemption in the mortgaged premises; and, therefore, the relief asked for should not be granted. *Turner v. Teague*, 73 Ala. 554.

1. *Robertson v. Trigg*, 32 Gratt. (Va.) 76; *Orem v. Wrightson*, 51 Md. 34; *Jackson v. Davis*, 4 Mackay (D. C.) 194.

2. *Jackson v. Davis*, 4 Mackay (D. C.) 194; *Orem v. Wrightson*, 51 Md. 34. In this last case, the court, by Brent, J., said: "We think the doctrine is well established by a decided preponderance of the cases, that a surety who has paid the debt of his principal obligor, is subrogated in equity by the act of payment, not only to the securities of the creditor, but to all his rights of priority. If, therefore, the creditor could have rightfully claimed a preference in the distribution of assets, the same preference will be upheld by way of subrogation for the benefit of the surety. Is a different rule to be applied where the state is the creditor? We can see no reason why it should be. It is not necessary to inquire how, or in what manner the state's right to rank as a preferred creditor is derived, whether it is a prerogative right derived from the common law, or whether it is conferred by statute. As is said in some of the cases to which we have referred, equity, in applying the doctrine of subrogation, looks not to form, but to the substance and essence of the transaction; it looks to the debt which is to be paid, and not to the hand which may happen to hold it, and will see that the fund charged with its payment shall be so applied. In the present case the debt of the collector, Leeke, was due to the state at the time of his death. It was a charge against him as the principal debtor, and upon the assets left by him. The latter constituted the fund out of which it was to be paid as a preferred debt, and if equity does not regard the hand which holds the debt, and will see that the fund charged with its payment shall be so applied, what difference can logically result, whether the creditor to whom the sureties made payment is the state

his principal, but contains no express provision for his substitution against a co-surety, the right nevertheless remains and is not overthrown by the principle *expressio unius est exclusio alterius*.¹

The sureties of a tax collector, upon being compelled to make good a loss arising from the misappropriation of tax money by their principal, are entitled to be subrogated to all the rights and remedies of the government to reach the money in the hands of all persons in which it may be found, who have received it with knowledge of its true character; and the fact that a person had received such money in payment for property sold, will be no defense, if at the time, he had notice, actual or constructive, of the character of the money; but a *bona fide* seller for a valuable consideration without notice, actual or constructive, is entitled to full protection.²

An act extending the time of payment of taxes by a collector, with the written assent of the sureties on his official bond, without notice to the legislature that others had purchased real estate of the collector after the state's lien thereon accrued, will not discharge such lien, nor defeat the sureties' right of subrogation thereto, upon making good their principal's default.³ Nor will the taking of a mortgage by one of such sureties, as an indemnity against loss, constitute a waiver of any right of subrogation to the state's lien;⁴ nor will the release by him of a part of such mortgage, without notice of the equitable rights of a purchaser of real estate from the collector, which was subject to the state's lien, defeat his right, or that of his co-sureties, to be subrogated to the benefit of that lien.⁵

or an individual? While this view of the law will do no wrong to anyone, it will add facilities in securing and collecting the revenue of the state. If sureties know that they can be subrogated to the priority of the state, less apprehension will be felt in joining in the bonds of collectors, and less delay in payment by solvent sureties; other creditors are not injured, for if the state has the first claim upon the fund, it does them no wrong whether its claim is enforced by the state or those standing in its stead."

1. *Jackson v. Davis*, 4 Mackay (D.C.) 194; *Robertson v. Trigg*, 32 Gratt. (Va.) 76.

2. *Brown v. Houck*, 41 Hun (N. Y.) 16. In this case the plaintiff, a surety upon the bond of the town tax collector, being compelled to pay to the county treasurer the sum of \$1,423.00, which had been received by the collector, but not paid over, brought an action against the defendant, alleging that he borrowed of the tax collector \$1,211.92 of the tax funds collected by him, knowing the

true character thereof. Upon the trial, the defendant offered, but was not allowed, to prove: That the tax collector was a member of the firm of P. & Sons; that after he borrowed the money he sold goods to the firm for about five months; that it was agreed that the money in his hands should be applied to pay any balance that might be due him for goods furnished, and that upon the settlement of the accounts the firm was indebted to him for more than \$800.00; that he did not know that the money borrowed was tax money. It was held that the court erred in excluding the evidence; that if the defendant could have shown that he did not know the true character of the funds borrowed by him, and that he in good faith sold and delivered to P., goods to the value of \$800.00, with the understanding and agreement that it should be deducted from the loan, it would, to that extent, constitute a defense.

3. *Crawford v. Richeson*, 101 Ill. 351.

4. *Crawford v. Richeson*, 101 Ill. 351.

5. *Crawford v. Richeson*, 101 Ill. 351.

In some jurisdictions, sureties of tax-collectors upon making good the default of their principal arising from his failure to collect taxes, are held to be entitled to subrogation to the rights and remedies of the government against the derelict taxpayers, but in other jurisdictions, the right is denied.¹

(3) *Sureties of Vendor and Vendee of Lands*.—A surety for the purchase price of land has a right to be subrogated to the lien of the vendor on the land, upon being compelled to discharge the obligation of his principal.² But he may not assert that right

1. In *Livingston v. Anderson*, 80 Ga. 175, it was held that the sureties on a defaulting tax collector's bond, after discharging the *fiery facias* issued against them and their insolvent principal, and thus satisfying the state for all taxes due to it from the taxpayers of the county for the given year, are entitled to be subrogated to the rights of the state to the uncollected taxes for that year; and where executions for unpaid state taxes have not been issued may recover such taxes by bill in equity. See also *White v. State*, 51 Ga. 252.

And in *Prather v. Johnson*, 3 Har. & J. (Md.) 487, the sureties of W., deceased, late a tax collector, were compelled to pay the amount due from their principal to the state, and for their reimbursement an act of the legislature authorized them to institute suits against parties owing taxes, in the same manner as the late collector might. And as W. could have instituted suits and recovered on proof of the taxes being due, and that they were paid by him to the state, the surety could do the same; and it was immaterial whether the sureties all together paid, or only one of them, or the collector, for by subrogation they occupied the place of the collector.

But in *Jones v. Gibson*, 82 Ky. 561, it is held that under the statute of *Kentucky*, the sureties of a sheriff who pay to the state taxes due but uncollected by their principal, may not be subrogated to the rights of the state against the delinquent taxpayers. The decision was put upon the ground, that taxes are not debts founded on contract, express or implied, and that the sureties having accounted for and paid the whole amount, the commonwealth had no longer any claim therefor against the taxpayers. And, further, that the officers who are to collect the taxes, and the mode of collecting, are particularly and specifically provided, and

summary and effective means exist for the collection, and the indemnity of the officer appointed to collect. He is authorized to distrain the goods and chattels owned by, or in the rightful possession of, the person from whom the taxes are due, and if there be no personal property which he can distrain, he may, in the manner prescribed, levy on and sell real estate for the purpose, or may garnishee any person indebted to the taxpayer. Moreover, he has by law the same power, for five years after the expiration of his term of office, to collect any arrearages of taxes which fell due during his official term, and for which taxpayers are and were responsible, as he had before the expiration of his term of office. And in view of all this, it should not be presumed that the legislature intended in any case where it is not clearly expressed, that the judiciary department should interpose and subject the taxpayer to tedious and expensive litigation. The legislature alone may give relief in such cases. See also *Hinchman v. Morris*, 29 W. Va. 673; *Wallace's Estate*, 59 Pa. St. 401. See also *infra*, this title, *Sureties on Obligations to Government*.

2. *Ghiselin v. Ferguson*, 4 Har. & J. (Md.) 522; *McGruder v. Peter*, 11 Gill & J. (Md.) 217; *Tuck v. Calvert*, 33 Md. 209; *Fulkerson v. Brownlee*, 69 Mo. 371; *Burk v. Chrisman*, 3 B. Mon. (Ky.) 50; *Highland v. Anderson* (Ky. 1892), 17 S. W. Rep. 866; *Beattie v. Dickinson*, 39 Ark. 205; *Hatcher v. Hatcher*, 1 Rand. (Va.) 53; *Uzzell v. Mack*, 4 Humph. (Tenn.) 319; 40 Am. Dec. 648; *Ellis v. Roscoe*, 4 Baxt. (Tenn.) 418; *Carter v. Sims*, 2 Heisk. (Tenn.) 166; *Ferrer v. Barrett*, 4 Jones Eq. (N. Car.) 455; *Walke v. Moody*, 65 N. Car. 599; *Ex p. Pettillo*, 80 N. Car. 50; *Stenhouse v. Davis*, 82 N. Car. 432; *Deitzler v. Mishler*, 37 Pa. St. 82. *Contra* *McNeill v. McNeill*, 36 Ala. 109; 76 Am. Dec. 320; *Foster v. Trustees*, 3 Ala. 302.

In *Ballew v. Roler*, 124 Ind. 557, the purchaser of land mortgaged it to the surety on his note for the purchase price thereof, to secure him against loss. The surety being compelled to pay the note, foreclosed the mortgage after the death of the mortgagor; it was held that the surety's right was superior to that of the mortgagor's widow, he being subrogated to the lien of the vendor to whom he had paid the purchase price.

In *Smith v. Schneider*, 23 Mo. 447, the facts were these: A bought land at a sale in partition, and in compliance with the terms of the sale, paid ten *per centum* of the price, and gave his bond to the sheriff for the residue; B was surety on the bond. At a sheriff's sale C purchased all the interest of A in the land; A failing to pay the residue of the purchase money, judgment was obtained on the bond, which was discharged by the surety, the principal being insolvent. A had never received a deed for the land. It was held that B, by paying the residue of the purchase money, became subrogated to the right of the original owner, and entitled to subject the land in the hands of C for his reimbursement.

In *Green v. Crockett*, 2 Dev. & B. Eq. (N. Car.) 390, it was held that the sureties for the payment of the purchase price of land, sold by the clerk and master under a decree of the court of equity, where the title is retained until the purchase price is paid, are entitled, upon the insolvency of their principal, before the payment of the debt, to file their bill to restrain the conveyance of the land, and to have it applied to their relief, although the principal has assigned his interest in it to another person, without notice, for the purpose of discharging a debt *bona fide* due to him. The principle applied was that the surety was substituted to the place of the creditor, and allowed to assert the latter's legal title. *Followed* in *Polk v. Gallant*, 2 Dev. & B. Eq. (N. Car.) 395; 34 Am. Dec. 410; *Shoffner v. Fogleman*, Winst. Eq. (N. Car.) 12; *Arnold v. Hicks*, 3 Ired. Eq. (N. Car.) 17; *Barnes v. Morris*, 4 Ired. Eq. (N. Car.) 22; *Egerton v. Alley*, 6 Ired. Eq. (N. Car.) 188. See also *Henry v. Compton*, 2 Head (Tenn.) 549. In this last case a slave was sold under decree of court, which decree retained a lien on the slave for the payment of the purchase price. The purchaser gave bond with surety for the

price; he became insolvent and the creditor levied on the slave. The surety of the purchaser, before paying the debt, filed a bill to enjoin the sale of the slave by the creditor, and to be substituted to the lien retained by the decree. It was held that the surety was entitled to the relief asked for. See also *Myers v. Yapple*, 60 Mich. 339; *Torp v. Gulseth*, 37 Minn. 135.

Vendor Making Full Title to Land; No Right to Subrogation in Favor of Surety for Purchase Price.—But where the vendor made a full title to the land, taking from the vendee a personal bond with sureties for the purchase price, upon the insolvency and death of the vendee and one of the sureties, and the sale of the land by a devisee of the vendee, it was held that the other surety could not subject the land for his indemnification, the creditor (the original vendor), having neither the legal nor equitable title, and therefore nothing for a court of equity to act upon by way of substitution. *Miller v. Miller*, Phillips Eq. (N. Car.) 85. See also *Bradford v. Marvin*, 2 Fla. 463.

Concealment and Bad Faith by Surety—Effect on Rights of Co-surety.—A parcel of land was sold three times in succession, the first vendor withholding the deed and retaining a lien, as well as a bond with two sureties, for the purchase price. Under these circumstances one of the sureties advised a party to buy the land, but gave him no intimation of the existence of the lien. It was held that though this advice and concealment might estop that surety from asserting any equity for his own benefit to the detriment of the party purchasing by his advice, they could not affect the rights of the first vendor nor those of the co-surety, and the purchase price remaining unpaid upon each successive sale, the land might be sold by virtue of the first lien, to which the sureties, who had paid the debt, were subrogated. *Kleisen v. Scott*, 6 Dana (Ky.) 138.

Assignment of Title Bond—Surety's Right.—In *Keith v. Hudson*, 74 Ind. 333, a title bond was given by the vendor of lands to the vendee, conditioned for a conveyance in fee simple upon payment of the purchase money. This bond was assigned by the vendee to indemnify his surety, upon an agreement that it should be reassigned to the assignor if the latter should punctually pay the debt for which the former was surety. After the death of

against a sub-purchaser of part of the tract, when the purchase money paid by the latter has been applied in partial payment of the note on which the surety was bound.¹ It seems, however, that the surety may be subrogated to the right of the vendor to maintain an action against a subsequent purchaser of the property, to rescind the sale as simulated and fraudulent, although made before payment by him of the principal's debt.² It has been held that where an assignee receives a promissory note of a third person before maturity, in consideration of the sale to the assignor of a tract of land, and executes a bond to the assignor to make him a deed when the note is collected or paid, the maker of the note becomes thereby a surety for the assignor, and will be entitled to be substituted to the lien of the vendor on the land, and the payee being insolvent, to have the land sold for his indemnity in advance of the payment of the debt.³ Where a

the vendee the surety assumed the payment of the notes for the purchase price, as well as the notes on which he was surety; the vendee's administrator surrendered the agreement by which the surety had obligated himself to reassign the title bond. It was held that the surety was entitled to be subrogated to the rights of the vendor, and might hold the bond, or the land if he had received a deed, until the debts for which the bond was pledged to him were paid.

Agreement by Agent of Vendor with Vendee as to Settlement of Adverse Claim—Rights of Surety on Bond of Vendee Given in the Suit.—The agent of a vendor agreed with the vendee that the latter should take such steps as he might deem prudent to settle the claim of an adverse occupant of the land, or sue him if necessary, in either case the vendee to be credited with his expenses on the deferred payments for the land. The vendee brought ejectment for the land, and executed a bond with surety thereupon required of him. It was decided that these sureties were entitled to be subrogated to the rights of their principal, the vendee, for the recovery of such damages, and interest, as they were compelled to pay in consequence of the failure of the suit. *American Land Co. v. Grady*, 33 Ark. 550.

1. *Sawyers v. Baker*, 72 Ala. 50. In this case the court said: "The sureties were certainly liable for the whole of the purchase money due on the land purchased by their principal, Boone. This amounted to more than \$1,100, and was evidenced by the joint and several note of Boone and these sure-

ties, Sawyers and Gamble. When Baker (the sub-purchaser) purchased the land in controversy, which was something less than half the original tract, he paid for it the sum of \$550, which was credited on this note. The sureties have, therefore, gotten full benefit of this credit once, and cannot in equity or good conscience be permitted to enjoy it a second time, to the detriment of the purchaser. It does not appear that the price paid was inadequate or the purchase unfair. If this claim is sustained the sureties will virtually have been permitted to enforce their alleged equity twice against the same land; once by having the purchase money paid by Mrs. Baker appropriated to pay about one-half of their own debt, and again by enforcing a lien against it for the other half. No principle of equity jurisprudence is known to us by which such an inequitable proceeding can be justified or tolerated."

2. *Groves v. Steel*, 2 La. Ann. 480; 46 Am. Dec. 551. The reasoning of the court was: The first vendor could have attacked the sale, for it was made while he was a creditor, and as the conditional liability of the surety (in this case indorser of notes for the purchase price) existed at the date of the sale, it is just that when subsequently compelled to pay, he should be considered as standing in the place of the vendor, and subrogated to his right to sue for a rescission of the sale. See also *Torregano v. Segura*, 2 Mart. (La.) N. S. 158; *Tatum v. Tatum*, 1 Ired. Eq. (N. Car.) 113.

3. *Gallihier v. Gallihier*, 10 Lea (Tenn.) 23.

surety pays a judgment on a purchase-money note, obtained by the vendor against himself and principal, but in the suit the court refuses to decree a vendor's lien on the land, he may not subsequently claim to be entitled to such a lien by subrogation to the rights of the vendor—being a party to the action in which the vendor was refused a lien, he is bound by that adjudication.¹ The surety for the vendor of real estate may, under certain circumstances, be substituted to the equitable rights of the vendee: Thus, where the surety on a bond of the vendor, conditioned to make title to the land upon payment of the purchase money, is compelled to answer the default of his principal in failing to perform the condition of the title bond, he may be subrogated to the position of the original vendee, and be allowed to set up the latter's equitable title against a purchaser at a sale on execution against the insolvent vendor.²

(4) *Surety of Surety*.—The sureties of a surety, and also the assignees of a surety, are entitled precisely as the original surety, to be substituted in the place of the creditor as to all the latter's remedies against the principal debtor or his estate.³ But the surety of a surety, although compelled to pay the creditor, is not entitled to be substituted to the latter's position for the purpose of enforcing payment against the principal debtor if the latter has paid the immediate surety.⁴

(5) *Co-sureties*.—A surety who is compelled to pay the debt of his principal is entitled to be subrogated to all the rights and remedies of the creditor as against his co-sureties, in precisely the same manner as against the principal debtor.⁵ But the extent of

1. *Blake v. Koons*, 71 Iowa 356.

2. *Freeman v. Mebane*, 2 Jones Eq. (N. Car.) 44. In this case F. was the surety of one S. on a bond, conditioned to make title to land to one N., upon payment by the latter of the purchase price. Subsequently M. bought the legal estate, which S. held, at a sheriff's sale to satisfy execution against the latter who was insolvent. F. having to pay damages for the default of his principal at the suit of N., filed a bill and obtained a decree to subject the land to his indemnity; on the ground that N., the creditor in the bond, had the equitable estate and could force M. to convey the legal estate to him, and by the doctrine of substitution F., the surety, had a right to call on the creditor (the original vendee) and have the benefit of all rights and securities which he held against the principal; in other words, the surety was allowed to take the place of the creditor and set up the latter's equitable title.

3. See *infra*, this title, *Successive Sureties in Judicial Proceedings*; 1

Story Eq., § 449; *Cheesebrough v. Millard*, 1 Johns. Ch. (N. Y.) 412; 7 Am. Dec. 494; *King v. Baldwin*, 2 Johns. Ch. (N. Y.) 554; *Hall v. Smith*, 5 How. (U. S.) 96; *Cuyler v. Ensworth*, 6 Paige (N. Y.) 32; *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398; *Rittenhouse v. Levering*, 6 W. & S. (Pa.) 190; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274; *Leake v. Ferguson*, 2 Gratt. (Va.) 419; *Dodd v. Wilson*, 4 Del. Ch. 399.

In *Hodgson v. Shaw*, 3 Myl. & K. 183, it was held that a surety on a second bond given for the same debt, was entitled on paying the first bond and taking an assignment thereof, to be subrogated to the rights of the obligee in the first bond against the estate of the deceased obligor.

4. *New York State Bank v. Fletcher*, 5 Wend. (N. Y.) 85.

5. *Croft v. Moore*, 9 Watts (Pa.) 451; *Cuyler v. Ensworth*, 6 Paige (N. Y.) 32; *Hess' Estate*, 69 Pa. St. 272. In this last case A and B became co-sureties for C, who made an assignment for the benefit of his creditors; he aft-

this right will be regulated by what he actually pays; he may not speculate in the common debt to the disadvantage of his co-sureties any more than he may to the disadvantage of his principal. Accordingly, the co-sureties will be entitled to the benefit of any compromise effected by the paying surety, or any discount that he has obtained by paying the common debt in depreciated currency, notes of banks or the like.¹ And this rule is founded in both reason and justice: if the principal be liable only for the

erwards died insolvent, and B paid the obligations, the estates of A and C together not being sufficient to pay one-half of the obligations. It was held that B was subrogated to the claims and entitled to a dividend on his whole payment from the estate of A.

Where A and B were sureties for C, and B paid half the debt and joined A in confessing a judgment to a creditor of C for the other half, and it was agreed that A should pay this judgment, but B, however, was compelled to pay it, it was held that A's land being sold, by execution, B had a right to come on the fund in the sheriff's hands in preference to a subsequent judgment creditor of A. *Fleming v. Beaver*, 2 Rawle (Pa.) 128; 19 Am. Dec. 629.

If the debt be due at the time of payment by a surety, he becomes, by the act of payment, subrogated to the rights of the creditor in the debt and security, both as against the principal debtor and his co-surety, so far as may be necessary to enforce indemnity from the former, or contribution from the latter, and to that end may take from the creditor an assignment of the debt and security. If he pays before maturity, his right to subrogation becomes perfect when the debt becomes due, and he may then take an assignment; or, if he has taken one at the time of paying the debt, it operates to vest in him the legal title so soon as the debt becomes due, and he may then, for the purpose of compelling indemnity or contribution, enforce the debt and securities as assignee. *Felton v. Bissell*, 25 Minn. 15.

In the leading case of *Lidderdale v. Robinson*, 2 Brock. (U. S.) 160, affirmed in 12 Wheat. (U. S.) 594, it was held "that where there are two sureties on bills of exchange and specialties, and one of them has paid more than his proportion, and his representative seeks contribution out of the estate of his co-surety, the surety who has overpaid

will be subrogated to the rights of his creditors. The representatives of the surety who has overpaid are entitled to rank according to the degree of the claims on which such excess was paid. The principle of substitution applies equally to cases arising between co-sureties and those between a surety and his principal."

So in *Burrows v. McWhann*, 1 De-saus. Eq. (S. Car.) 409, it was held that co-sureties are entitled to be subrogated to the rights of the judgment creditor although satisfaction has been entered upon the judgment—in order to let them stand as judgment creditors against one of the co-sureties who was dead and insolvent, but whose estate could pay his proportion of this debt if considered a judgment debt.

In *German American Sav. Bank v. Fritz*, 68 Wis. 390, it was held that one surety who has paid a judgment against the principal debtor and all the sureties, may, for the purpose of enforcing repayment from the principal, or contribution from his co-sureties, be substituted to all the rights of the judgment creditor, especially if he has taken an assignment of the judgment.

But to secure the benefit of the lien of such judgment, as against a co-surety, the paying surety should ordinarily resort to an equitable proceeding. *German American Sav. Bank v. Fritz*, 68 Wis. 390; *McDaniel v. Lee*, 37 Mo. 204; *Hull v. Sherwood*, 59 Mo. 173. Yet when such co-surety has made a motion, based on such payment, that the judgment be canceled and declared satisfied as to all the defendants, the court may order the judgment to stand as against him to the extent of his liability to contribute, and may award execution thereon against him for that amount. *German American Sav. Bank v. Fritz*, 68 Wis. 390. See also *supra*, this title, *Sureties on Official Bonds*.

1. *Tarr v. Ravenscroft*, 12 Gratt. (Va.) 642; *Edmonds v. Sheaham*, 47 Tex. 443; *Hickman v. McCurdy*, 7 J. J.

amount actually paid by a surety in discharge of the debt, then he could be liable to any other surety only for his quota of that amount; and if the latter could be called on to contribute according to the nominal amount of the debt, he would thus be liable to his co-sureties for a sum greater than he could recover from the common principal.¹

(6) *Wife as Surety*.—A wife who joins with her husband in a mortgage of her own property to secure his debts, occupies the position of a surety, and is entitled to be subrogated to the rights of the creditor against her husband's property.²

If she joins in a mortgage relinquishing her dower in her husband's estate, she will, on redeeming the mortgage with her own means, be subrogated to the benefits thereof, as against intervening lien creditors.³ And where she has paid a balance due on a mortgage, executed by herself and husband, on property in which she has a life interest, her devisees are entitled, as against his heirs, to be subrogated to the rights of the mortgagee, to the extent of her payment.⁴

When the personal estate of a decedent is inadequate to pay his debts, and the wife, to prevent the real estate from being sold at a probable sacrifice, uses funds derived from the decedent's life insurance, of which she and her children are the beneficiaries, to discharge several of the debts, one of which is a lien upon the

Marsh. (Ky.) 555; *Fuselier v. Babin*, 14 La. Ann. 777; *Owen v. McGehee*, 61 Ala. 440; *Sinclair v. Redington*, 56 N. H. 146; *Jones v. Bradford*, 25 Ind. 305; *Apperson v. Wilbourn*, 58 Miss. 440; *Kelly v. Page*, 7 Gray (Mass.) 213; *New Bedford Sav. Inst. v. Hathaway*, 134 Mass. 69. See also *supra*, this title, *How Far Subrogation Will be Carried*.

1. See cases cited in note just preceding. See also *supra*, this title, *How Far Subrogation Will be Carried*.

2. *Aguilar v. Aguilar*, 5 Madd. 414; *Vartie v. Underwood*, 18 Barb. (N. Y.) 563; *Neimcewicz v. Gahn*, 3 Paige (N. Y.) 614; 11 Wend. (N. Y.) 312; *Hawley v. Bradford*, 9 Paige (N. Y.) 200; 37 Am. Dec. 390; *Fitch v. Cotheal*, 2 Sandf. Ch. (N. Y.) 29; *Loomer v. Wheelwright*, 3 Sandf. Ch. (N. Y.) 135; *Carley v. Fox*, 38 Mich. 387; *Medeker v. Parker*, 70 Ind. 509; *Spear v. Ward*, 20 Cal. 659; *Hassey v. Wilke*, 55 Cal. 525; *Sheidle v. Weishlee*, 16 Pa. St. 134; *Wilcox v. Todd*, 64 Mo. 388; *Barratt v. Davis*, 104 Mo. 549; *Hubbard v. Ogden*, 22 Kan. 363; *Burtis v. Wait*, 33 Kan. 478; *Eisenburg v. Albert*, 40 Ohio St. 631; *McFillin v. Hoffman*, 42 N. J. Eq. 144; *Hanford v. Bockee*, 20 N. J. Eq. 101; *Johns v. Reardon*, 11

Md. 465; *Albion Bank v. Burns*, 46 N. Y. 170; *Van Horne v. Everson*, 13 Barb. (N. Y.) 526; *Smith v. Townsend*, 25 N. Y. 479; *Erie Co. Sav. Bank v. Roop*, 80 N. Y. 591; *Orr v. White*, 106 Ind. 341; *Keller v. Orr*, 106 Ind. 406; *Moffitt v. Roche*, 77 Ind. 48; *Wolf v. Banning*, 3 Minn. 202; *Agnew v. Merritt*, 10 Minn. 308; *Allis v. Ware*, 28 Minn. 166; *Savage v. Winchester*, 15 Gray (Mass.) 453; *Gore v. Townsend*, 105 N. Car. 228; *Purvis v. Carstaphan*, 73 N. Car. 575.

See generally SURETYSHIP. A widow who joins with her husband in a mortgage of his lands, to secure notes due at different times, by paying off an early installment, will be subrogated to the benefit of the mortgage; but, as against the mortgagee or his assignee of the notes maturing later, she will be postponed. *Carlthers v. Stuart*, 87 Ind. 424. See *infra*, this title, *Persons Interested in Encumbered Estate*.

3. *Jefferson v. Edrington*, 53 Ark. 545. And in this case it was held that this right was not affected by the fact that there was no proof of a specific intent at the time of payment to keep the mortgage alive.

4. *Ohmer v. Boyer*, 89 Ala. 273.

realty, she will be subrogated to the position and rights of the creditor whose claims are thus satisfied, and reimbursed out of the proceeds of the estate.¹

(7) *Successive Sureties in Judicial Proceedings.*—The general rule is, that one who becomes a surety in the course of legal proceedings against the principal, for the benefit of the latter alone, without the assent or sanction of the surety on the obligation in suit, will not be subrogated to the rights and remedies of the creditor against the prior surety; on the contrary, he is entitled to stand in the creditor's place only as to the latter's rights against the principal; as to any prior surety, or any prior interest in the property which may be under pledge, he must occupy the place of the debtor.² And this doctrine seems to be entirely equitable, for it is but reasonable that the benefit intended for the principal solely, by the second surety, should be conferred, if at all, at

1. *Kelley v. Ball* (Ky. 1892), 19 S. W. Rep. 581. See *infra*, this title, *Persons Interested in Encumbered Estate*.

2. *Armstrong's Appeal*, 5 W. & S. (Pa.) 352; *U. S. Bank v. Winston*, 2 Brock. (U. S.) 252; *Givens v. Nelson*, 10 Leigh (Va.) 382; *Bentley v. Harris*, 2 Gratt. (Va.) 358; *Langford v. Perrin*, 5 Leigh (Va.) 552; *Hanby v. Henritze*, 85 Va. 177; *Fitzpatrick v. Hill*, 9 Ala. 783; *Smith v. Bing*, 3 Ohio 33; *Denier v. Myers*, 20 Ohio St. 336; *Barlow v. Deibert*, 39 Ind. 16; *Daniel v. Joyner*, 3 Ired. Eq. (N. Car.) 543; *Dent v. Wait*, 9 W. Va. 41; *Bohannon v. Combs*, 12 B. Mon. (Ky.) 563; *Hammock v. Baker*, 3 Bush (Ky.) 208; *Hopkinsville Bank v. Rudy*, 2 Bush (Ky.) 326; *Kellar v. Williams*, 10 Bush (Ky.) 216; *Yoder v. Briggs*, 3 Bibb (Ky.) 228; *Riemer v. Schlitz*, 49 Wis. 273; *Pierson v. Catlin*, 18 Vt. 77; *Tennessee Hospital v. Frequa*, 4 Lea (Tenn.) 608; *Coles v. Anderson*, 8 Humph. (Tenn.) 489; *Moore v. Lassiter*, 16 Lea (Tenn.) 630; *Higgs v. Landrum*, 1 Coldw. (Tenn.) 81; *Chaffin v. Campbell*, 4 Sneed (Tenn.) 184; *Chrisman v. Jones*, 34 Ark. 73; *Fletcher v. Menken*, 37 Ark. 206.

In *Bradenburg v. Flynn*, 12 B. Mon. (Ky.) 397, Marshall, J., said: "We know of no case in which, on the ground either of contribution among co-sureties or of substitution to the securities of the creditor, a subsequent surety coming in aid of the debtor alone, without the request or concurrence of the original sureties, and in the regular course of the remedy for coercing the debt from him alone, or for the purpose of obstructing its col-

lection by his own separate proceeding and for his own benefit, has obtained in equity either partial or full reimbursement from the prior sureties. The doctrine, established by the adjudged cases, and, as we think, in conformity with the true principles of equity, is that, if under such circumstances the prior surety is compelled to pay the debt, he thereby becomes entitled by substitution to the rights of the creditor against the subsequent surety to the whole extent of the payment made and of the obligation of the subsequent surety; which precludes all right on the part of the subsequent surety should the debt be coerced from him, to claim reimbursement from the prior surety."

Parsons v. Briddock, 2 Vern. 608, seems to be the leading case on this subject. There the principal had given bail in an action, and judgment was recovered against the bail. The original surety being compelled to pay the debt, prayed in chancery for an assignment of the judgment against the bail, which was granted, upon the ground that the bail stood in the place of the principal debtor, who would have been responsible to the surety, and that he was therefore subject to a similar liability.

In *Douglass v. Fagg*, 8 Leigh (Va.) 588, the surety on an injunction bond, given in a suit attacking a judgment obtained for the purchase money of land, was denied the benefit of a vendor's lien on the land as against the sureties in a forthcoming bond executed before the injunction suit was commenced.

A surety for the payment of a judg-

ment will not be entitled to the benefit of a mortgage given by the judgment debtor to secure a surety on the debt for which the judgment was recovered. *Havens v. Foudry*, 4 Metc. (Ky.) 247.

In *Sherman v. Shaver*, 75 Va. 1, the court, by Burks, J., said: "If an execution against principal and surety be levied on property of the principal, and a third person, at the request of the principal but without the consent or concurrence of the surety, intervene and bind himself as surety in a bond for the forthcoming of the property on the day of sale, and the bond be forfeited, although such third person thus becomes bound as surety for the debt (*Garland v. Lynch*, 1 Rob. (Va.) 545), yet he is not entitled on making payment to be substituted for contribution to the original judgment against the original surety (*Givens v. Nelson*, 10 Leigh (Va.) 382; *Stout v. Vause*, etc., 1 Rob. (Va.) 169, 180); because by his intromission the property of the principal has been withdrawn from the levy and restored to the debtor instead of being applied, as it otherwise would have been, to the payment of the debt, and thereby the original surety has been injured, and the second surety whose intervention has caused the injury has no equity to substitution for indemnity or contribution against the first. The same principle applies to sureties on appeal-bonds, bail-bonds, injunction-bonds, stay-bonds, prison-bonds' bonds, and the like obligations. See *Harnsberger v. Yancey* (33 Gratt. (Va.) 527, 540), and cases there cited." See also *Coffmann v. Hopkins*, 75 Va. 645.

The sureties on a bond given on a second appeal have no right to subrogation as against the sureties on the first appeal bond. *Hinckley v. Kreitz*, 58 N. Y. 583. Compare *Chester v. Broderick*, 131 N. Y. 549.

If the principal appeals from a judgment without the consent of the surety, the latter, on payment of the judgment will be subrogated to the rights of the creditor against the surety on the appeal bond. *Friberg v. Donovan*, 23 Ill. App. 58. See also *Mitchell v. De Witt*, 25 Tex. Supp. 180; 78 Am. Dec. 561.

Where a judgment was obtained against a principal who gave absolute bail to obtain a stay of execution, after which judgment was obtained against the bail, it was held that one of the two sureties in the original obligation

who paid one-half the debt, was entitled to an assignment of the judgments against the principal and the absolute bail to enable him to indemnify himself for what he had paid. *Burns v. Huntingdon Bank*, 1 Pen. & W. (Pa.) 395. See also *Schnitzel's Appeal*, 49 Pa. St. 23; *Hanner v. Douglass*, 4 Jones Eq. (N. Car.) 262.

In *Wright v. Morley*, 11 Ves. 22, Sir Wm. Grant says: "Though the bail be but sureties, as between them and the principal debtor, yet, coming in the room of the principal as to the creditor, they likewise come in the room of the principal debtor as to the surety. The surety has no direct engagement, by which the bail is bound to him, but only a claim through the medium of the creditor; and consequently, the surety has precisely the same right that the creditor has, and stands in his place." See also *Winchester v. Bear-din*, 10 Humph. (Tenn.) 247; 51 Am. Dec. 702, where the effect of the statute in the case was declared to be to interpose the stayor in the execution before the original surety, and to place such original surety in the situation of surety for the stayor.

In *Patterson v. Pope*, 5 Dana (Ky.) 241, the court, by Marshall, J., said: "A surety who first comes in as a surety in an obligation incidental to the prosecution of a legal remedy against the person of the debtor, is *prima facie* to be considered as trusting to his principal only, for whom alone he is surety; that upon his paying the debt he is entitled to stand in the creditor's place only as to his remedies against the person and property of the principal; and that as to any prior surety, or any prior interest in the property which may be under pledge, he must occupy the place of the debtor."

If separate judgments be recovered against a principal and surety, and the latter pays the judgment against himself, he will be subrogated to the lien of a judgment against a third person on his undertaking for a stay of execution on the judgment against the principal. *Pott v. Nathans*, 1 W. & S. (Pa.) 155.

Where suit was instituted against a principal and surety, and the appointment of a receiver asked, and to prevent such appointment, a third person became surety on a bond to the plaintiff in the injunction suit, and afterwards the original surety was compelled to pay the debt, it was held that he was entitled to be subrogated to

the rights of the plaintiff on the bond in question, since he, the original surety, may have been injured by the non-appointment of the receiver. *McCor-mick v. Irwin*, 35 Pa. St. 111.

In *Opp v. Ward*, 125 Ind. 241, it appeared that a person had guaranteed the payment of rent by a lessee, and the lessee having refused to give up possession, judgment was recovered against him from which he appealed giving a bond with surety. The guarantor was compelled to pay the rent accruing while the lessee held over, and to this extent it was decided that he was entitled to be subrogated to the rights of the lessor on the appeal bond. See also *Hays v. Van Eyck*, 99 Ind. 345; *Hays v. Wilstach*, 101 Ind. 100; *Græter v. De Wolf*, 112 Ind. 1.

In *Hartwell v. Smith*, 15 Ohio St. 205, the court said: "In regard to this question of superiority of equities, which is liable to arise in the case of prior and subsequent bonds, executed by different sureties, for distinct purposes, and both constituting securities in the hands of the creditor for the same debt, it is well settled that if the interposition of the second surety is for the benefit of the principal alone, without the sanction or assent of the first surety, who may be prejudiced thereby; as when the effect of the second bond is to prevent the enforcement of present payment from the principal, and thus to prolong the responsibility of the first surety; in such a case the equity of the first surety is superior and he is entitled to be subrogated to the rights of the creditor as against the second." *Citing Parsons v. Briddock*, 2 Vern. 208; *Pott v. Nathans*, 1 W. & S. (Pa.) 155; *Bradenburg v. Flynn*, 12 B. Mon. (Ky.) 397; *Dunlap v. Foster*, 7 Ala. 734; *Burns v. Huntingdon Bank*, 1 Pen. & W. (Pa.) 395.

In *Dessar v. King*, 110 Ind. 69, it was held that where the replevin bail has been compelled to pay the judgment, he may have execution thereon against all the defendants, and may enforce the collection thereof against one who is surety of the other defendants in the judgment, though he may have known of such suretyship at the time he became bail, unless it appears that the surety objected to a stay of execution at the time judgment was rendered.

In *Rosenbaum v. Goodman*, 78 Va. 121, the facts were these: A short while before E was adjudged a bank-

rupt, be sold a lot of goods to L, which goods were seized by the marshal on a claim that the sale was fraudulent. L replevied them and gave bond with R as surety, conditioned for their delivery on the decree of the district court; that court decreed that the sale was fraudulent and void, and that L deliver up the goods; L appealed to the circuit court, with new sureties on his appeal bond; the decree of the district court was affirmed; L then appealed to the supreme court, with new sureties on his second appeal bond; this court also affirmed the decree of the court below. In the meanwhile L had squandered the goods, become insolvent and died. R, having been compelled to pay their value to the bankrupt's assignee, filed his bill for indemnity against the sureties of L on his appeal bonds; the court below dismissed the bill, and on appeal it was held, first, that the bill was properly dismissed; second, R had no right to be substituted to the position of the assignee to proceed against the securities in the two appeal bonds. The ground of the decision was that the undertaking of R, and that of the sureties in the appeal bonds were altogether distinct, giving him no rights against them. See also *Bradford v. Mooney (Ohio)*, 2 Cinn. Super. Ct. Rep. 468.

In *Peirce v. Higgins*, 101 Ind. 178, it was held that a surety on an appeal bond is entitled to be subrogated to the lien of the judgment appealed from and paid by him, and his equities are superior to those of a purchaser in good faith, who buys the land on which the judgment is a lien after the execution of the appeal bond.

In *Louisiana* it is held that the later surety is entitled to subrogation against the prior surety, on the ground that it must be presumed that he relied upon the undertaking of the first surety as a protection against loss. *Howe v. Frazer*, 2 Rob. (La.) 424. See also *McClung v. Beirne*, 10 Leigh (Va.) 394; 34 Am. Dec. 739; *Rodgers v. McCluer*, 4 Gratt. (Va.) 81; 47 Am. Dec. 715; *Leake v. Ferguson*, 2 Gratt. (Va.) 420; *Hill v. Manser*, 11 Gratt. (Va.) 522, cases in which the sureties on appeal bonds were subrogated to the lien of the judgment appealed from.

In *Kane v. State*, 78 Ind. 103, where a bond with surety, conditioned for the observance of the liquor laws, was executed, and fines assessed against the

his own risk, and not at the risk, or to the prejudice, of other parties whose wishes were not consulted in the transaction.¹ But the rule is otherwise where the subsequent surety becomes bound for a purpose in which both the principal and the prior surety have an interest, and the assent of the prior surety is expressly given, or may be clearly inferred from the circumstances of the case.² In some jurisdictions it is held that neither the prior nor the subsequent surety is entitled to subrogation against the other.³

(8) *Guarantors*.—The guarantor of a promissory note occupies the position of a surety, and will be subrogated to the rights of the holder to whom he has been compelled to make payment.⁴

If the note be secured by mortgage, and the guaranty be enforced, the guarantor will be substituted to the benefit of the mortgage.⁵

obligor for violations of those laws were paid by a third person as surety on a stay of execution for such fines, it was held that such surety was entitled to be subrogated to the rights of the state in the original bond, and might recover from the surety therein the amount so paid to the use of the principal. See also *Burgett v. Paxton*, 99 Ill. 288.

1. See cases cited in the note immediately preceding.

2. *Dillon v. Scofield*, 11 Neb. 419; *Cowan v. Duncan*, Meigs (Tenn.) 470; *Hartwell v. Smith*, 15 Ohio St. 200; *Smith v. Anderson*, 18 Md. 520; *Monson v. Drakeley*, 40 Conn. 552; 16 Am. Rep. 72; *Yeager's Appeal* (Pa. 1887), 8 Atl. Rep. 225; *Howe v. Frazer*, 2 Rob. (La.) 424. See also *Harris v. Warner*, 13 Wend. (N. Y.) 400; *Harrison v. Lane*, 5 Leigh (Va.) 414; 27 Am. Dec. 607; *Craythorne v. Swinburne*, 14 Ves. 160.

In *La Grange v. Merrill*, 3 Barb. Ch. (N. Y.) 625, it was held that where a judgment has been recovered against the principal debtor and sureties, and a third party agrees with the creditor to become surety for the debt, upon an agreement with such creditor that the new surety shall have the benefit of the judgment, he has a prior equity over the first sureties, and is entitled to enforce the collection of the judgment for his own benefit and protection.

3. *Morse v. Williams*, 22 Me. 17; *Holmes v. Day*, 108 Mass. 563; *Semmes v. Naylor*, 12 Gill & J. (Md.) 358; *criticising Parsons v. Briddock*, 2 Vern. 608.

4. *Babcock v. Blanchard*, 86 Ill. 165; *Rand v. Barrett*, 66 Iowa 731; Wash-

ington Bank *v. Shurtleff*, 4 Met. (Mass.) 30. See also *Darst v. Bates*, 95 Ill. 493; *Pennsylvania R. Co. v. Pemberton*, etc., R. Co., 28 N. J. Eq. 338. Compare *Putnam v. Tash*, 12 Gray (Mass.) 121.

5. In *Rand v. Barrett*, 66 Iowa 731, the guarantor of a promissory note paid the same at the request of the maker, whereupon the note was indorsed and delivered to him. It was held that he became subrogated in equity to the rights of the holder including the security of a chattel mortgage, and that the subsequent cancellation of the mortgage by the holder did not deprive him of that security as against the parties to the note, and other parties not prejudiced by the cancellation; and that all these rights passed to the assignee of the guarantor upon a sale of the note.

In *Conner v. Howe*, 35 Minn. 518, A, to secure a note, mortgaged certain land, which, subject to a mortgage to B was owned by him, to C; D and E were guarantors of the payment of the note. A, by a warranty deed conveyed the land to F subject to these mortgages, F in the deed and as a part of the consideration thereof assuming to pay both. F then, by warranty deed, conveyed the land to G, subject to these mortgages, G in the deed, and as a part of the consideration thereof, assuming to pay the mortgages. Afterwards the B mortgage was duly foreclosed, and on the day after the expiration of the period of redemption the purchaser at the foreclosure sale made to G a quitclaim deed of the land. A having failed to pay the guaranteed note when it fell due, D and E, the guarantors, paid to C the amount due thereon, and about six years afterwards, and after the com-

And when the guaranty of a bond is executed at the solicitation of the obligee therein, his assignee, who has by suit and judgment fixed the guarantor's liability, will not be permitted to defeat the latter's claim to subrogation on the ground that he assumed the obligation without the request of the principal debtor.¹

mencement of this action, took an assignment of the mortgage from C. It was held that D and E as sureties had a right to pay the C note after maturity, for their own protection, and without regard to whether C could collect of A or not, and upon payment they were immediately entitled to be subrogated to the securities held by C, and among others to the C mortgage and G's obligation to pay the same; and further, the fact that the right of action of D and E, the guarantors, against A was barred by the Statute of Limitations, did not extinguish the lien of the C mortgage, against which the statute had not taken effect, nor did it take away their right of subrogation to it.

In *Havens v. Willis*, 100 N. Y. 482, the circumstances were these: Mortgagees, upon the assignment of certain bonds and of a mortgage given as security therefor, guaranteed the payment of the same. As a consideration for the discontinuance of an action upon one of the bonds, E, a third party, executed to the assignee a mortgage upon his land as additional security. The original mortgage being foreclosed, and a deficiency arising thereon, the guarantors paid the same, upon an assignment of the second mortgage. In an action to foreclose the second mortgage the defendant, the owner of the equity of redemption, defended on the ground that as to him both the guarantors and the obligators were the principals for whose liability his lands were security, and the former having merely discharged their own obligation the security was released. This contention, however, was negatived, the court holding that such security was an independent one having no reference to the obligation of the guarantors; that the latter, upon payment of the deficiency, were entitled to be subrogated to the security and had a legal right to enforce the same.

1. *Mathews v. Aikin*, 1 N. Y. 594. In this case E, the son of the complainant, executed to H a bond secured by a mortgage on certain real estate,

conditioned for the payment of \$1,300 in six equal annual installments. At the time of the execution of the bond and mortgage E was indebted to one W in the amount thereof, and W, being also indebted to one H, procured the bond and mortgage to be executed directly to the latter. At the time the bond and mortgage were given, or soon thereafter, the complainant at the urgent solicitation of W and H, executed upon the bond a sealed guaranty of the payment thereof. There was no evidence that the complainant executed the guaranty at the desire or request of E, the principal debtor. Indeed, E testified that he advised his father not to sign the guaranty, informing him that he was under no obligations to procure additional security. Subsequently E executed to one of the defendants, M, a mortgage upon the same premises conditioned for the payment of the sum of about \$600. The mortgage to H had been previously recorded, and M had actual notice of its existence. M, having caused his mortgage to be foreclosed and canceled, purchased the premises at the master's sale under a decree, for the sum of \$500, and procured the master's deed to himself. After the purchase the personal representatives of H assigned the bond and mortgage above mentioned to one of the defendants, O. The consideration for this assignment was paid by M, and such assignment was made in trust for him, and for his benefit alone. Immediately afterward M caused an action at law to be commenced in the name of H's representative against the complainant upon the aforesaid guaranty and recovered judgment against him for the amount of the last installment due upon the bond and mortgage, the other installments having been previously paid. The complainant thereupon tendered the amount recovered against him and demanded that O assign the bond and mortgage to him. This was refused, and the complainant then paid absolutely the sum and demanded an assignment. This was also refused. At the

(9) *Co-debtors, Tenants in Common, and Partners.*—A joint debtor who has been compelled to pay the whole debt, or more than his share thereof, is regarded as a surety for his co-debtor, and will, in the absence of a contravening equity, be subrogated to the rights of the creditor against the latter for his ratable share of the debt.¹ But if the debt be compromised or paid in depre-

commencement of the suit the defendant, M, was in possession of the premises under his purchase at the master's sale above mentioned. The complainant claimed by the bill to be subrogated to the rights of O or N as the holder of the bond and mortgage, for the purpose of reimbursing himself the sum collected of him by suit on the guaranty. The vice-chancellor decreed in favor of the complainant according to the prayer of the bill, and on appeal that decree was affirmed. The court, by Johnson, J., said: "The creditor should not be permitted in a court of equity to question the rights of the surety after the obligation has been incurred at his request, and he has fixed the character upon him by suit and judgment in a court of law. As to him, at least, Aikin, the father, was surety for the debt of the son, and was compelled to pay that debt or a portion of it, and it is immaterial as to the creditor what the state of the case is, or the legal rights are, as between the principal debtor and the surety. There is no reason why the creditor should set up a defense for the debtor. It is sufficient for him that he has received his debt of the surety, to create the obligation on his part to surrender to the surety the securities in his hands. He is not to litigate the rights of the debtor and set up defenses for the latter which he, peradventure, might be too honest and conscientious to set up against the securities in the hands of his surety who has paid his debt for him. It might be different if the debtor himself was here urging this defense, and especially if he was able to show that the surety entered into the obligation not only against his wish or request, but for some purpose of fraud or oppression, or to make him his debtor against his will, or, as suggested by the appellant's counsel, to compel him to pay a debt to which, as between him and the creditor, he had a good defense at law. In such case a court of equity would not lend the surety its aid, as he would not come before it with clean hands. But this is no such case; the

principal debtor is here made a party and suffers the bill to be taken as confessed against him. He sets up no such defense, nor does he pretend that he is not liable, or that he is not under both a legal and a moral obligation to his surety to repay the money which the latter has advanced for him. Indeed, he expressly swears that his father was a mere security for him for the payment of the bond without receiving any consideration for becoming such surety. It is true he also testifies that he advised his father not to sign the guaranty; but it is obvious to my mind that this was in reference to a claim made by the creditor upon the debtor that he was under some obligation to give some additional security. . . . It is sufficient, however, as I apprehend, that the debtor sets up no defense of the kind, and, although a party, admits the validity of the respondent's claim, and would not afterwards be heard to allege, it was illegal or invalid. Could the appellant, Matthews, be permitted to set up a defense so ungracious as against a surety whom he has compelled to pay his debt, he would be bound in order to make it complete to show, as I think, that the principal debtor resisted the surety's claim, and that the securities in the hands of the latter would be worthless, inasmuch as he could never enforce them against such principal; otherwise the court would intend that the principal was willing to do what equity required him to perform."

1. Pratt v. Law, 9 Cranch (U. S.) 456; Ackerman's Appeal, 106 Pa. St. 1; Dobyns v. Rawley, 76 Va. 537; Sumner v. Rhodes, 14 Conn. 135; Rardin v. Walpole, 38 Ind. 146; Smith v. Latimer, 15 B. Mon. (Ky.) 75; Tompkins v. Mitchell, 2 Rand. (Va.) 428; Schoenewald v. Dieden, 8 Ill. App. 389; Newton v. Newton, 53 N. H. 537; Henderson v. McDuffee, 5 N. H. 38; 20 Am. Dec. 557; Boyd v. Boyd, 3 Gratt. (Va.) 113; Wheatley v. Calhoun, 12 Leigh (Va.) 264; Cornell v. Prescott, 2 Barb. (N. Y.) 16; Cherry v. Munro, 2 Barb. Ch. (N. Y.) 618; Hatch v. Norris, 36

ciated currency, the actual outlay, and not the nominal amount of the debt, will regulate the extent of the paying debtor's recovery against his co-debtor.¹ He will be entitled to the benefit of collaterals deposited with the creditor by the other joint-debtors, and will have a lien on such securities in the hands of the creditor to the extent of the share which the other joint-debtor should have paid.² Subrogation will not be enforced in favor of one apparently a joint principal, but really a surety, to the prejudice of an

Me. 419; Goodall v. Wentworth, 20 Me. 322; Roddy's Appeal, 72 Pa. St. 98; Hall v. Hall, 34 Ind. 314; Shropshire v. His Creditors, 15 La. Ann. 705; Whitehead's Succession, 3 La. Ann. 396.

Payment by a debtor will not operate a satisfaction of the instrument evidencing the debt as against his co-debtor, so as to drive the former to his action on an *assumpsit* against the latter. He succeeds to all the rights and securities of the creditor against his co-debtor. Greenlaw v. Pettit, 87 Tenn. 467. But see Greiner's Estate, 2 Watts (Pa.) 414, in which it was held that payment by one joint obligor in a bond, created merely in his favor a simple contract claim for contribution from his co-obligor, and did not preserve to him the rights of a specialty creditor against his co-obligor's estate. *Accord* Hendrickson v. Hutchinson, 29 N. J. L. 180; Hollingsworth v. Pearson, 53 Iowa 53. But see authorities cited *supra*, this title, *Whether Payment by Surety Extinguishes Specialty*, sustaining the proposition that payment by a surety does not extinguish the debt, nor affect the remedy of the surety making such payment against his co-surety on the instrument evidencing the debt.

The rule stated in Bispham's Eq., § 337, and supported by Dering v. Earl of Winchelsea, 1 Lead. Cas. Eq. 434; Aldrich v. Cooper, 8 Ves. 382, that the right of subrogation does not exist "between parties who are equally bound—as for example, co-partners, co-obligors and co-contractors," is doubted in Dowdy v. Blake, 50 Ark. 205; 7 Am. St. Rep. 88, so far as it applies to co-obligors. See also Pratt v. Law, 9 Cranch (U. S.) 456; Campbell v. Pratt, 5 Wheat. (U. S.) 429. But see Stanley v. Nutter, 16 N. H. 22; Morley v. Stevens, 47 How. Pr. (N. Y.) 228; Adams v. Keeler, 30 Ga. 86; Maxwell v. Owen, 7 Coldw. (Tenn.) 630; Baldwin v. Merrill, 8 Humph. (Tenn.)

132; Tompkins v. Fifth Nat. Bank, 53 Ill. 57.

If a vessel be injured in collision by the joint fault of two other vessels, and one of them pays the loss, it will be subrogated to the rights of the injured vessel against the other wrongdoer. The Hattie M. Spraker, 29 Fed. Rep. 457. See also Morrow v. Peyton, 8 Leigh (Va.) 54; Crafts v. Mott, 4 N. Y. 604; Brazer v. Clark, 5 Pick. (Mass.) 96; Ames v. Armstrong, 106 Mass. 15; Cook v. Hinsdale, 4 Cush. (Mass.) 134; Crafts v. Crafts, 13 Gray (Mass.) 360; Collins v. Carlisle, 7 B. Mon. (Ky.) 13; Sterling v. Stewart, 74 Pa. St. 445; 15 Am. Rep. 559; Prichard v. State, 34 Ind. 137; Braxton v. State, 25 Ind. 82; Moore v. State, 49 Ind. 558; Baltimore, etc., R. Co. v. Walker, 45 Ohio St. 577; Durbin v. Kume, 19 Oregon 71; Seward v. Huntington, 26 Hun (N. Y.) 217; Owen v. McGehee, 61 Ala. 440; Martin v. Baldwin, 7 Ala. 923; Chipman v. Morrill, 20 Cal. 130; Garfield v. Foskett, 57 Vt. 290; Neilson v. Fry, 16 Ohio St. 552; 91 Am. Dec. 110.

1. See *supra*, this title, *How Far Subrogation Will be Carried; Co-sureties*. See also Walker v. Municipality No. One, 5 La. Ann. 10; Shropshire v. His Creditors, 15 La. Ann. 705.

And a co-promisor paying a debt barred by the act of limitations, against the consent of his co-debtor, has no right of subrogation as against the latter. Ellcott v. Nichols, 7 Gill (Md.) 85. See Screven v. Joyner, 1 Hill Eq. (S. Car.) 252; 26 Am. Dec. 199; Lovell v. Nelson, 11 Allen (Mass.) 101; 87 Am. Dec. 706.

2. Vincent v. Logsdon, 17 Oregon 284.

If collaterals deposited by one joint debtor be used to pay the whole debt, that debtor will be subrogated to the rights of the creditor as to other collaterals deposited by his co-debtors to secure the same debt. Gould v. Central Trust Co., 6 Abb. N. Cas. (N. Y.) 381; McCready v. Van Antwerp, 24 Hun (N. Y.) 322.

intervening security taken by a creditor from the principal, *bona fide*, and in ignorance of the suretyship.¹

If one of several tenants in common pays off a lien binding the common property, there will be no merger of his demand, but he will be considered a surety for his co-tenants, and subrogated to the rights of the creditor against them for their proportion of the debt.²

1. *Orvis v. Newell*, 17 Conn. 96. In this case A and B executed to C a mortgage of certain tracts of land, some of which were owned by A and the others by B, as security for their joint and several note. Shortly thereafter A mortgaged one of his tracts to D to secure a debt due to him of \$100. D became the legal owner of the first-mentioned note and mortgage by assignment from C. D foreclosed the mortgage for \$100 and brought a bill against A and B to foreclose the mortgage executed by them jointly. It appeared that B signed the note and executed the mortgage simply as the surety of A, and on this ground B claimed that he, on paying the first mortgage only, was entitled to be subrogated to the position of the mortgagee, and to hold the entire mortgaged premises for his indemnity. It was held, first, that a party claiming the rights of a surety must show that those to be affected by his claim, knew, or had the means of knowing, of its existence; second, that in this case neither the record of the first mortgage nor the note afforded notice to D of any claim of B as the surety of A, and no actual notice being found, D ought not to be charged with notice; third, that D, being a *bona fide* purchaser of the first mortgage, without notice, ought not to be affected by the claim of B. But if, in a case of this kind, the intervening creditor had actual knowledge of the suretyship, then the fact that it did not appear from the papers, would be immaterial and the equity of the surety would prevail. *Rogers v. School Trustees*, 46 Ill. 428.

2. *Young v. Williams*, 17 Conn. 393; *Champlin v. Williams*, 9 Pa. St. 341; *Gearhart v. Jordan*, 11 Pa. St. 325; *Watson's Appeal*, 90 Pa. St. 426; *Duncan v. Drury*, 9 Pa. St. 332; 49 Am. Dec. 565; *Barker v. Flood*, 103 Mass. 474; *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 388; *Cornell v. Prescott*, 2 Barb. (N. Y.) 16; *Calkins v. Steinbach*, 66 Cal. 117; *Lyon v. Robbins*, 45 Conn. 513; *Higham v. Harris*, 108 Ind. 246.

But the lien must be an actual existing incumbrance, and not a limited or inchoate one, in order to entitle the tenant discharging it to subrogation against his co-tenant. *Preston v. Wright*, 81 Me. 306; 10 Am. St. Rep. 257. See also *Watkins v. Eaton*, 30 Me. 529; 50 Am. Dec. 637; *Harrison v. Harrison*, 56 Miss. 174; *Oliver v. Montgomery*, 42 Iowa 36; 39 Iowa 601; *Moon v. Jennings*, 119 Ind. 130; 12 Am. St. Rep. 383; *Weare v. Van Meter*, 42 Iowa 128; 20 Am. Rep. 616; *Hurley v. Hurley*, 148 Mass. 444.

A somewhat different rule appears to have obtained in *Walsh v. McBride*, 72 Md. 45, in which it was held that one of two tenants in common who pays the entire purchase money of the common property and takes a note from the other tenant for his share, will not, on the death of such tenant, be subrogated to the vendor's lien on his interest in the land. And see *Clark v. Warren*, 55 Ga. 575, where subrogation was denied the paying co-tenant as against a purchaser from the non-paying co-tenant. In *Williams v. Perry*, 20 Ind. 437; 83 Am. Dec. 327, a share aliened by one of several co-tenants was subjected to the payment of a balance of the purchase money due by him on a mortgage executed by all the co-tenants, the purchaser being charged with notice of the mortgage by the registry thereof.

One of two joint purchasers of land who pays more than his share of the purchase money will be subrogated to the rights of the vendor against the other purchaser, as against a vendee of the latter with notice. *Dowdy v. Blake*, 50 Ark. 205. Compare *Engles v. Engles*, 4 Ark. 286; 38 Am. Dec. 37. See also *Furman v. McMillian*, 2 Lea (Tenn.) 121; *Birdsall v. Cropsey*, 29 Neb. 679. If several persons are interested in land, incumbered by a mortgage, whether as tenants in common of the whole or as owners of distinct parcels, and one of them redeems for the protection of his own interest, he becomes substituted in equity to the

A partner who, after dissolution of the firm, pays a social debt out of his private means, will be subrogated to the rights of the partnership creditors against the other partners.¹ But it has been held that he will not be entitled to a lien on the separate estate

rights of the mortgagee, and has a right to hold the land as if the mortgage subsisted, until he shall have received from the other owners their shares of the incumbrance. *Hubbard v. Ascutner Mill Dam Co.*, 20 Vt. 402; 50 Am. Dec. 41; *Aiken v. Gale*, 37 N. H. 501. See also *Newbold v. Smart*, 67 Ala. 326; *Ran-kin v. Black*, 1 Head. (Tenn.) 650; *Gee v. Gee*, 2 Sneed (Tenn.) 395; *Tiftworth v. Stout*, 49 Ill. 78; 95 Am. Dec. 577; *Lowrey v. Byers*, 80 Ind. 443; *Rardin v. Walpole*, 38 Ind. 146; *Adams v. La Rose*, 75 Ind. 471; *Carter v. Penn.*, 99 Ill. 390; *Brooks v. Harwood*, 8 Pick. (Mass.) 497; *Colton v. Colton*, 3 Phila. (Pa.) 24; *Pease v. Egan*, 131 N. Y. 262.

In *Fisher v. Dillon*, 62 Ill. 379, and *Simpson v. Gardiner*, 97 Ill. 237, after co-tenants had made partition, one was compelled to pay a mortgage for the whole purchase money, and he was subrogated to the rights of the mortgagor against the other co-tenant. See also *Sawyer v. Lyon*, 10 Johns. (N. Y.) 32.

But if one joint tenant discharges a vendor's lien for a balance of purchase money due on the land, after that lien has become barred by lapse of time, he will have no recourse against the other tenant by substitution to the rights of the vendor. *Screven v. Joyner*, 1 Hill Eq. (S. Car.) 252; 26 Am. Dec. 199. See also *Ellicott v. Nichols*, 7 Gill (Md.) 85; 48 Am. Dec. 546, a decision based on the same principle.

And if tenants in common execute a mortgage to secure the purchase money of the common property, and the mortgagee fails to record the mortgage, thereby losing his lien as to an innocent purchaser from one of the tenants, but enforces the mortgage against the interest of the other tenant, the latter will not be substituted to the lien of the mortgage as against such purchaser. *Ohio L. Ins. Co. v. Ledyard*, 8 Ala. 866.

1. *Eakin v. Knox*, 6 Rich. (S. Car.) 14; *In re Smith*, 16 Nat. Bankr. Reg. 113; *Royalton Nat. Bank v. Cushing*, 53 Vt. 321; *Downs v. Jackson*, 33 Ill. 465; 85 Am. Dec. 289; *Hill v. Huston*, 15 Gratt. (Va.) 350; *Tibbetts v. Ma-gruder*, 9 Dana (Ky.) 80.

This right has been extended to the

representatives of a deceased partner who have paid the partnership debt on account of their intestate. *Sells v. Hubbell*, 2 Johns. Ch. (N. Y.) 394; but was denied in *Alabama*, upon the ground that payment by a co-principal extinguishes the debt and leaves no right of subrogation. *Bartlett v. Mc-Rae*, 4 Ala. 688; *Hogan v. Reynolds*, 21 Ala. 56.

A partner paying off a judgment against the individuals of the firm for money borrowed by them in their individual names, but for use in the firm business, out of his private means, is entitled to the benefit of a statute giving a debtor who pays off a judgment against himself and his co-debtors the right to issue execution on such judgment against the latter for reimbursement. *O'Bryan v. Neel*, 84 Ga. 134; *Pearce v. Chastain*, 3 Ga. 226.

Where property owned by two partners is subject to a mortgage, and one of them, after selling his interest therein to the other who assumes the mortgage debt, is compelled to pay the debt, or any part thereof, he may be subrogated to the rights of the mortgagee or his assignee. *Shinn v. Shinn*, 91 Ill. 477. See also *Laylin v. Knox*, 41 Mich. 40.

And when a partner pays judgments obtained by the firm creditors on claims which by an award were to be settled by his co-partner, the former is entitled to be subrogated to the position of the creditors, and may maintain a bill to vacate a fraudulent conveyance executed by the co-partner. *Swan v. Smith*, 57 Miss. 548.

In *Field v. Hamilton*, 45 Vt. 35, the plaintiff and M., partners, agreed that M. should pay the defendant for certain property purchased of him. M. sent his note to the defendant in payment for the property, but the defendant refused to accept it and demanded and received payment of the plaintiff; thereupon it was agreed between the plaintiff and defendant that the latter should hold M.'s note and not let it be known that he had received payment, and if M. ever paid anything on it, he should pay it to the plaintiff. M. thereafter made a payment on the note, not knowing that the defendant had re-

of a co-partner in bankruptcy, for a balance due him upon the adjustment of the partnership affairs, by substitution to the position and rights of a social creditor who has been paid out of social assets.¹

As a general rule there must be an adjustment of the partnership accounts, and of the equities between the partners, before subrogation will be enforced.²

A partner who retires from the firm, and for a valuable consideration is indemnified by the remaining partners against all debts and liabilities of the firm, will in equity be considered a surety for them, and subrogated to the rights of the creditor, to whom he is compelled to pay a firm debt.³

ceived payment for the property. It was held that the plaintiff was merely surety for M., and as such was entitled to be subrogated to all the securities, and avails of securities, received by the defendant; that the defendant held M.'s note as security, and that the money paid thereon belonged to the plaintiff.

1. *In re Smith*, 16 Nat. Bankr. Reg. 113. In this case the court, by Hughes, J., said: "If this debt of the firm had been paid out of the individual property of H., then the question of subrogation as to half the debt in favor of H. might arise. But the debt having been paid with social assets, there is no right of subrogation as to H.'s half, so far as the debt specifically paid with social assets is concerned. If in the suit for settlement between the partners a final balance had been found due from S. (a partner) to H. (the other partner), and a decree rendered requiring S. to pay that balance to H., and afterwards this debt (to the creditor) had been decreed and H. had paid it out of his individual means, then and in that event H. might have had a right of subrogation for half against S.'s individual estate."

2. *Fessler v. Hickernell*, 82 Pa. St. 150; *Bittner v. Hartman*, 139 Pa. St. 632. See also *Lyons v. Murray*, 95 Mo. 23; 6 Am. St. Rep. 17; *McDonald v. Holmes*, 22 Oregon 212; *Shattuck v. Lawson*, 10 Gray (Mass.) 405; *Baily v. Brownfield*, 20 Pa. St. 41.

So where a surviving partner becomes insolvent and makes a voluntary assignment of his individual property for the benefit of creditors, and the deceased partner's administrator pays the remaining debts of the partnership, the latter may not upon the distribution of the assets in the hands of the assignee demand a *pro rata* dividend

upon a moiety of such debts paid, where the accounts and equities of the partners have not been adjusted. *Singizer's Appeal*, 28 Pa. St. 524.

3. *Frow's Estate*, 73 Pa. St. 459. In this case F. sold his interest in the firm to the other members, who covenanted jointly and severally to pay the debts and indemnify him against them; the remaining members continued in the same business as a partnership, took all the firm's assets and assumed all the liabilities without any division of F.'s interest. F. discharged the debts of the first firm; the second firm afterwards assigned for the benefit of creditors. It was held that the other partners, having bought out F. and indemnified him, he became their surety, and having paid debts, was subrogated to the rights of the creditors against the partners. See also *Cherry v. Monroe*, 2 Barb. Ch. (N. Y.) 618; *Buchanan v. Clark*, 10 Gratt. (Va.) 164.

In *Scott's Appeal*, 88 Pa. St. 173, F., who had been a member of the firm of G., C. & Co. during a period of six months, retired therefrom in June, 1872. F.'s withdrawal was entirely voluntary, with the mutual consent of the remaining partners, and with the agreement that he was to go out of the firm without profit, and that G. and C., the remaining members, were to pay the debts of the firm, including rent of the storehouse and warehouse, which they had rented in December, '71, when the partnership was formed, from H. H. instituted suits for two quarters' rent of the storeroom and warehouse, and obtained judgment against G., C. and F.; F. paid the judgments and took assignments of the same. It was held that F., holding these judgments, was entitled to be subrogated to the rights of the judgment creditor as against G. and C.

See also *Conwell v. McCowan*, 81 Ill.

And one who in good faith lends money to a surviving partner, which is faithfully applied by the latter in satisfaction of the firm liabilities, will be subrogated to the rights of the partner to have the loan repaid out of the firm assets.¹

285, where, on the dissolution of the partnership, one partner assumed the payment of a partnership note and executed a mortgage to the payee of the note to secure its payment, and also to indemnify his co-partner against the payment thereof; and the co-partner being compelled to make a payment upon the note, it was held that he was entitled to be subrogated to the rights of the mortgagee to the extent of his payment.

A and B, partners, agreed in writing to settle the partnership affairs. Certain judgment notes had been signed by the firm and delivered to C. In the agreement it was stipulated that B should discharge one of the judgments, or procure a release therefor; and it was further agreed that said "A shall have the right to pay or cause to be paid in the event of said B failing to do so, as herein provided, both of C's judgments; and in that event, said A shall have the right . . . to collect from said B the amount of the debt, interest and costs of one of said judgments." B failed to pay either of the judgments; A was compelled to pay both of them; he thereupon issued an attachment execution upon one of the judgments in the name of the legal plaintiff to his own use to collect the amount of the judgments from B. The court of common pleas vacated the attachment on the ground that, by the act of payment of the judgment, the debt was satisfied, and that A had no power to keep the judgment on foot and issue an execution against his partner and co-defendant. But on appeal this ruling was reversed, and it was held that although originally partners, yet by the agreement mentioned above, A became practically surety for B as to one of the judgments, and having paid the money was entitled, not only by the terms of the agreement, but also by virtue of his relation as surety, to use the judgment for his reimbursement from B. *Brown v. Black*, 96 Pa. St. 482.

In *Butler v. Birkey*, 13 Ohio St. 514, the facts were as follows: A became surety for B and C, who were partners, upon their note payable to D, upon B conveying to A as collateral security certain lands and moneyed

contracts. H shortly thereafter purchased C's interest in the partnership, and agreed to assume the debt due to D and all other partnership debts. B became insolvent and allowed judgment to be obtained by D, and execution thereon to be levied on the lands of C. E, a judgment creditor of B, filed a petition against B, A and C, to subject the securities held by A to the payment of his judgment. C's lands being subsequently sold and the proceeds applied to the payment of D's judgment, C also claimed the securities, in respect to said debt paid by him to D for B. It was held that C, having so by agreement with B, become merely his security upon the debt to D, although occupying towards A the position of principal, was, as to the securities held by A, to be deemed his co-surety; and that C, having paid D's judgment as surety for B, and thereby relieved A from further liability, became entitled as such co-surety to the securities or to a part thereof sufficient to indemnify him for his payment, and that C's equity in regard to the securities was superior to that of E.

To the point that the remaining partners are principals and the retiring one a surety and entitled to all the rights of a surety, see *Savage v. Putnam*, 32 N. Y. 501; *Millerd v. Thorn*, 56 N. Y. 404; *Colgrove v. Tallman*, 67 N. Y. 95; *Morss v. Gleason*, 64 N. Y. 204; *Merrill v. Green*, 55 N. Y. 270; *Waddington v. Vredenberg*, 2 Johns. Cas. (N. Y.) 227; *Williams v. Bush*, 1 Hill (N. Y.) 623; *Leithauser v. Baumeister*, 47 Minn. 151; *Smith v. Sheldon*, 35 Mich. 42; 24 Am. Rep. 529; *Olson v. Morrison*, 29 Mich. 395; *Williams v. Boyd*, 75 Ind. 286; *Oakeley v. Pasheller*, 10 Bligh N. S. 548; *Wilson v. Lloyd*, L. R., 16 Eq. 60; *Dodd v. Dreyfus*, 17 Hun (N. Y.) 600; *Shamberg v. Abbott*, 112 Pa. St. 6; *Burnside v. Fetzner*, 63 Mo. 107.

1. *Durant v. Pierson*, 124 N. Y. 444; 21 Am. St. Rep. 686.

In *Haynes v. Brooks*, 8 N. Y. Civ. Pro. Rep. 106, Van Vorst, J., said: "The debt of these creditors originated in a loan of money made by them to the surviving partner to pay an accommodation note loaned to the firm itself.

(10) *Parties to Bills and Notes*.—The payment of a bill or note to the holder by an indorser does not operate as an extinguishment thereof, requiring him to proceed upon an *assumpsit* or implied contract for his reimbursement; on the contrary, he is entitled to be subrogated to the position of the holder, and to have the benefit of all the rights and remedies available upon the instrument, against antecedent parties.¹ And the indorsee or transferee of a bill or note will be subrogated to the rights and remedies of the transferor against all parties to the note prior to himself, and to the benefit of all securities originally provided for the payment of the note, though there has been no actual transfer of the security to him.² It seems that if the first indorser has been

If a firm obligation was retired by the use of the money loaned, or advanced, by Brown and Co., the surviving partner would have been entitled to be repaid out of the firm property. As the moneys of Brown and Co., in fact, paid a firm obligation, I see no objection to the subrogation of them in equity to the rights of the surviving partner, or to the regarding of them as entitled to be repaid out of the firm assets. That works injustice to no one."

1. *Ex p. Ryswick*, 2 P. Wms. 89; *Ex p. Royal Bank*, 2 Rose 197; *Ex p. Wyldman*, 2 Ves. 115; *Blake v. Ames*, 8 Allen (Mass.) 318; *Sohier v. Loring*, 6 Cush. (Mass.) 537; *National Mount Wollaston Bank v. Porter*, 122 Mass. 308; *Schleissmann v. Kallenberg*, 72 Iowa 338; 2 Am. St. Rep. 247. See also *Corey v. White*, 3 Barb. (N. Y.) 12; *Lyon v. Bolling*, 9 Ala. 463; 44 Am. Dec. 444. See in this connection, *supra*, this title, *Whether Payment by Surety Extinguishes Specialty*.

The indorser of a note is entitled to the benefit of a mortgage securing the note. *McCurdy v. Clark*, 27 Mich. 445; *Bridgman v. Johnson*, 44 Mich. 492; *Third Nat. Bank v. Shields*, 55 Hun (N. Y.) 274. And to the benefit of a pledge of property for the payment of the note. *Woodward v. American Exposition R. Co.*, 39 La. Ann. 566.

An indorser of a bill paying a judgment thereon against the drawer is within a statute providing that a "surety" who pays a judgment against himself and principal shall have all the privileges of the plaintiff in the judgment. *Wilson v. Wright*, 7 Rich. (S. Car.) 400; *Yates v. Mead*, 68 Miss. 787. Compare *Dibrell v. Dandridge*, 51 Miss. 55.

If separate judgments be recovered against the maker and indorser of a

note, and judgment be recovered in another state on the judgment against the indorser, and he satisfies the same, he will be subrogated to the lien of the judgment which was obtained against the maker. *Bank of Old Dominion v. Allen*, 76 Va. 200.

A second indorser who pays a judgment on the note against himself and the first indorser, may, without further proceedings, issue execution against the first indorser. *Sprigg v. Beaman*, 6 La. 63; *Scott v. Featherston*, 5 La. Ann. 313; *Connelly v. Bourg*, 16 La. Ann. 109; 79 Am. Dec. 568.

One who indorses a certificate of deposit in good faith and in ignorance of its fraudulent inception, and is compelled to pay the certificate, will be subrogated to the rights of the holder against prior indorsers and the issuing bank. *Beckwith v. Webber*, 78 Mich. 390.

If an indorser procures a suit against himself and the maker to be discontinued as to himself upon his giving new notes for the debt, he will not be subrogated to the benefit of a judgment obtained against the maker, unless he has paid the notes executed by himself. *Payton v. Wight*, 2 Hilt. (N. Y.) 77.

An indorser who pays a note to the indorsee will not be subrogated to the rights of the indorsee so as to enable him to carry on a suit begun by the indorsee to vacate a fraudulent conveyance by the maker of the note. *Heighe v. Farmers' Bank*, 5 Har. & J. (Md.) 68.

2. *Woodward v. Pell*, L. R., 4 Q. B. 55; *Cook v. Lister*, 13 C. B. N. S. 543; 106 E. C. L. 542; *Pollard v. Ogden*, 2 El. & Bl. 459; 75 E. C. L. 459; *Randall v. Moon*, 12 C. B. 261; 74 E. C. L. 260; *Williams v. James*, 15 Q. B. 498; 69 E. C. L. 497; *Jones v. Broadhurst*, 9 C. B. 173; *Duncan v. North*

& South Wales Bank, L. R., 6 App. Cas. 1; *Ex p. Smart*, L. R., 8 Ch. 220; *Ex p. Waring*, 19 Ves. 345; *City Bank v. Luckie*, L. R., 5 Ch. 773; *Bird v. Louisiana State Bank*, 93 U. S. 96; *Merriken v. Godwin*, 2 Del. Ch. 236; *Koehler v. Farmers', etc., Bank*, 5 N. Y. Supp. 745; *Auburn Bank v. Throop*, 18 Johns. (N. Y.) 505; *Heath v. Hand*, 1 Paige (N. Y.) 329; *Riverside Bank v. Totten*, 11 N. Y. Supp. 519; *Green v. Hart*, 1 Johns. (N. Y.) 580; *Gould v. Marsh*, 4 Thomp. & C. (N. Y.) 128; *Partridge v. Partridge*, 38 Pa. St. 78; *Phillips v. Lewistown Bank*, 18 Pa. St. 394; *Harmony Nat. Bank's Appeal*, 101 Pa. St. 428; *Kelley v. Whitney*, 45 Wis. 110; 30 Am. Rep. 697; *Heath v. Otis*, 3 Chand. (Wis.) 49; *Martineau v. McCollum*, 4 Chand. (Wis.) 153; *Gordon v. Mulhare*, 13 Wis. 22; *Cornell v. Hichens*, 11 Wis. 353; *Croft v. Bunster*, 9 Wis. 503; *Bange v. Flint*, 25 Wis. 544; *Beckwith v. Webster*, 78 Mich. 390; *Martin v. McReynolds*, 6 Mich. 70; *Dutton v. Ives*, 5 Mich. 515; *Helmer v. Krollick*, 36 Mich. 373; *Judge v. Vogel*, 38 Mich. 568; *Printup v. Johnson*, 19 Ga. 73; *Mundy v. Whittemore*, 15 Neb. 647; *Bank of America v. Senior*, 11 R. I. 376; *Dudley v. Cadwell*, 19 Conn. 218; *Hartford, etc., Transp. Co. v. Hartford Bank*, 46 Conn. 569; *Hyman v. Devereux*, 63 N. Car. 624; *Potter v. Stevens*, 40 Mo. 229; *Gottschalk v. Neal*, 6 Mo. App. 596; *St. Louis Bldg., etc., Assoc. v. Clark*, 36 Mo. 601; *McQuie v. Peay*, 58 Mo. 56; *Merchants' Nat. Bank v. Abernathy*, 32 Mo. App. 222; *Hobson v. Edwards*, 57 Miss. 128; *Dick v. Mawry*, 9 Smed. & M. (Miss.) 448; *Stratton v. Gold*, 40 Miss. 778; *Pacific Bank v. Mitchell*, 9 Met. (Mass.) 297; *North Nat. Bank v. Hamlin*, 125 Mass. 506; *Wolcott v. Winchester*, 15 Gray (Mass.) 461; *Young v. Miller*, 6 Gray (Mass.) 152; *Taylor v. Page*, 6 Allen (Mass.) 86; *Breen v. Seward*, 11 Gray (Mass.) 118; *Rice v. Dewey*, 13 Gray (Mass.) 47; *Crane v. March*, 4 Pick. (Mass.) 136; 16 Am. Dec. 329; *Bryant v. Damon*, 6 Gray (Mass.) 564; *Keyes v. Wood*, 21 Vt. 331; *Nash v. Kelley*, 50 Vt. 425; *Ohio L. Ins., etc., Co. v. Winn*, 4 Md. Ch. 253; *Boyd v. Parker*, 43 Md. 182; *McCracken v. German F. Ins. Co.*, 43 Md. 471; *Indiana Bank v. Anderson*, 14 Iowa 544; 83 Am. Dec. 390; *Crow v. Vance*, 4 Iowa 441; *Dougherty v. Deeney*, 45 Iowa 443; *Updegraff v. Edwards*, 45 Iowa 515; *Preston v. Morris*, 42 Iowa 549; *Garvin v. State Bank*, 7 S. Car. 266;

Blumenthal v. Jassoy, 29 Minn. 177; *Paine v. French*, 4 Ohio 318; *Cook v. Shiras* (Ohio), 1 Cinn. Super. Ct. Rep. 398; *Blake v. Williams*, 36 N. H. 39; *Esty v. Graham*, 46 N. H. 169; *Barton v. Croydon*, 63 N. H. 417; *Southerin v. Meudum*, 5 N. H. 420; *Planters' Bank v. Douglass*, 2 Head (Tenn.) 699; *Biscoe v. Royston*, 18 Ark. 508; *Bennett v. Solomon*, 6 Cal. 134; *Burhans v. Hutcheson*, 25 Kan. 625; *Toulmin v. Hamilton*, 7 Ala. 362; *Bankhead v. Owen*, 60 Ala. 457; *Wolffe v. Nail*, 62 Ala. 24; *Graham v. Newman*, 21 Ala. 497; *Duncan v. Louisville*, 13 Bush (Ky.) 385; 26 Am. Rep. 201; *Crawford v. Logan*, 97 Ill. 396; *Walker v. Dement*, 42 Ill. 278; *Petillon v. Noble*, 73 Ill. 567; *Byrant v. Vix*, 83 Ill. 14; *Melendy v. Keen*, 89 Ill. 395; *U. S. Mortgage Co. v. Gross*, 93 Ill. 483; *Chicago, etc., R. Co. v. Loewenthal*, 93 Ill. 451; *Barrett v. Hinckley*, 124 Ill. 40; 7 Am. St. Rep. 331; *Mutual Mill Ins. Co. v. Gordon*, 121 Ill. 366; *McIntire v. Yates*, 104 Ill. 497; *Mapps v. Sharpe*, 32 Ill. 13; *Pardee v. Lindley*, 31 Ill. 174; 83 Am. Dec. 219; *Sargent v. Howe*, 21 Ill. 148; *Hamilton v. Lubukee*, 51 Ill. 415; 99 Am. Dec. 562; *Keohane v. Smith*, 97 Ill. 156; *Olds v. Cummings*, 31 Ill. 188; *Wayman v. Cochrane*, 35 Ill. 151; *Kleeman v. Frisbie*, 63 Ill. 482; *Scott v. Featherston*, 5 La. Ann. 313; *Connolly v. Bourg*, 16 La. Ann. 109; *Seixas v. Gonsoulin*, 40 La. Ann. 351; *Scott v. Turner*, 15 La. Ann. 346; *Perot v. Levasseur*, 21 La. Ann. 529.

The indorsee of a bill, drawn against a consignment of merchandise and secured by a warehouse receipt for the merchandise, will be subrogated to the rights of the indorser against the consignee. *Michigan State Bank v. Gardiner*, 15 Gray (Mass.) 362. *Compare Banner v. Johnston*, L. R., 5 H. L. 157; *Wigton v. Bowley*, 130 Mass. 252.

The transferee of a note will be subrogated to the rights of the payee in a mortgage executed to secure the payment of the note. *Hilliard on Mortgages* 526, § 49a; 1 Dan. Nego. Insts., 4th ed., § 834; *Carpenter v. Longan*, 16 Wall. (U. S.) 273; *Sawyer v. Prickett*, 19 Wall. (U. S.) 146.

The payee of a note is entitled to the benefit of a mortgage executed by the maker to secure an indorser. *O'Hara v. Haas*, 46 Miss. 374.

The holder of a note will not be entitled to the benefit of a mortgage executed by the maker to indemnify a surety and which the surety trans-

discharged from his liability on the note, by reason of the negligence of the holder in not giving him due notice of dishonor, no subsequent party to the paper may claim to be subrogated to the benefit of securities executed for his indemnity.¹

One who becomes accommodation indorser for two joint makers of a promissory note at the request of only one of them, upon being compelled to pay, will be subrogated to the rights of the original creditor, and may maintain suit against the other maker, as both of them presumptively stand to him as principals.² It has been held that joint indorsers of negotiable paper are liable as co-promisors, and as such have no rights of subrogation against each other.³

If an indorser be compelled to pay a note or bill, his right of subrogation will not be affected by the fact that he acquired the paper when overdue, or took it with notice of equities between prior parties, if he himself took from a *bona fide* purchaser for value before maturity and without notice of any such equities.⁴

ferred to a *bona fide* purchaser for value. *Waller v. Oglesby*, 85 Tenn. 321.

Banks discounting notes of another bank indorsed for accommodation by its directors will be entitled to the benefit of collaterals provided for the security of such indorsers. *Warner's Appeal* (Pa. 1886), 7 Atl. Rep. 216. See *Kramer's Appeal*, 37 Pa. St. 71; *Rice's Appeal*, 79 Pa. St. 168.

If a note be assigned several times and the last assignor be insolvent, or a non-resident, and his assignor be a resident, the last assignee may be subrogated to the right of his assignor to have recourse upon a prior assignor. *McFadden v. Finnell*, 3 B. Mon. (Ky.) 121; *Turneys v. Hunt*, 8 B. Mon. (Ky.) 407.

The indorsee of a note will not be subrogated to the rights of his indorser in securities held by the latter for such note and for other claims, unless he pays all claims for which the securities are held. *Vose v. Scatcherd* (N. Y.), 16 Alb. L. J. 33. See also *Swan v. Paterson*, 7 Md. 167.

Assignment of Purchase-Money Notes—Rights of Assignee.—Where the assignee of unpaid purchase-money notes receives from the original vendor in an executory contract for the sale of land, a transfer of his superior title which exists until the contract of sale is consummated by complete payment, he is entitled to be subrogated to the rights of the original vendor, and may enforce his rights by a sale of the land, in default of payment, although a note be barred by limitation. *Hamblen v.*

Folts, 70 Tex. 132. See also *Sloan v. Campbell*, 71 Mo. 387; 36 Am. Rep. 493; *Lee v. Clark*, 89 Mo. 553; *Hagerman v. Sutton*, 91 Mo. 520; *Hall v. Mobile, etc., R. Co.*, 58 Ala. 10; *Edwards v. Bohanan*, 2 Dana (Ky.) 98; *Stevens v. Chadwick*, 10 Kan. 406; 15 Am. Rep. 348; *Felton v. Smith*, 84 Ind. 485.

But if the vendor of land conveys it to the vendee by deed, receiving his note for the purchase price, an assignee, by the mere assignment of the note, will not be subrogated to the vendor's lien upon the land to enforce payment of the note. *Shall v. Biscoe*, 18 Ark. 150. See also *Williams v. Christian*, 23 Ark. 255; *Rogers v. James*, 33 Ark. 77; *Pillow v. Helm*, 7 Baxt. (Tenn.) 545; *First Nat. Bank v. Salem Capital Flour Mills Co.*, 39 Fed. Rep. 89.

1. *Bank of Virginia v. Boisseau*, 12 Leigh (Va.) 398; *Hopewell v. Cumberland Bank*, 10 Leigh (Va.) 206.

2. *Hoffman v. Butler*, 105 Ind. 371.

3. *West Branch Bank v. Armstrong*, 40 Pa. St. 278.

4. *Williams v. Matthews*, 3 Cow. (N. Y.) 252; *Roberts v. Lane*, 64 Me. 108; *Dillingham v. Blood*, 66 Me. 140; *Woodman v. Churchill*, 52 Me. 58; *Boyd v. McCann*, 10 Md. 118; *Bassett v. Avery*, 15 Ohio St. 299; *May v. Chapman*, 16 M. & W. 355; *Carruthers v. West*, 11 Q. B. 143; 63 E. C. L. 143; *Fairclough v. Pavia*, 9 Exch. 690; *Robinson v. Reynolds*, 2 Q. B. 196; 42 E. C. L. 634; *Chalmers v. Lanion*, 1 Campb. 383; *Prentice v. Zane*, 2 Gratt. (Va.) 262; *Marion County v. Clark*,

As a general rule an indorser may not claim to be subrogated to the rights of the holder, in securities held by the latter, until he has paid the note.¹

In general, the acceptor for value of a bill of exchange is the principal debtor and the other parties thereto are sureties for him; accordingly, upon payment by an indorser, he is entitled to exoneration from such acceptor, and to be subrogated to the benefit of securities deposited by the latter with the holder.² The rule in regard to an accommodation acceptor may be stated thus: at law he is regarded as the principal debtor, in favor of a *bona fide* holder, but as between himself and the drawer he, in equity, occupies the position of a surety, and, upon payment of the bill, is entitled to be subrogated to the rights of the holder in respect of any securities received by the latter from the drawer.³

94 U. S. 278; *Wilson v. Mechanics' Sav. Bank*, 45 Pa. St. 488; *Barker v. Parker*, 10 Gray (Mass.) 339; *Sonoma County Bank v. Gove*, 63 Cal. 355; *Hogan v. Moore*, 48 Ga. 156; *Roberson v. Vason*, 37 Ga. 66; *Kost v. Bender*, 25 Mich. 515; *Riley v. Schawacker*, 50 Ind. 592; *Simon v. Merritt*, 33 Iowa 537; *Morneyer v. Cooper*, 35 Iowa 257; *Woodworth v. Huntoon*, 40 Ill. 131; 89 Am. Dec. 340; *Cook v. Larkin*, 19 La. Ann. 507; *Howell v. Crane*, 12 La. Ann. 126; 68 Am. Dec. 765; *Cotton v. Sterling*, 20 La. Ann. 282.

1. *Buffalo Bank v. Wood*, 71 N. Y. 405; *Third Nat. Bank v. Shields*, 55 Hun (N. Y.) 274; *Ross v. Jones*, 22 Wall. (U. S.) 576; *In re Babcock*, 3 Story (U. S.) 393. See also *supra*, this title, *When Right to Subrogation Becomes Complete*.

In *Telford v. Garrels*, 132 Ill. 550, it was held that where an indorser of notes secured by a trust deed pays to the assignee interest on the notes in discharge of his agreement and liability to the latter, he will be subrogated to the security of the deed, and may, on bill to foreclose by the holder of the notes, by his cross-bill, have decree for the interest so paid, as against the original debtor or mortgagor.

2. *Randolph on Com. Paper*, vol. 2, § 900; *Smith's Merc. Law* (3d ed.), p. 253; *Duncan v. North & South Wales Bank, L. R.*, 6 App. Cas. 1. In this case the Lord Chancellor said: "The acceptor, though he may know nothing of any particular indorser, knows that by his acceptance he does an act which will make him liable to indemnify any person who may indorse and may afterwards pay the bills; and he know-

ingly and intentionally undertakes that liability as much as if the indorsement were the result of direct communication between him and that person." See also *Trimble v. City Nat. Bank* (Ky. 1891), 15 S. W. Rep. 853; *Salaun v. Relf*, 4 La. Ann. 575; *Underwood v. Metropolitan Nat. Bank*, 144 U. S. 669; *Fowler v. Gate City Nat. Bank*, 88 Ga. 29.

3. *Bank of Toronto v. Hunter*, 4 Bosw. (N. Y.) 646; *Wodehouse v. Farebrother*, 5 El. & Bl. 277; 85 E. C. L. 276. See also *Byers v. Franklin Coal Co.*, 106 Mass. 131; *First Nat. Bank v. Morris*, 1 Hun (N. Y.) 680; *Meggett v. Baum*, 57 Miss. 22. In *Rigney v. Vanzandt*, 5 Grant Ch. 494, the holder of certain accommodation drafts, after having obtained judgment and execution against the payee thereof, was paid the amount of them by the accommodation acceptor, and thereupon expressed his intention of directing the sheriff to credit that sum on the execution in his hands, the amount of which he had made by sale under execution of the goods of the payee, for whose accommodation the bills had been negotiated. The acceptor hearing of this, gave the sheriff notice of his claim, and filed a bill to compel the payment of the amount which he had advanced. It was held that, as surety, the acceptor was entitled to receive the amount of his claim out of the proceeds of the execution, to the exclusion of the subsequent execution creditors.

In *Gomez v. Lazarus*, 1 Dev. Eq. (N. Car.) 205, the facts were these: A bill was accepted for the accommodation of the drawer, and this was known

An exception to the rule that a volunteer is not entitled to subrogation is made in the interest of commerce in favor of one who pays a protested bill of exchange for the honor of the drawer or other party thereto: in such case the payor will be subrogated to the rights of the holder against those for whose honor payment was made.¹

But a stranger who takes up a note at or after maturity, with nothing to show an intent to purchase, thereby satisfies the note, and may not claim to be subrogated to the rights of the person to whom he made payment, against prior parties.²

to the indorser who, when his indorsement was made, took from the drawer a bond and mortgage for his indemnity against that and any subsequent indorsement. The drawer then conveyed the mortgaged premises in trust to secure all his debts, with an instruction in the deed to his trustee to give preference to such debts "as may be indorsed by the said" indorser. After this conveyance, the bill, being protested, was taken up by giving the holder the note of the drawer with the acceptor and indorser as sureties, which was paid by the acceptor, who procured an assignment of all the securities in the hands of the indorser and holder. It was held that the indorser, being liable only after the default of the acceptor, the latter could not be subrogated to the rights which the holder had against the former.

In *England* it seems that an accommodation acceptor is in equity a surety for the drawer as against all parties who have notice of his true character. *Bailey v. Edwards*, 4 B. & S. 761.

1. 2 Dan. Nego. Inst. (4th ed.), § 1254; Story on Notes, § 453; Chitty on Bills (13th Am. ed.) (*509) 576; Vandewall v. Tyrrell, 1 M. & M. 87; Mertens v. Withington, 1 Esp. 112; Cox v. Earle, 3 B. & Ald. 430; 5 E. C. L. 334; *Ex p. Swan*, L. R., 6 Eq. 344; Goodall v. Polhill, 1 C. B. 233; 50 E. C. L. 233; *Ex p. Wackertath*, 5 Ves. 574; Hoare v. Cazenove, 16 East. 391; Williams v. Germaine, 7 B. & C. 468; 14 E. C. L. 84; König v. Bayard, 1 Pet. (U. S.) 250.

If the payment be made for the honor of a particular indorser, the person so paying will be subrogated only to the rights of that indorser. 2 Dan. Nego. Insts., § 1254; Mertens v. Withington, 1 Esp. 112; Chitty on Bills, m. p. 509.

The right of payment, *supra protest*, extends only to the case of a protested bill of exchange, and does not include

promissory notes. 2 Dan. Nego. Insts. (4th ed.), § 1258; Byles on Bills, m. p. 262; Story on Notes, § 453.

When a person other than a regular party to a note voluntarily pays it for the honor or credit of any indorser without request, he does not thereby acquire a right to repayment from any of the prior parties thereto. *Smith v. Sawyer*, 55 Me. 141; 92 Am. Dec. 576; *Willis v. Hobson*, 37 Me. 405.

2. 2 Dan. Nego. Inst., § 1222; *Burr v. Smith*, 21 Barb. (N. Y.) 262; *Lancey v. Clark*, 64 N. Y. 209; 21 Am. Rep. 454; *Citizens' Bank v. Lay*, 80 Va. 440; *Dooley v. Virginia F., etc., Ins. Co.*, 3 Hughes (U. S.) 221; *Oliver v. Bragg*, 15 La. Ann. 402; *Eastman v. Plumer*, 32 N. H. 238.

In *Weil v. Enterprise Ginnery, etc., Co.*, 42 La. Ann. 492, it was said that payment of a note secured by mortgage by one not bound therefor, and who had no interest in discharging it, will not entitle him to be subrogated to the rights of the party to whom payment was made. Such payment will extinguish the debt and the mortgage given to secure it, and the claim for reimbursement will constitute the party paying an ordinary creditor of him for whose benefit payment was made. See *infra*, this title, *Volunteers and Strangers*. Compare *Swope v. Leflingwell*, 72 Mo. 348; *Campbell v. Allen*, 38 Mo. App. 30; *Teberg v. Swenson*, 32 Kan. 225; *Bishop v. Rowe*, 71 Me. 263; *Pacific Bank v. Mitchell*, 9 Met. (Mass.) 297.

Right of Holder of Check.—In *Fonner v. Smith*, 31 Neb. 107, it was held that when a bank receives deposits, there arises an implied promise on its part to pay them out on the checks of the depositor to any person in whose favor they may be drawn, and the checkholder is thus subrogated to the rights of the depositor in the deposits to the amount of the check, which may not,

(11) *Sureties on Obligations to Government*—(Such as *Recognizances, Customs, Excise, etc.*).—While bail in criminal cases may be subrogated to the means of enforcing the performance of that which the recognizance of bail is intended to secure the performance of, they are not entitled to be subrogated to the peculiar remedies which the government may possess for collecting the penalty; to allow the latter would be to aid the bail to get rid of their obligation and to relieve them from the motives to exert themselves in securing the appearance of the principal.¹ Nor does the statute entitling sureties upon bonds given to the federal government to subrogation to the government's priority, embrace recognizances in criminal cases.² And it has been held that even in the class of obligations contemplated by the statute, the surety may not claim subrogation to the government's priority, by virtue of the statute, unless he be bound in the same bond with the principal debtor;³ but it seems that in such a case, he will, upon the general principles of equity, be substituted to such priority, when he assumes the obligation at the request of the principal—equity looks to the essence and not the form of transactions, and,

after notice to the bank, be withdrawn by the drawer. See generally CHECKS, vol. 3, p. 227.

1. To permit the bail to be substituted to the benefit of the government's remedies for collecting the penalty would clearly be against public policy, by subverting as far as it might prove effectual, the very object and purpose of the recognizance, which is to secure the appearance of the principal before the court for the purposes of public justice. It would be as though the government should say to the bail: "We will aid you to get the amount of the recognizance from the principal, so that you may be relieved from your obligation to surrender him to justice." If payment of the recognizance operated as a satisfaction or composition of the crime, then such subrogation might be allowed, for in that case the government would be satisfied in regard to the principal matter intended to be secured. It has, however, no such effect. While it discharges the bail, it does not discharge the obligation of the principal to appear in court. That obligation still remains and the principal may at any time be retaken and brought into court. *U. S. v. Ryder*, 110 U. S. 308.

2. *U. S. v. Ryder*, 110 U. S. 308. In this case it was held further, that even if the bail were entitled under the act (§ 3468 U. S. Rev. Sts.) to the same priority which the federal government

has, they are not entitled to use the name of the *United States* in prosecuting their claim. The statute expressly declares that they must sue in their own names. The reason is obvious: The government has many advantages in proceeding which are not possessed by individuals, and is not liable for costs, and individuals prosecuting claims against other individuals ought not to have the advantage of the name and prestige of the *United States*.

In *U. S. v. Preston*, 4 Wash. (C. C.) 446, the surety on a duty bond, having paid the judgment recovered on it, instituted an action in the name of the *United States* for his own use against the assignees of the principal, and contended that he was entitled to every advantage which the *United States* was entitled to in such a suit; as, for instance, to sue in the federal court, to require special bail, to demand a trial at the return of the writ, to exclude equitable defenses, etc. The court, by Washington, J., held that the action could not be brought in the name of the *United States* but only in the name of the surety himself, and that the only advantage which the law gave to the surety was that of priority over other creditors, and not in the form and mode of proceeding.

3. *Enders v. Brune*, 4 Rand. (Va.) 438. In this case A gave his bond for duties on goods imported into the *United States* for B, the importer, but

therefore, it does not require that a surety shall be bound in the same bond with his principal in order that the doctrine of substitution may operate, but simply that, having obligated himself for the debt of the principal, he should have paid it.¹

So in *England*, the sureties of a crown debtor for customs, duties, excise, taxes, and other civil duties, upon paying the debt of their principal, are entitled to have the benefit of prerogative process to aid them in coercing payment from the principal and com-

B was not bound in the bond. A discharged the bond, and claimed substitution to the government's priority against B. The statute (4 vol. Laws of *United States*, p. 386, § 65) in question provided in substance, that if the principal in any bond given for duties on goods, etc., shall become insolvent, etc., and any surety in the bond, etc., shall discharge it, such surety shall have and enjoy the like advantage, priority, or preference for the recovery of such money as is reserved to the *United States*, and may maintain a suit in his own name in law or equity for all money paid thereon. Mr. Justice Carr, delivering the opinion of the court, said: "Is the case of the plaintiff's within this act? I incline to think not. The law speaks of principal and surety in the bond. Although these bonds were executed by B for the debt of Shelton & Company, and the plaintiffs by discharging them paid their debt, yet Shelton & Company were not principals and the plaintiffs' sureties in the bond. They could hardly, it would seem, maintain an action on the bond at law against Shelton & Company as principal, and I doubt whether equity could help them. The law was providing for a particular case. If ours be not that case, equity, no more than law, can make it so. Both courts must construe the statute according to its true meaning, and that meaning is the same whichever *forum* has to expound it."

The statute involved in this case is now R. S. *United States*, § 3368.

1. *Enders v. Brune*, 4 Rand. (Va.) 438. In this case, Carr, J., for the court, said: "It (the doctrine of substitution) has nothing of form, nothing of technicality about it; and he who, in administering it, 'would stick in the letter,' forgets the end of its creation and perverts the spirit which gave it birth. It is the creature of equity, and real essential justice is its object. All agree that where A is bound in a

bond with B, for B's debt, the doctrine of substitution holds. Now, I ask, where is the difference, in the eye of reason, whether A is bound for the debt of B jointly with B or separately from him? He is still bound for the debt of B. As between him and B, he stands as much in the relation of a surety as if they were jointly bound. So he does, as between him and the creditor, where the separate bond is taken as collateral security. Suppose A owed B a debt by simple contract or bond. C, at the request of A, executes his separate bond to B as a collateral security. After this the creditor B gets a mortgage from the debtor A, further to secure this debt. Would not C upon discharging the debt be substituted to this mortgage? Again, suppose that C, when he executed his separate bond to pay the debt of A to B, had taken a mortgage from A for his security, I ask, would not the creditor B have had a right to resort to this mortgage to satisfy his debt? These principles are the every-day equity of the court; and the case before us rests on precisely the same ground. The *United States* are the creditors; Shelton & Company, the debtors. At the request of these debtors, the plaintiffs execute their bond to the *United States*; the priority given by the law to the *United States* is the mortgage taken by the creditor of his debtor. The plaintiffs pay off the debt, and ask the court to give them the benefit of the creditor's lien. Who can object to this? Who is injured by it? Not the *United States*, for they have received their debt from the plaintiffs, and justice binds them to give the plaintiffs their vantage ground. Not Shelton & Company, for they have no interest in the matter. Not the creditors of Shelton & Company, under the trust, for the *United States* had this priority; these creditors were but subsequent incumbancers. The elder lien was upon the property, and whether

selling contribution from their co-sureties.¹ But there, as here, the rule is confined to such cases and it is not applied in favor of bail in criminal proceedings; indeed, it has even been held that the law raises no liability on the part of the principal to indemnify his bail for what they have been compelled to pay on their recognition by reason of his default.²

The right of persons discharging tax liens, etc., to be subrogated to the rights of the government, is discussed in a subsequent part of this article.³

enforced by the *United States* in their own name, or by the plaintiffs standing in their stead, could make little difference with these creditors."

1. Thus, where upon a *scire facias* issued against the heir and executor of one surety, the defendant paid the debt, it was ordered that he should stand in the place of the crown and have the aid of the court to recover either the whole against the principal or a moiety against a co-surety. *Manning Exch. Pr.* 563.

And where a collector of a township was a defaulter and the township was retaxed for the deficit, the same relief was given. *MacDonald, C. B.*, said: "The parish stands very much in the nature of sureties, and it is a reasonable practice that the party who has made good to the Crown the default of the defendant should have the same remedy that the Crown itself would have." *Rex v. Bennett*, 6 Eng. Exch. 1. See also *Reg. v. Salter*, 1 H. & N. 274.

2. *Jones v. Orchard*, 16 C. B. 614; 81 E. C. L. 613; *Cripps v. Hartnoll*, 4 B. & S. 414; 116 E. C. L. 412.

3. See *infra*, this title, *Persons Interested in Encumbered Estate*.

Tax-Collector Advancing Funds to Pay Taxes of Delinquents Not a Surety, and Not Entitled to Subrogation to Rights and Remedies of Government.—In *Griffing v. Pintard*, 25 Miss. 173, it was held that the doctrine of subrogation does not apply in cases of the rights and remedies of the government against delinquent tax-payers. In this case, Mr. Justice Fisher, delivering the opinion of the court, said: "The power of a tax-collector to sell land in any case is special and limited by the end to be accomplished. This end is to coerce the delinquent to pay the taxes which have been assessed against him. Power is, therefore, given by the law to the collector to compel payment by a sale of the property of the delinquent. This power only exists so long as the party is in default in perform-

ing his duty to the government, and can only be exercised by the collector while he is a disinterested party pursuing the remedy in behalf of the government. Hence, when the taxes have been paid, immaterial by whom, the state is satisfied and the power of sale, which was given only for the purpose of coercing payment, no longer exists. In the present case, the taxes were paid by Moore (the tax-collector) long before the sale, and in consequence of this payment he did not report Bowen as a delinquent. It is manifest that the land was not sold for the purpose of collecting any taxes due by Bowen to the state or county, but only to reimburse Moore for the money which he had advanced. If it be contended that he had power to sell for this purpose, then it must be shown, to sustain the proposition, that on payment of the taxes he was subrogated to the rights and remedies of the state against delinquent tax-payers. Nothing can be found in either the letter or policy of the law giving countenance to this position." A similar decision was made in *Hinchman v. Morris*, 29 W. Va. 673. Compare *Hart v. Tiernan*, 59 Conn. 521; *Meyer v. Burritt*, 60 Conn. 117.

In *Wallace's Estate*, 59 Pa. St. 401, taxes assessed on real estate in a county from 1852 to 1858 had been paid over by the collector, but were unpaid by the owner of the real estate. In 1859 the owner confessed judgment to the collector for the amount of the taxes as collateral security. He, shortly thereafter, died. The real estate was sold in 1864 by order of the orphans' court. It appeared that there had always been, up to the time of sale, personal property on the premises sufficient to satisfy the taxes. It was held (1), that the collector had not priority over liens which preceded his judgment; (2), under the *Pennsylvania* act of Feb. 3, 1824, relating to Philadelphia taxes, extended by the act of April 5, 1844, to

2. Persons Interested in Encumbered Estates—*a.* In GENERAL—(See also MORTGAGES, vol. 15, p. 725; REDEMPTION, vol. 20, p. 608).—The general rule is that any person having an interest in property upon which there is a lien or encumbrance may, if necessary for his own protection, pay off the same and be substituted to the rights and remedies of the holder thereof.¹ Thus, a co-

A county, the taxes were a lien prior to all others charged on the premises after the passage of the act; (3), this lien, however, is for the benefit of the party entitled to the taxes as security, and may be discharged only by payment; (4), when the collector pays the taxes to the proper officer the lien is thereby discharged; (5), but when the taxes have been paid by a surety, the lien may be kept on foot for his benefit if justice demands it; (6), but the collector paying the taxes cannot be regarded as a surety; he should collect and pay over promptly, and has no authority to grant indulgence or extend the time of payment. Public policy and the law require that an officer entrusted with the collection of taxes necessary to the support and proper administration of the government, should discharge his duties with promptness and fidelity; and if he has been remiss or delinquent, it may well be doubted if he is entitled to subrogation under any circumstances. At any rate, it is clear that he is not entitled to it to the prejudice of the rights of others.

Deposit of Revenue Collections in Bank by Deputy Collector, Payment by Principal—Latter Not Surety for Bank and Not Entitled to Government's Priority.—In *Wilkinson v. Babbitt*, 4 Dill. (U.S.) 207, the facts were these: The defendant was the assignee in bankruptcy of the German Savings Bank. The bank had been adjudged a bankrupt on April 3, 1873, and at the time there were on deposit certain moneys belonging to the *United States* which had been placed there by one V., who at the time of such deposit was a deputy collector under the complainant, who was collector of internal revenue. The moneys so deposited were collections of internal revenue. The complainant, as required by law, paid the aforesaid sum into the treasury, and claimed that by the deposit of the money in the bank he became the surety of V., his deputy, and of the bank to the federal government, and that the federal government, until the 3d of April, 1873, had a cause of action against the bank and V.; and

that by virtue of the payment of the said sum to the *United States* by complainant he became entitled to the preference of the government as against the bank, and prayed to be so subrogated as a preferred creditor. Dillon, J., in delivering the opinion of the court, said: "The deposit of the money by Voede in the Union German Savings Bank was the act of complainant; the deputy, who is his appointee authorized by law, derives the breath of life from the collector—is appointed by him, and receives his pay from, and is removable at the pleasure of, the collector. The deposit of money in the bank did not create the bank the principal debtor and the complainant the surety. The various sections of the Internal Revenue act of 1862 show that the collector is the only person known to the law as the custodian of the revenue collected until it is paid into the proper depository. While the doctrine of subrogation, which entitles the surety to all of the liens and securities of the creditor on paying the latter the debt of the principal, is fully recognized in equity, and in certain cases at law, this is not a case for its application. The complainant is not entitled to be subrogated to the rights of the *United States* as a preferred creditor against the bank. And, moreover, under the acts of Congress, the deposit of the money in the bank by Voede or Wilkinson was positively forbidden, and the deposit there was unlawful. The complainant, therefore, is not in a position to ask aid of the court of equity to give him the fruits of an unlawful act, and to do so would encourage other officers in the violation of the law."

1. *Exall v. Partridge*, 8 T. R. 308; *McLean v. Tompkins*, 18 Abb. Pr. (N.Y.) 24; *Dings v. Parshall*, 7 Hun (N.Y.) 522; *In re Coster*, 2 Johns. Ch. (N.Y.) 503; *Silver Lake Bank v. North*, 4 Johns. Ch. (N.Y.) 370; *Bacon v. Schoonhover*, 19 Hun (N.Y.) 158; *Dale v. McEvers*, 2 Cow. (N.Y.) 118; *Southworth v. Scofield*, 51 N.Y. 513; *Mellier v. Bartlett*, 106 Mo. 381; *Mossier's Appeal*, 56 Pa. St. 76; 93 Am.

Dec. 783; *Downer v. Fox*, 20 Vt. 388; *Staples v. Fox*, 45 Miss. 667; *Loud v. Lane*, 8 Met. (Mass.) 517; *Hamilton v. Dobbs*, 19 N. J. Eq. 227; *Bigelow v. Cassey*, 26 N. J. Eq. 557; *Denman v. Nelson*, 31 N. J. Eq. 452; *Page v. Foster*, 7 N. H. 392; *Brown v. Simons*, 44 N. H. 475; *Marsh v. Rice*, 1 N. H. 167; *Young v. Williams*, 17 Conn. 393; *Street v. Beal*, 16 Iowa 68; 85 Am. Dec. 504; *Massie v. Wilson*, 16 Iowa 390; *Knowles v. Rablin*, 20 Iowa 101; *White v. Hampton*, 13 Iowa 259; *Powers v. Golden Lumber Co.*, 43 Mich. 468; *Lucking v. Wesson*, 25 Mich. 443; *Willis v. Jelineck*, 27 Minn. 18; *Evans v. Saunders*, 3 Lea (Tenn.) 734; *Griswold v. Marshman*, 2 Ch. Cas. 170; *Russell v. Howard*, 2 McLean (U. S.) 489; *Armstrong v. McAlpin*, 18 Ohio St. 184; *Southard v. Dorrington*, 10 Neb. 119; *Johnson v. Payne*, 11 Neb. 269; *Ventress v. His Creditors*, 20 La. Ann. 359; *Pratt v. Pratt*, 96 Ill. 184.

Subrogation is applicable whenever payment is made under a legitimate and fair effort to protect the ascertained interests of the party paying, and where intervening rights are not jeopardized or defeated. *Per Thompson, C. J.*, in *Mosier's Appeal*, 56 Pa. St. 76; 93 Am. Dec. 783.

Invalid Mortgage—Right of Mortgagees Upon Paying Off Prior Lien.—In *Spaulding v. Harvey*, 129 Ind. 106, husband and wife being under guardianship, falsely represented that the guardianship had ended and that they had been adjudged of sound mind, and upon the faith of these representations an attorney was induced to take a mortgage on the undivided interest of the wife in certain property, as security for compensation agreed upon for legal services to be rendered by him. Before the date of the guardianship, a judgment had been rendered against the wife which constituted a lien upon her interest in the real estate. The mortgage was adjudged void on the ground of legal incapacity on the part of the mortgagors. But the attorney having paid off the judgment rendered against the wife to protect what he erroneously supposed to be a valid incumbrance, was held entitled to be substituted to the lien of the judgment, with priority over a judgment rendered in favor of the guardian for services, etc.

Widow Paying off Liens.—Where a widow, after the death of her husband, pays off a debt secured by a trust deed given by the husband, and takes a release thereof, the deed being a valid

lien, and thereby preserves the property, she will be entitled to foreclose the same for her own benefit. *Stinson v. Anderson*, 96 Ill. 373.

In *Simmons v. Lyle*, 32 Gratt. (Va.) 752, the widow remained in the mansion house, having with her her two infant children, whom she supported; no assignment of dower was made to her; she paid the balance of the purchase price due for the property, which was secured by a vendor's lien; she also paid taxes due upon the property. It was held, as against judgment creditors of her late husband, that she was entitled to be reimbursed the amount of the taxes and purchase money paid by her; and that the claims so paid off constituted prior liens on the property.

Assignees of Terms.—The assignees of a term may, in order to protect their own interest, redeem a mortgage executed by the lessor prior to the date of their lease, though the demised premises constitute a portion only of those embraced in the mortgage. And upon such redemption the assignees are entitled to an assignment of the mortgage and an acknowledgment thereof, if the mortgage be recorded. *Averill v. Taylor*, 8 N. Y. 44.

Creditor Paying Taxes on Debtor's Property.—When the mortgagor neglects to pay the taxes on the property, it then becomes the duty of the executor or administrator of the estate to which the property is mortgaged to do so, and if he fails, or if there is no representative of the estate, a creditor of the latter may pay to protect his own interest, and will be entitled to reimbursement out of the proceeds of sale upon foreclosure of the mortgage. *Whittaker v. Wright*, 35 Ark. 511.

Execution Creditor Redeeming from Chattel Mortgage.—An execution creditor may, as soon as he has acquired a lien upon chattels by a levy of his execution, redeem them from a chattel mortgage which constitutes a prior lien thereon, and upon payment of the amount due on the mortgage, is entitled to be subrogated to the rights of the mortgagee, and to that end may demand an assignment of the mortgage. *Lucking v. Wesson*, 25 Mich. 443. See also *Hunt v. Sackett*, 31 Mich. 34; *Smith v. Coolbaugh*, 21 Wis. 427; *Hinman v. Judson*, 13 Barb. (N. Y.) 629; *Treat v. Gilmore*, 49 Me. 34.

Execution Collected but not Returned by Officer—Execution Defendant Paying Same to Release Lien Upon His Land.—

In *Harvey v. Warren*, 31 Neb. 155, the sheriff collected the amount of an execution, marked the judgment "satisfied," but failed to return the same or to pay the money into court or to the creditor. Subsequently, to release the lien upon his land, the plaintiff paid the creditor the amount of the judgment and costs, and instituted an action against the sheriff and his surety to recover the money so paid by him. It was held that the plaintiff was entitled to be subrogated to the rights of the creditor, and could recover from the sheriff and the surety.

Various Views Upon Question of Assignment of Mortgage.—In *Robinson v. Leavitt*, 7 N. H. 73, Parker, J., for the court, in an able and exhaustive opinion, said: "There are cases in which a party, who has paid money due upon a mortgage, is entitled, for the purpose of effecting the substantial justice of the case, to be substituted in the place of the incumbrancer, and treated as the assignee of the mortgage, and is entitled to hold the mortgage as the assignee, notwithstanding the mortgage itself has been canceled and the debt discharged. (*Citing Marsh v. Rice*, 1 N. H. 167; *Peltz v. Clarke*, 5 Pet. (U. S.) 481; *In re Coster*, 2 Johns. Ch. (N. Y.) 503; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *Dale v. McEvers*, 2 Cow. (N. Y.) 118; *Powell on Mortgages* 315a.) The true principle, I apprehend, is, that where money due on a mortgage is paid, it shall operate as a discharge of the mortgage, or in the nature of an assignment of it, substituting him who pays in the place of the mortgagee, as may best serve the purposes of justice and the just intent of the parties. (*Citing Star v. Ellis*, 6 Johns. Ch. (N. Y.) 395.) Many cases state the rule in equity to be, that the incumbrance shall be kept on foot, or considered extinguished or merged, according to the intent or the interest of the party paying the money. But the decisions themselves, it is believed, will generally be found in accordance with the principle above stated. (*Citing Gardner v. Astor*, 3 Johns. Ch. (N. Y.) 53; *James v. Johnson*, 6 Johns. Ch. (N. Y.) 425; 2 Cow. (N. Y.) 246; *Burnet v. Denniston*, 5 Johns. Ch. (N. Y.) 41; *Mills v. Comstock*, 5 Johns. Ch. (N. Y.) 220; *Freeman v. Paul*, 3 Me. 260; 14 Am. Dec. 237; *Thompson v. Chandler*, 7 Me. 377; *Harvey v. Hurlburt*, 3 Vt. 561; *Marshall v. Wood*, 5 Vt. 250; *Lockwood v. Sturdevant*, 6

Conn. 374; *Kirkham v. Smith*, 1 Ves. 258; *Shrewsbury v. Shrewsbury*, 1 Ves. 233; *Lord Compton v. Oxender*, 2 Ves. 264; *Forbes v. Moffatt*, 1 Ves. 384; *Earl of Buckinghamshire v. Hobart*, 3 Swanst. 186.)

"There is another class of cases, in which he who has paid money due upon a mortgage of land, to which he had some title which might be affected and defeated by the mortgage, and who was thus entitled to redeem, has the right to consider the mortgage as subsisting in himself, and to hold the land as if it subsisted, until others interested in the redemption, or who had also a right to redeem, have paid a contribution. Such are the cases: *Cass v. Martin*, 6 N. H. 25; *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482; 9 Am. Dec. 318; *Carll v. Butman*, 7 Me. 102; *Taylor v. Bassett*, 3 N. H. 294; *Russell v. Austin*, 1 Paige (N. Y.) 192; *Saunders v. Frost*, 5 Pick. (Mass.) 259; 16 Am. Dec. 394. And it makes no difference in either of these cases, as I conceive, whether the party on the payment of the money took an assignment of the mortgage, or a release, or whether a discharge was made and the evidence of the debt canceled. *Gardner v. Astor*, 3 Johns. Ch. (N. Y.) 53; *Snow v. Stevens*, 15 Mass. 278; *Kirkham v. Smith*, 1 Ves. 258; *Barker v. Parker*, 4 Pick. (Mass.) 505; *Wade v. Howard*, 6 Pick. (Mass.) 498. The debt itself may be held still to subsist in him who paid the money, as assignee, so far as it ought to subsist, in the nature of a lien upon the land; and the mortgage be considered in force for his benefit, so far as he ought in justice to hold the land under it if it had actually been assigned. *Pratt v. Law*, 9 Cranch (U. S.) 456."

This language was quoted approvingly and the doctrine applied in the following cases: *First Nat. Bank v. Ackerman*, 70 Tex. 315; *Heath v. West*, 26 N. H. 191; *Johnson v. Elliott*, 26 N. H. 67; *Towle v. Hoit*, 14 N. H. 61; *Hastings v. Stevens*, 29 N. H. 564; *Bacon v. Goodnow*, 59 N. H. 415.

In *Arnold v. Green*, 116 N. Y. 566, it was said that where one, who pays a mortgage upon land in which he has an interest, stands in such relation thereto that his interest, whether legal or equitable, cannot otherwise be protected, the transaction will be treated in equity as an assignment, and he will be entitled to enforce it for his own reimbursement and the protection of his

tenant paying taxes upon lands held in common, will be subrogated to the benefit of the lien thereof for his reimbursement.¹

interests. See also *Clark v. Mackin*, 95 N. Y. 346.

Party Paying Must be Surety, or there Must Exist Some Equitable Reason for Assignment.—One who pays off an encumbrance is not entitled to demand an assignment of the security unless he can be regarded as a surety for the debt. *Ellsworth v. Lockwood*, 42 N. Y. 89; *Johnson v. Zink*, 52 Barb. (N. Y.) 396; 51 N. Y. 333; *Cherry v. Monro*, 2 Barb. Ch. (N. Y.) 618; *Averill v. Taylor*, 8 N. Y. 44; *Speiglemyer v. Crawford*, 6 Paige (N. Y.) 257; *Nelson v. Loder*, 132 N. Y. 288; *Bigelow v. Cassidy*, 26 N. J. Eq. 557.

Or, unless there is some equitable reason for the assignment. *Holland v. Citizens Sav. Bank*, 16 R. I. 734, citing *Chedel v. Millard*, 13 R. I. 461; *Butler v. Taylor*, 5 Gray (Mass.) 455; *Lamson v. Drake*, 105 Mass. 564; *Lamson v. Montague*, 112 Mass. 352; *Hamilton v. Dobbs*, 19 N. J. Eq. 227; *Chase v. Williams*, 74 Mo. 429; *Gatewood v. Gatewood*, 75 Va. 407; *Davis v. Flagg*, 35 N. J. Eq. 491.

And the mere fact that he is a subsequent mortgagee does not constitute such equitable reason. *Vandercook v. Cohoes Sav. Inst.*, 51 Hun (N. Y.) 641; *Bigelow v. Cassidy*, 26 N. J. Eq. 557. But see *Twombly v. Cassidy*, 82 N. Y. 155.

Assignment of Mortgage Debt and Subrogation to Lien of Mortgage Creditor Distinguished.—In *Gatewood v. Gatewood*, 75 Va. 407, the distinction between the case of one who discharges a mortgage and takes an assignment thereof, and that of him who pays off the mortgage in order to protect his own interests, was clearly presented by *Staples, J.*, in the following observation: "We must be careful to distinguish between an assignment of the mortgage debt, and a mere right of subrogation to the lien of the mortgage creditor. Assignment is the act of the parties, and depends generally upon intention. Where the nature of the transaction is such as imports a payment of the debt, and a consequent discharge of the mortgage, there can of course be no assignment, for the lien of the mortgage is extinguished by the payment. A mortgage creditor cannot be compelled to assign the debt and mortgage upon receiving payment.

All that he can be required to do is to give an acquittance and release. The exception to this rule, if it can be so termed, is found in those cases where the party making the payment occupies the position of surety to the debt, or is in some way personally bound for its payment. Such a person may, in equity, require an assignment or transfer, not only of the mortgage itself, but of all the securities held by the creditor, for his protection and indemnity; and although no such assignment or transfer is actually made, a court of equity will treat it as having been done. But if the party making the payment does not occupy the position of surety for the debt, as a general rule he can not claim to be entitled as assignee unless by agreement with the creditor. Subrogation is, however, a very different thing from an assignment. It is the act of the law, and the creature of a court of equity, depending not upon contract but upon the principles of equity and justice. It presupposes an actual payment and satisfaction of the debt secured by the mortgage. But although the debt is paid and satisfied, a court of equity will keep alive the lien for the benefit of the party who made the payment, provided he as security for the debt, has such an interest in the land, as entitles him to the benefit of the security given for its payment."

Source of Right to Assignment.—In *Pardee v. Van Anken*, 3 Barb. (N. Y.) 534, *Gridley, J.*, for the court, said: "The owner of a junior incumbrance redeems not the premises, strictly speaking, but the senior incumbrance, and he is entitled, not to a conveyance of the premises, but to an assignment of the security." And he further said that the right to an assignment "springs directly from the general right of redemption." But *Johnson, J.*, in *Dauchy v. Bennett*, 7 How. Pr. (N. Y.) 375, denies that the right to an assignment springs from the right of redemption, but rather "from the necessity of the assignment to the protection of some right in the person redeeming." And he then adds that to entitle a party to an assignment, he should show that such an assignment is necessary to protect his rights and interest. See also *infra*, this title, *Junior Mortgagees*.

1. *Oliver v. Montgomery*, 42 Iowa 36.

And when by the contract of lease, the lessee engages to pay all subsequent taxes on the property, but fails to do so, the lessor having an interest as owner in discharging the debt, will upon payment, be subrogated to the rights of the state or municipality against the lessee; but as the rights of the claimant for subrogation cannot be higher than those of the party to whose position he succeeds, if the lessor fails to prosecute this right until the right of the state or municipality has been lost by lapse of time, his right will likewise be lost.¹ When specific performance of a contract for the conveyance of land is decreed, the vendor will be subrogated to the lien of taxes accruing on the land during the time the vendee was in possession and use of the property under the contract, which were paid by him.² If the property of a corporation is sold under execution, and the corporate authorities take no steps to redeem within the period prescribed by law, a stockholder may interpose and redeem for the benefit of the corporation, and hold the property liable for the money so advanced; and by so doing, he becomes the equitable assignee of the certificates of sale, and will be subrogated to all the rights of the original purchaser at the sale.³ Again, where a junior mortgagee pays assessments on the property after a sale to the municipality for their non-payment, and takes an assignment of the certificates of sale, and the assessments are, by the city's charter, a lien prior to other incumbrances, he will be entitled by equitable subrogation to the benefit of the city's lien, in advance of the rights of a senior mortgagee.⁴

It has been held that subrogation will be enforced in favor of one, who, although at the time may have no absolute interest in the property, yet upon the happening of a contingency may become the owner, and in order to save the property, pays a debt which is a lien thereon.⁵

In regard to the question of mortgages, it should be observed that the right of the redeeming party to subrogation does not follow as a matter of course from the right of redemption. That right depends upon the relation of the parties liable to be foreclosed, to each other, the particular situation of the party claiming such right, and especially and generally upon the inquiry, whether such subrogation is necessary for the protection of the redeeming party, and consequently upon the circumstances in which the right of redemption is sought to be exercised. Thus, where there are several successive mortgages upon the same premises, the mortgagor may have a decree for the redemption of the first mortgage, though by payment under such decree he acquires no right to subrogation; so the grantee of the mortgagor,

1. *Mathias Succession*, 15 La. Ann. 381. 463. See also *infra*, this title, *Junior Mortgagees*.

2. *Lillie v. Case*, 54 Iowa 177.

3. *Wright v. Oroville Gold, etc.*, Min. Co., 40 Cal. 20.

4. *Fiacre v. Chapman*, 32 N. J. Eq.

5. *Pease v. Egan*, 131 N. Y. 262. In such a case the party is not a volunteer. See *infra*, this title, *Volunteers and Strangers*.

holding the fee subject to the mortgages, may redeem the first mortgage, but he does not thereby become entitled to subrogation.¹

b. PURCHASERS—(1) *In General*.—One of the most familiar instances of the application of the doctrine of subrogation is where the purchaser of incumbered property, without having assumed the incumbrance, pays it off, in order to protect his own interest, or to perfect his own title; in such cases, it is uniformly held that he is entitled to be subrogated to the position of the incumbrancer, in respect of all the latter's securities, rights, remedies, and priorities.² And this right will not be affected by the circumstance that the purchaser's title subsequently fails, when the payment was made in the belief that he was the owner of the

1. *Jenkins v. Continental Ins. Co.*, 12 How. Pr. (N. Y.) 66; *per Woodruff, J.* See also the succeeding subdivisions of this section.

2. *Cole v. Malcolm*, 66 N. Y. 366; *Johnson v. Parmely*, 14 Hun (N. Y.) 398; *Simpson v. Del Hoyo*, 94 N. Y. 189; *Corbally v. Hughes*, 59 Ga. 493; *Gooch v. Botts*, 110 Mo. 419; *Gooch v. Moore*, 110 Mo. 425; *Armentrout v. Gibbons*, 30 Gratt. (Va.) 632; *Dircks v. Logsdon*, 59 Me. 173; *In re Pierce*, 2 Low. (U. S.) 343; *Hurt v. Reeves*, 5 Hayw. (Tenn.) 50; *Planters' Bank v. Dodson*, 9 Smed. & M. (Miss.) 527; *Bush v. Wadsworth*, 60 Mich. 255; *Scott v. Dunn*, 1 Dev. & B. Eq. (N. Car.) 425; 30 Am. Dec. 174; *Coudert v. Coudert*, 43 N. J. Eq. 407; *Kelly v. Duff*, 61 N. H. 435; *Bright v. Boyd*, 1 Story (U. S.) 478; *Rush v. State*, 20 Ind. 432; *Harlan v. Jones*, 104 Ind. 167; *Chaplin v. Sullivan*, 128 Ind. 50; *Fowler v. Parsons*, 143 Mass. 401; *Stiger v. Bent*, 111 Ill. 328.

A purchaser by parol of a part of a tract of land, who pays off a mortgage on the whole to prevent a sale, will be subrogated to the benefit of the mortgage and the judgment recovered thereon. *Champlin v. Williams*, 9 Pa. St. 341.

Where the purchaser of land with general warranty, afterwards ascertains that judgments have been recovered and docketed against his vendor, and to save his land from being sold to satisfy the liens thereof, pays off the same, he will be subrogated to the liens so paid against any other land owned by his vendor. *Beall v. Walker*, 26 W. Va. 741. See also *Hoke v. Smith*, 33 W. Va. 501.

Where a grantee of real estate, at the request of the grantor, pays the

consideration due therefor to persons having suits pending against the grantor with attachments on such real estate to secure liens due them on the same, he will be subrogated to the ownership of the claims thus discharged, and with the consent of such persons may prosecute such suits in their name for his own benefit to prevent the priority of later attachments placed upon the property without his knowledge after he paid out his money and before the deed was recorded. *Stevens v. King*, 84 Me. 291.

If a debtor gives personal security, and also a mortgage on his real estate, for his debt, and the creditor recovers judgment against both him and his surety on the personal security given, which constitutes a lien upon the surety's land, and the surety then sells his land by warranty deed to another, and subsequently the land so purchased is sold in satisfaction of the judgment, and the purchaser is compelled to buy the certificate of purchase to save his title and takes an assignment of the mortgage, he will be entitled to subrogation to the right of the creditor to have the mortgage foreclosed to indemnify him for the sum so expended. *Beaver v. Slanker*, 94 Ill. 175.

A purchaser of goods subject to duty, upon being compelled to pay the same in order to get the goods, the importer being bankrupt, will succeed to the government's priority against the bankrupt's estate. *In re Kirkland*, 14 Nat. Bank. Reg. 139.

In *Alford v. Cobb*, 28 Hun (N. Y.) 22, the plaintiffs became the owners from the defendant of a lease of an oil well, and a derrick, carpenter's rig, and other improvements upon the lease-

hold premises. While they were such owners one H. held a debt and lien against the defendant for furnishing the derrick, etc., at the request of the latter. Being about to enforce the debt and lien by sale of the property, the plaintiffs, in order to prevent a sale, were compelled to pay to the officer, into whose hands an execution had been put, the amount of the debt. It was held that the plaintiffs became entitled by subrogation to the lien and debt so held by H.

In *Hines v. Dresher*, 93 Ind. 551, a personal judgment was rendered against a debtor after he had conveyed land in anticipation of such a judgment. The grantee mortgaged the land to a *bona fide* mortgagee. Subsequently the judgment creditor procured a decree against the grantor and grantee setting aside the conveyance as fraudulent, from which decree an appeal was taken. After the decree, but prior to the appeal, the fraudulent grantee was adjudged a bankrupt and the land was sold by his assignee. Subsequently the mortgage was foreclosed against the debtor, his fraudulent grantee, and his judgment creditor, and was bought in by the mortgagee at the foreclosure sale. The purchaser at the bankrupt sale redeemed the land and received a conveyance from the judgment debtor and the fraudulent grantee, the bankrupt. Afterwards the appeal was sustained reversing the decree setting aside the conveyance for a defect in the complaint. This, however, was cured by amendment, and a decree again rendered setting aside the conveyance as fraudulent. In a suit by the purchaser at the bankrupt sale to enforce his lien and quiet his title against the judgment creditor, wherein the latter set up his judgment, it was held that the plaintiff was entitled to be subrogated to the rights of the mortgagee, but that, subject to the mortgage debt, the defendant's judgment must be satisfied next, and the residue, if any, go to the plaintiff.

In *Sheffy's Appeal*, 97 Pa. St. 317, the facts were these: A, as assignee, sold certain lands belonging to B, under an order of court in pursuance of the *Pennsylvania* Act of 1876, Pamph. Laws 4. On 7th of June, a return was made that the property had been sold to C for \$5,210. The return was confirmed, and on September 13th a deed of the property was made by A to C. On the same day, the

property was re-conveyed by C to A. The property was sold subject to certain mortgages, amounting to \$4,392. At the time of the sale, the understanding was that the purchaser should pay \$818 only, and to discharge the mortgages. A paid off the mortgages and thereafter procured an amendment of the return of sale, so as to agree with the facts above stated. He thereupon filed his account as assignee, and claimed subrogation as against the personal property of B for the amount of the mortgages discharged by him. It was held that A was not entitled to subrogation as against B's personal property; the court observing that where an anterior lien has been paid by the debtor or one who stands in the debtor's shoes, a posterior lien creditor cannot be subrogated to the rights of the anterior.

When a judgment creditor buys under his judgment the land of his debtor on which there is an attorney's lien against the latter for services rendered in recovering the land for him, and such purchaser subsequently pays off a lien, or the land is sold to satisfy it, he will be subrogated to the rights of the attorney to an execution on his personal judgment rendered against the debtor for his fee. *Lane v. Hallum*, 38 Ark. 385.

If the plaintiff in a judgment, which is a lien on certain lands, levies on the portion sold by the judgment defendant, and the latter's vendee pays the judgment and takes an assignment of it, he will be entitled to priority by subrogation over another who obtains his judgment against the same defendant after the date of the purchase. But it is otherwise if the land were purchased subject to the judgment first mentioned, or the price reduced in consequence of its existence. *Zeigler v. Long*, 2 Watts (Pa.) 205.

In *Ayers v. Adams*, 82 Ind. 109, it was held that one who buys real estate subject to a mortgage and a judgment lien, and pays the mortgage, and causes an entry of satisfaction to be made of record, in ignorance of the judgment, will be subrogated to the rights of the mortgagee as against the judgment creditor; and will not be estopped to assert this right against such creditor who purchases such property at an execution sale upon the judgment after the entry of satisfaction.

But it seems that in such a case relief will not be granted unless necessary to

property purchased.¹ It seems that if he deposits funds in court, with the intention of paying off in full a senior judgment, he will be subrogated to the rights of the holder to the extent of his payment, as against a junior judgment creditor, though by a mistake in the calculations the amount deposited is not sufficient to satisfy the senior judgment in full.² But it is held that if the purchaser expressly assumes to pay the incumbrance, he thereby becomes the principal debtor, primarily and absolutely liable for the debt, and may not be subrogated to the benefit of the incumbrance upon making payment according to his contract.³ And,

the protection of the purchaser. *Edinburg, etc., Mortgage Co. v. Latham*, 88 Ind. 88. Nor will it be granted at all when the discharge and cancellation of the mortgage were made with the knowledge, or with the means of knowing, of the existence of the judgment, but in ignorance of the legal effect of such acts. *Garwood v. Eldridge*, 2 N. J. Eq. 145; 34 Am. Dec. 195.

In *Dunning v. Seward*, 90 Ind. 63, a decree was rendered subjecting real estate conveyed by an ancestor to the payment of certain judgments against him. On the same day there was a partition of the lands between the widow and heirs of the debtor, and it was agreed by all the parties that the proceeds of such sale (not including the one-third reserved for the widow) be applied first: a certain amount to the widow to make up a balance of \$500 under the statute, and next to the payment of the judgments. The sale was made by a commissioner, but the court refused to enforce the agreement by applying the purchase money on the judgments. The lands were then sold by the sheriff to satisfy the judgments, and the purchaser at the partition sale was compelled to buy for his own protection. It was held that he was entitled to be reimbursed the amount paid upon his purchase from the sheriff out of the proceeds of the partition sale.

A sub-purchaser of lands subject to a mortgage, who is compelled to satisfy the mortgage in order to prevent a sale, will be subrogated to the rights of the mortgagee against the mortgagor on the mortgage note, but not as to expenses of advertising a sale of the lands. *Bock v. Gallagher*, 114 Mass. 28.

But where a judgment debtor conveyed land to his vendee, leaving enough of the purchase money with the vendee to pay the judgment, and the latter failed to do this, and con-

veyed to a third party, who sold the land under a general warranty and subsequently voluntarily paid the judgment to protect the warranty, it was held that he was not entitled to be subrogated to the right of the judgment creditor to proceed against the estate of the judgment debtor. *Hardin v. Clark*, 32 S. Car. 480.

And in *Louisiana*, a purchaser of lands, at a sheriff's sale, which are subject to the payment of a privileged debt for materials furnished and used in the construction of buildings on the premises, will not, upon the payment of this debt, have any claim to be subrogated to the rights of the privileged creditor against the former owner of the property—since under art. 679, *Louisiana Code of Practice*, it is the duty of the purchaser to retain in his hands out of the price for which the property was adjudicated, a sum sufficient to pay the privileged debt; and the fact that he was the vendor of the lots, and that they were sold at his suit to pay the purchase price, and bought in by himself, did not release him from that obligation. *Sturges v. Taylor*, 15 La. Ann. 285.

1. *Betts v. Sims*, 35 Neb. 840.

2. *Sower's Appeal* (Pa. 1888), 15 Atl. Rep. 898. The court recognized the well-established rule that the right to subrogation is not complete until the creditor has been fully satisfied, but considered itself justified in making this ruling, as it was fully established that it was the intention of all parties concerned to deposit funds sufficient to discharge the judgment in full, and that the shortage was due to an error in the calculation of interest, costs, etc. For the general rule, see *supra*, this title, *When Right to Subrogation Becomes Complete*.

3. *Kellogg v. Colby*, 83 Iowa 513; *Stiger v. Bent*, 111 Ill. 328; *Hancock v. Fleming*, 103 Ind. 533; *Birke v. Abbott*,

103 Ind. 1; *distinguishing* Peet v. Beers, 4 Ind. 46, and Ayers v. Adams, 82 Ind. 109; Atherton v. Toney, 43 Ind. 211; Bunch v. Grave, 111 Ind. 351; Winans v. Wilkie, 41 Mich. 264. See also Leamons v. Harvey, 52 Ind. 331.

A vendee of land charged with notice of a judgment against his vendor constituting a lien thereon, may not, as against the judgment creditor, claim a superior lien on account of improvements made upon the property and of money paid in discharge of other liens thereon, which he assumed to pay as part of the purchase price, notwithstanding they were prior to the judgment. First Nat. Bank v. Thompson, 72 Iowa 417.

Neither the purchaser of land, subject to a mortgage, which he assumes and pays as a part of the purchase price, nor his grantee, may be subrogated to the mortgagee's rights as against a judgment creditor of the mortgagor, whose judgment was filed prior to the purchase. Goodyear v. Goodyear, 72 Iowa 329.

Where two parties buy land as co-tenants, and one of them subsequently sells to the other, the vendee engaging to pay the balance of the original purchase price, and he afterwards grants to another under a similar agreement, the latter will not, upon paying such balance, be subrogated to the original vendor's lien, so as to prevent a lien from attaching in favor of the one who sold to his co-tenant. Birdsall v. Cropsey, 29 Neb. 679.

And in Martin v. Aultman, 80 Wis. 150, it was held that where the grantee of land incumbered by mortgages and a docketed judgment against the grantor, agrees to pay all incumbrances thereon, he may not, after paying the mortgages, have them declared a lien in his favor prior to the judgment, although at the time of the grant he was ignorant of the existence of the judgment.

And in Shirk v. Whitten, 131 Ind. 455, it is held that where one buys land subject to a mortgage pending proceedings for the establishment of a ditch, and thereafter pays off the incumbrance, he does so as owner and presumptively as part of the purchase price, and it is thereby extinguished, and therefore he will not be subrogated to the mortgage lien so as to defeat the lien of the assessment for the construction of the ditch. The court recognizes and approves the general doc-

trine that, where a purchaser pays an incumbrance which he is not in equity bound to pay, for the purpose of protecting his own title, it will be kept alive and enforced for his benefit, but denied the application of the doctrine to the case stated.

In Carlton v. Jackson, 121 Mass. 592, it was held that when an incumbrance is paid by one whose duty it is, by contract, or otherwise, to pay it, such payment effects a release or discharge of the debt, and cannot thereafter be kept alive for any purpose. See also Heim v. Vogel, 69 Mo. 529; Willson v. Burton, 52 Vt. 394.

In Booker v. Anderson, 35 Ill. 66, it was held that where at a sale under a junior incumbrance, notice is given of the existence of a prior incumbrance on the property, and the sale is made subject thereto, and the purchaser pays off the prior incumbrance, such payment is only a part of the purchase money of the land, and operates as a discharge of the prior incumbrance, and not as an equitable assignment thereof to him.

A standard author has this to say upon the subject: "When a grantee thus assumes payment of the mortgage debt as a part of the purchase price, the land in his hands is not only made the primary fund for payment of the debt, but he himself becomes personally liable therefor to the mortgagee, or other holder of the mortgage. The assumption produces its most important effect, by the operation of equitable principles, upon the relations subsisting between the mortgagor, the grantee, and the mortgagee. As between the mortgagor and the grantee, the grantee becomes the principal debtor primarily liable for the debt, and the mortgagor becomes a surety, with all the consequences flowing from the relation of suretyship. As between these two and the mortgagee, although he may treat them both as debtors, and may enforce the liability against either, still, after receiving notice of the assumption, he is bound to recognize the condition of suretyship, and to respect the rights of the surety in all of his subsequent dealings with them. Payment, therefore, by a grantee who has assumed the entire mortgage debt, completely extinguishes the mortgage; he cannot be subrogated to the rights of the mortgagee, and keep the mortgage alive for any purpose." 3 Pom. Eq. Jur. (2d ed.), § 1206. See also the

generally speaking, to entitle a purchaser to subrogation, the claims which he satisfies must be such as would be enforceable against the land in his hands.¹ If the purchaser's title fails, and the purchase money has been applied to the payment of liens and incumbrances on the property, he will be subrogated to the rights of the holders of such claims.² Thus, a purchaser at a void overdue tax sale will be subrogated to the state's lien for the purchase

observation of the same author at section 797.

But in *Cameron v. Holenshade*, 1 Cin. Sup. Ct. (Ohio) 83, it is held that where an innocent purchaser with deed of general warranty pays off and cancels of record certain mortgages, which he assumed as part payment of the purchase price, equity will disregard the cancellation and hold the mortgages valid subsisting liens in the purchaser's hands to protect him against junior incumbrances.

And in *Young v. Morgan*, 89 Ill. 199, it was held that a purchaser of land who pays off a debt of the mortgagor secured by a deed of trust upon the premises, as a part of the purchase money, and to protect his own title from sale, will be subrogated to the lien of the trust deed, although formally released, so as to cast off an intervening lien of a judgment against his grantor. See also *Bressler v. Martin*, 133 Ill. 278; *Bryson v. Myers*, 1 W. & S. (Pa.) 420.

In *Matzen v. Shaeffer*, 65 Cal. 81, a purchaser of land on which there was a mortgage agreed with the owner and the mortgagee to pay the mortgage debt as a part consideration for the purchase; the debt was paid by him to the mortgagee, and the remainder of the purchase money to the owner, who thereupon conveyed the land to the purchaser. The mortgagee entered upon the record satisfaction of the mortgage debt. It was held that the transaction operated as an equitable assignment of the mortgage to the purchaser, and was a lien prior and superior to that of a judgment against the mortgagor obtained and entered after the execution of the mortgage and before the entry of satisfaction.

1. *Carpentier v. Brenham*, 40 Cal. 221.

2. In *Brewer v. Nash*, 16 R. I. 458, it was held that a purchaser in good faith at a sale under a power which turned out to be invalid, will be subrogated to the rights of the mortgagee, though the conveyance to him contains no language amounting to a legal as-

signment, and the mortgage is discharged of record after the purchase, and this right may be exercised as against an infant whose guardian has inserted in the mortgage invalid powers of sale.

Where a husband and wife owned land jointly, and he sold the whole interest therein, representing to the vendee that he was authorized to do so, when in fact he was not, and the wife thereafter claimed her interest in the land, it was held, that the vendee having bought in good faith, and paid off an outstanding lien on the land for purchase money due by the husband and wife, he should be substituted to the lien holder's right as against the wife's claim. *Dillow v. Warfel*, 71 Iowa 106.

If a new company, formed after the dissolution of an insolvent company, purchase lands of the old company from its receiver, and obtain from him a deed which proves invalid, it will be subrogated to the rights of the creditors whose claims were paid with the purchase money of the lands. *St. Louis, etc., Min. Co. v. Sandoval, etc., Min. Co.*, 116 Ill. 170.

And in *House v. Fowle*, 22 Oregon 303, it was held that when the proceeds of a decedent's land sold under order of court, are applied to the payment of a mortgage made by him and his wife, the purchaser will be subrogated to the rights of the mortgagee as against the widow's claim for dower.

In *Sidener v. Hawes*, 37 Ohio St. 533, it was held that if an heir, to whom lands descend subject to his ancestor's debts, sells the same privately with general warranty, without administration on the estate of the ancestor, to a *bona fide* purchaser, who applies the purchase money to discharge liens created thereon by the ancestor, and to the payment of preferred claims, the purchaser will be entitled in equity, in the distribution of the purchase money, to be subrogated to the rights of the holders of such claims.

A purchaser whose land is seized on an execution against his vendor, on

money and all taxes paid by him;¹ and the same is true if the purchaser's title fails because the sale is void by reason of a defective description of the land;² or because the act under which the sale was made is unconstitutional;³ or because the requirements of the statute that all sales shall be made at public auction have not been complied with.⁴ So where an executor sells real estate and uses the proceeds in the payment of debts, under a mistake of his power, and the purchaser is ousted by the devisee, the land in equity will be subjected to indemnify the purchaser to the extent to which his money was applied to the debts, over and above the personal estate.⁵ But this equitable principle will not be

paying the demand is entitled to subrogation as to the remaining land of the vendor, but if the vendee has given bonds for the purchase money, which were unpaid, though assigned by the vendor, the vendee has not that equity, since the payment of the judgment is a defense to the bonds. *In re McGill*, 6 Pa. St. 504; *Evelyn v. Evelyn*, 2 P. Wms. 664.

If a purchaser of land, pursuant to his contract, discharges a lien on the land binding the vendor's estate therein, and the contract is abandoned by the parties, and the vendor becomes unable to execute it, the purchaser is entitled to be substituted to the benefit of such lien, although he took no assignment thereof when he discharged it; and the lien will be kept alive in equity for his indemnity. *James v. Burbridge*, 33 W. Va. 272.

J. owned two tracts of land, eighty acres, and three hundred and twenty acres. On the former he kept the taxes paid; on the latter they were allowed to become delinquent. He mortgaged the eighty-acre tract. It was thereafter sold by the mortgagee under a decree of foreclosure, and the certificate of purchase assigned to A, who received a deed from the sheriff. J., subsequent to the execution of the mortgage on the eighty acres, sold the other tract to W. The taxes on the three hundred and twenty acre tract were transferred by the county auditor to the eighty-acre tract, which was sold for their non-payment. It was held that A was entitled to be subrogated to the lien held by the state against the three hundred and twenty acre tract. *Cockrum v. West*, 122 Ind. 372.

A mortgaged lands to B, a school commissioner, as security for the payment of a loan from the school fund, and upon his default the land was sold publicly by B. C, the purchaser at the

sale, sold and conveyed it with covenants of warranty to D, who took possession. At the suit of the heirs of A, the sale made by B was adjudged void for want of proper notice, and the heirs recovered possession. D in turn sued the heirs of C on the latter's covenants of warranty, and recovered judgment against them, which they paid. The heirs of A afterwards conveyed the land to E, who conveyed to F: both of these parties having notice of all the prior proceedings. It was held, in an action instituted by the heirs of C against E and F for the sale of the land to pay the amount of the mortgage, that the heirs of C were entitled to be regarded as the equitable assignees of the mortgage, and to be subrogated to the rights of the mortgagee. *Muir v. Berkshire*, 52 Ind. 149.

For further illustrations of this principle, see *Caldwell v. Palmer*, 6 Lea (Tenn.) 652; *Easthampton v. Bowman*, 136 N. Y. 521; *Browne v. Davis*, 109 N. Car. 23; *Hobgood v. Schuler*, 44 La. Ann. 537; *Eddy v. Faver*, 6 Paige (N. Y.) 521; *Young v. Ward*, 115 Ill. 264; *Phillips v. Chamberlain*, 61 Miss. 740; *Mallory v. Dauber*, 83 Ky. 239; *Webb v. William, Walker Ch.* (Mich.) 544; *Wade v. Beedmeir*, 40 Mo. 487.

1. *Gregory v. Bartlett*, 55 Ark. 30. See also *Meher v. Cole*, 50 Ark. 361.

2. *Hershey v. Thompson*, 50 Ark. 485.

3. *Bagley v. Castle*, 42 Ark. 77. And in this case it was held that the purchaser's vendee would have the same right.

4. *Arn v. Hoppin*, 25 Kan. 707.

5. *Scott v. Dunn*, 1 Dev. & B. Eq. (N. Car.) 425; 30 Am. Dec. 174.

So in *Duncan v. Gainey*, 108 Ind. 579, one who had bought land at an unauthorized administrator's sale, and had by direction of the administrator paid the purchase price upon debts of the estate, although the sale was

enforced in favor of one who purchases at a void executor's sale, cognizant of the want of authority of the executor to sell, and warned not to purchase.¹ As a general rule, the purchaser of lands will succeed to all the rights and remedies of his vendor in respect of the lands sold.² But it seems that he will not be subrogated to the benefit of his vendor's claim against a prior vendor for a deficiency in the quantity of the land, in the absence of an express agreement permitting such subrogation.³

(2) *Of Equity of Redemption*—(See also MERGER, vol. 15, p. 312; MORTGAGES, vol. 15, p. 725).—The purchaser of an equity of redemption of mortgaged premises, upon paying the amount due on the mortgage, will be entitled to subrogation to the rights of the mortgagee as against intervening rights; in such a case equity will generally treat the incumbrance as still subsisting, and not as merged, so long as it is necessary to do so to protect the rights of the party paying the mortgage debt.⁴ But one who purchases a mere

ineffectual to convey title and the land still remained liable to be sold under order of court for the payment of debts, was held entitled to be subrogated to all the rights of the original holder of such debts according to their respective priority.

And in *Bloodget v. Hill*, 29 Wis. 170, the purchaser of land in good faith, at an administrator's sale, without actual notice of defects in the proceedings which rendered the sale void, was held entitled to be subrogated to the rights of the mortgagee and other creditors of the estate, whose claims were paid with the purchase money, and to be paid the moneys so advanced before being turned out of possession. See also *Wilkinson v. Filby*, 24 Wis. 441; *Hudgin v. Hudgin*, 8 Gratt. (Va.) 320; 52 Am. Dec. 124; *Valle v. Fleming*, 29 Mo. 152; 77 Am. Dec. 557.

1. *Huse v. Den*, 85 Cal. 390; *Bagley v. Castile*, 42 Ark. 77; *Murphy v. Adams*, 71 Me. 184; 36 Am. Rep. 299; *Creanor v. Creanor*, 36 Ark. 91; *Peters v. Clements*, 52 Tex. 140.

2. Where A purchases land of B, but pays no part of the purchase price, and subsequently releases his title to C, on the latter's paying the purchase money to B, and A afterwards dies, leaving a widow, C will be subrogated to the rights of B, as against the widow's right of dower. *Fisher v. Johnson*, 5 Ind. 492.

B, the owner of land, contracted to sell it to A, reserving, if the purchase price be not promptly paid, the "right to sell the lot to any other person without further notice, time being of the

essence of this agreement." A took possession and employed a mechanic to do certain work on the property. On the day before the purchase money was due, C, D and E, with the consent of A, purchased, and received a conveyance to F, in trust for them, of the property, paying therefor the amount of purchase money due from A. It was held that C, D and E were subrogated to all the rights of B, and that their title was superior to the mechanic's lien. *Logan v. Taylor*, 20 Iowa 297. See also *Bonds v. Strickland*, 60 Ga. 624; *City Bank v. Smisson*, 73 Ga. 422, cases involving the *Georgia* homestead laws.

3. *Chambliss v. Miller*, 15 La. Ann. 713; *Davis v. Clark*, 33 N. J. Eq. 579. See also *Powell v. Hays*, 31 La. Ann. 789.

4. *Watson v. Gardner*, 119 Ill. 312; *Walker v. King*, 45 Vt. 525; *Gatewood v. Gatewood*, 75 Va. 407. See also *Wheeler v. Willard*, 44 Vt. 640; *Gleason v. Dyke*, 22 Pick. (Mass.) 390. Compare *Wade v. Howard*, 6 Pick. (Mass.) 492.

The purchaser of an equity of redemption, to the extent that his purchase money is applied to trust debts, is entitled to be subrogated to the rights of the *cestui que trust*. *Hudson v. Dismukes*, 77 Va. 242.

In *Braden v. Graves*, 85 Ind. 92, it was held that where in an action brought to foreclose a mortgage in the form of a deed, the defendant, who is the purchaser of the equity of redemption and who has paid off prior mortgages bearing interest at the rate

equity of redemption in terms subject to the payment of the mortgage debt, will not be subrogated to the benefit of other securities held by the mortgagee for the payment of that debt.¹ It seems that if a mortgage is paid off by the purchaser of the equity of redemption, and by him canceled in fact and on the record, while under the misapprehension that his title is good, he may not, upon discovering the contrary, have the cancellation set aside and the mortgage declared in force on the ground that, had he then

of seven and ten per centum, is entitled to the amounts paid upon such mortgages with interest thereon from the time of payment, at the rates named in such mortgages. The court quoted approvingly the following from Jones on Mort., § 877: "When a mortgage is paid by one, who is under no obligation to pay, although he does not take a formal assignment of it, he is subrogated to the rights of the mortgagee in the mortgaged property, and holds the title so acquired as against subsequent incumbrancers, although he had also acquired the equity of redemption. In such case no proof of intention on his part to keep the mortgage alive is necessary to give him the benefit of it. His payment of the mortgage and his relation to the estate are in aid of his title to strengthen and uphold it."

In *Cox v. Garst*, 105 Ill. 342, it was held that a purchaser of the equity of redemption at an administrator's sale of lands to pay the debts of deceased mortgagor takes only the interest which the latter held and occupies the same position as the heirs, and if such purchaser discharges the mortgage by payment, he will not, as against the widow of the mortgagor, be entitled to subrogation to the rights and equities of the mortgagee, and to foreclose the mortgage against the widow and heirs so as to cut off her dower unless she redeems from the mortgage. See also *Atkinson v. Stewart*, 46 Mo. 510; *Atkinson v. Angert*, 46 Mo. 515.

In *Bell v. Woodward*, 34 N. H. 90, M. H. purchased an equity of redemption, subject to two mortgages made by a former owner, and bought in the senior mortgage; she subsequently gave a quit-claim deed of the land to defendant and delivered over to him the mortgage deed and note; the note had not been paid, but when produced had written across the face these words, "canceled by Mary Hale." There was no evidence to show when, on what condition or bargain, or for what pur-

pose these words were written on the note. It was held that the intention of the parties must be presumed to have been to keep the mortgage alive; that this intention was consistent with equity, and would be effectuated against the holder of the second mortgage.

In *Simonton v. Gray*, 34 Me. 50, it was held, that when the purchaser of an equity of redemption becomes also the assignee of the mortgage, there is not necessarily an extinguishment of either estate; if required for the purposes of justice, the mortgage may be upheld by the assignee, according to his interest or his intention.

See also *Dutton v. Ives*, 5 Mich. 515; *Duffy v. McGinness*, 13 R. I. 595; *Richardson v. Hockenhull*, 85 Ill. 124.

In *Thompson v. Chandler*, 7 Me. 377, it is said: "If the purchaser of a right in equity to redeem a mortgage takes an assignment of it, this shall not operate as an extinguishment of the mortgage, if it is for the interest of the assignee to uphold it."

And in *Gibson v. Crehore*, 3 Pick. (Mass.) 475, it was said, that when the purchaser of an equity of redemption takes an assignment of the mortgage, it shall or shall not operate as an extinguishment according as his interest may be, and according to the real intent of the parties.

In *Atherton v. Toney*, 43 Ind. 211, it was held that the assignee of an equity of redemption who accepts a deed without covenants for the mortgaged property, takes it charged with the mortgage debt. In the absence of special contract or special circumstances, the purchaser must be held to take the land charged with the incumbrance. He may not pay off the debt and then keep it on foot by taking an assignment of it to himself, and set it off against an unpaid balance which he owes to his vendor on the purchase.

1. *Stevens v. Church*, 41 Conn. 369. See also *Lovelace v. Webb*, 62 Ala. 271.

known of the defect in his title, he would have taken an assignment of the mortgage.¹ It has been held that an assignee of the equity of redemption, who pays and takes up several notes secured by mortgage, under an agreement with the mortgagee that he may hold them in the same manner as the mortgagee held them, is entitled to the same priority of lien that a stranger would have who took an assignment thereof.² The sale of an equity of redemption upon execution other than for the debts secured by the mortgage upon the premises, vests the estate sold in the purchaser subject to the payment of the mortgage debt; the purchaser is not allowed to take and hold the entire interest in the lands, since he purchased and paid only the value of the equity of redemption, and if under such circumstances, payment of the mortgage debt is enforced from other property of the mortgagor, he will be subrogated to all the rights of the mortgagee so as to enable him to indemnify himself out of the mortgaged premises.³

The general rule that the purchase of the equity of redemption by the mortgagee will operate a merger of the mortgage, is not inflexible; when it is the mortgagee's intention that there shall be no merger, it will not merge; and in the absence of evidence the mortgagee's intention will be presumed to accord with his interest.⁴

(3) *At Foreclosure, Judicial, and Quasi-Judicial Sales*—See also JUDICIAL SALES, vol. 12, p. 208; SHERIFF'S SALES, vol. 22, p. 571.—The generally received doctrine is, that purchasers at foreclosure,

1. Bentley v. Whittemore, 18 N. J. Eq. 366. See also Garwood v. Eldridge, 2 N. J. Eq. 145; 34 Am. Dec. 195; Edinburgh, etc., Mortgage Co. v. Latham, 88 Ind. 88. Compare Ayers v. Adams, 82 Ind. 109; Lowman v. Lowman, 118 Ill. 582.

But the purchaser of an equity of redemption, who has paid the mortgage debt, but has neglected to cause his deed from the mortgagor to be recorded until after a creditor of the latter has attached the equity of redemption, has an equitable lien upon the premises for the reimbursement of the amount so paid by him. Slocum v. Catlin, 22 Vt. 137.

2. Morrow v. U. S. Mortgage Co., 96 Ind. 21.

3. Funk v. McReynolds, 33 Ill. 482. In this case it was said that the sale is necessarily made for so much less than the property would have brought unincumbered; the debtor is thereby divested of property apparently sufficient to satisfy the indebtedness secured by the mortgage, and he has a right to demand that it be applied upon the liability.

When the equity of redemption in

mortgaged lands is sold under a judgment or under a junior mortgage, which judgment or mortgage is a lien upon the equity of redemption merely, the presumption of law is that the purchaser only bids to the value of the equity of redemption, and the land thus purchased is in equity the primary fund to pay the amount due upon the prior bond and mortgage, and such purchaser is not therefore entitled to an assignment of the prior mortgage to enable him to collect it out of the property of the mortgagor. McKinstrey v. Curtis, 10 Paige (N. Y.) 503; Clift v. White, 12 N. Y. 534; Hanger v. State, 27 Ark. 673; Dauchy v. Bennett, 7 How. Pr. (N. Y.) 376. See also Mathews v. Aikin, 1 N. Y. 604; Tice v. Annin, 2 Johns. Ch. (N. Y.) 125; Woods v. Spalding, 45 Barb. (N. Y.) 607; Heyer v. Pruyn, 7 Paige (N. Y.) 465; Russell v. Allen, 10 Paige (N. Y.) 249; Dodds v. Snyder, 44 Ill. 53; Tuttle v. Brown, 14 Pick. (Mass.) 514; Lovelace v. Webb, 62 Ala. 271.

4. Patterson v. Mills, 69 Iowa 755; Agnew v. Charlotte, etc., R. Co., 24 S. Car. 18; 58 Am. Rep. 237; Gresham v. Ware, 79 Ala. 192; Boardman v.

judicial, execution, or other sales of like nature, or the grantees of such purchasers, will be subrogated to the rights of the holders of claims which are paid with the purchase money, in the event that the sale is ineffectual to convey title to the property sold.¹ There is, however, a line of cases which denies this position, on the ground that such purchasers are volunteers, acting

Larrabee, 51 Conn. 39; McClain v. Sullivan, 85 Ind. 174; Smith v. Roberts, 91 N. Y. 470; Silliman v. Gammage, 55 Tex. 365; Rumpp v. Gerkens, 59 Cal. 496; Carpenter v. Gleason, 58 Vt. 244; Watson v. Dundee Mort., etc., Co., 12 Oregon 474; Cohn v. Hoffman, 45 Ark. 376; Cooper v. Bigly, 13 Mich. 463; Lowman v. Lowman, 118 Ill. 582.

In James v. Morey, 2 Cow. (N. Y.) 246, it was said: Where a mortgagee purchases or takes a release of the equity of redemption, the whole estate is vested in him, and the mortgage is extinguished and with it the mortgage debt, unless intention, incapacity to elect, interest, etc., in the mortgage, intervene to prevent the merger. And where a mortgagee purchases or takes a release of the equity of redemption in a part of the mortgaged premises, the mortgage is extinguished *pro tanto*.

Mr. Story states the rule thus: "An extinguishment of the debt will also ordinarily take place when the mortgagee becomes absolute owner of the equity of redemption, for then the equitable estate becomes merged in the legal. The rule, however, is not inflexible, and may be controlled by the express or implied intention of the parties. And where it is manifestly for the interest of the person in whom both the legal and equitable title unite to keep the incumbrance alive, there courts of equity will imply an intention to keep it alive, unless the other circumstances of the case repel such a presumption. The same doctrine, with the like qualifications, will apply to the case where an assignee of the mortgage purchases the equity of redemption, or the assignee of an equity of redemption purchases it and takes a conveyance of the mortgage." 2 Story Eq. Jur. (13th ed.), § 1035b.

In Lydecker v. Bogert, 38 N. J. Eq. 136, it is held that where a mortgagee recovers a judgment on his bond, sells the mortgaged premises under execution and purchases them himself, the mortgagor is not *ipso facto* entitled to an injunction to restrain him from selling other lands under his judgment

on the ground that the purchase of the equity of redemption extinguishes the mortgage debt, but he may enjoin such other sales until it shall be determined in this court whether the mortgagee ought to be permitted to raise any more money by execution on account of the debt, and if so, how much.

1. Purchaser at Foreclosure Sale.—Brobst v. Brock, 10 Wall. (U. S.) 534; Dutcher v. Hobby, 86 Ga. 198; 22 Am. St. Rep. 444; Johnson v. Sandhoff, 30 Minn. 197; Davis v. Roosevelt, 53 Tex. 305; Turman v. Bell, 54 Ark. 273; Honaker v. Shough, 55 Mo. 472; Brown v. Brown, 73 Iowa 430; Timmerman v. Howell, 2 Ohio C. Ct. Rep. 27; Frische v. Kramer, 16 Ohio 125; Gilbert v. Cooley, Walker's Ch. (Mich.) 494; Hoffman v. Harrington, 33 Mich. 392; Jackson v. Bowen, 7 Cow. (N. Y.) 13; Robinson v. Ryan, 25 N. Y. 320; Winslow v. Clark, 47 N. Y. 261; Miner v. Beakman, 50 N. Y. 337; Wolf v. Lowry, 10 La. Ann. 272; Muir v. Berkshire, 52 Ind. 149; Logansport v. Case, 124 Ind. 254; Watkins v. Winings, 102 Ind. 330; Parker v. Goddard, 81 Ind. 294; Curtis v. Gooding, 99 Ind. 45; Zylstra v. Keith, 2 Desaus. (S. Car.) 140; Russell v. Hudson, 28 Kan. 99; Smith v. Brittain, 3 Ired. Eq. (N. Car.) 37; 42 Am. Dec. 175; Merriam v. Rauen, 23 Neb. 217.

Purchaser at Judicial Sale.—Dunning v. Seward, 99 Ind. 63; Hayes v. Dalton, 5 Lea (Tenn.) 555; *overruling* Wright v. Duffield, 2 Baxt. (Tenn.) 218; Stockton v. Downey, 6 La. Ann. 581; Barelli v. Gauche, 24 La. Ann. 324; Jouet v. Mortimer, 29 La. Ann. 207; French v. Grenet, 57 Tex. 273; Hudgin v. Hudgin, 6 Gratt. (Va.) 320; 52 Am. Dec. 124; Hull v. Hull, 35 W. Va. 155; Haymond v. Camden, 22 W. Va. 180; Kinney v. Knoebel, 51 Ill. 112; Chambers v. Jones, 72 Ill. 275.

Purchaser at Administrator's, Executor's and Guardian's Sales.—Pool v. Ellis, 64 Miss. 555; McGee v. Wallis, 57 Miss. 638; 34 Am. Rep. 484; Grant v. Lloyd, 12 Smed. & M. (Miss.) 191; Ragland v. Green, 14 Smed. & M. (Miss.) 194; Douglas v. Bennett, 51 Miss. 680; Bennett v. Coldwell, 8 Baxt.

(Tenn.) 483; *Blodgett v. Hitt*, 29 Wis. 169; *Mohr v. Tulip*, 40 Wis. 66; *Winslow v. Crowell*, 32 Wis. 639; *Hart v. Smith*, 44 Wis. 213; *Wehrle v. Wehrle*, 39 Ohio St. 365; *Barr v. Hatch*, 3 Ohio 527; *Levy v. Riley*, 4 Oregon 392; *Dufour v. Camfranc*, 11 Martin (La.) 607; *Davidson v. Davidson*, 28 La. Ann. 269; *Blanton v. Ludeling*, 30 La. Ann. 1232; *Beall v. Barclay*, 10 B. Mon. (Ky.) 261; *Shepherd v. McIntire*, 5 Dana (Ky.) 574; *Goring v. Shreve*, 7 Dana (Ky.) 64; *Millis v. Lombard*, 32 Minn. 259; *Hawkins v. Miller*, 26 Ind. 173; *Carver v. Howard*, 92 Ind. 173; *Jones v. French*, 92 Ind. 138; *Hines v. Dresher*, 93 Ind. 551; *Paxton v. Sterne*, 127 Ind. 289; *Rinehart v. Long*, 95 Mo. 396; *Howard v. North*, 5 Tex. 290; 51 Am. Dec. 769; *Mayer v. Blanton*, 67 Tex. 245; *Cline v. Upton*, 59 Tex. 27; *Burns v. Ledbetter*, 54 Tex. 374; *Stone v. Darnell*, 25 Tex. Supp. 430; 78 Am. Dec. 582; *Morton v. Welborn*, 21 Tex. 772; *Andrews v. Richardson*, 21 Tex. 287; *Herndon v. Rice*, 21 Tex. 456; *Walker v. Lawler*, 45 Tex. 538; *Bentley v. Long*, 1 Strobb. Eq. (S. Car.) 43; 47 Am. Dec. 523.

In *Davis v. Gaines*, 104 U. S. 386, it was held that when the purchase money paid by a purchaser in good faith of the real estate of a decedent, ordered to be sold by a probate court, has been applied to the payment of a mortgage executed by the decedent upon the property sold, and constituting a valid incumbrance thereon, and it turns out that the sale was irregular or void, the purchaser may not be ousted of his possession by the heir or devisee without a repayment or tender of the purchase money so paid and applied. In this case, the court, by Mr. Justice Wood, said: "No case is cited by counsel for appellee where the court refused to give the purchaser in good faith the benefit of this rule. The authorities relied on by him, *Sugden Vend. ch. 16, § 483* (*Sheffield v. Orrery*), 3 Atk. 287, apply only to purchasers in bad faith. We are aware that some of the courts have held that a purchaser at an irregular or void judicial or execution sale, is not subrogated to the rights of the judgment creditor. *Richmond v. Marston*, 15 Ind. 134; *Nowler v. Coit*, 1 Ohio 519; 13 Am. Dec. 640. But the weight of authority is against this position. *McLoughlin v. Daniel*, 8 Dana (Ky.) 182; *Bentley v. Long*, 1 Strobb. Eq. (S. Car.) 43; 47 Am. Dec. 523; *Howard v. North*, 5 Tex. 290; 51 Am.

Dec. 769; *Jackson v. Bowen*, 7 Cow. (N. Y.) 13. And this court has expressly held that an irregular judicial sale made at the suit of a mortgagee, even though no bar to the equity of redemption, passes to the purchaser at such sale the rights of the mortgagee as such. *Brobst v. Brock*, 10 Wall. (U. S.) 519."

A purchaser of the lands of a lunatic at a sale made for the payment of the debts of the lunatic, will, if the sale be declared invalid, be subrogated to the rights of the creditors to whose demands the purchase money was applied. *Cathcart v. Sugheimer*, 18 S. Car. 123.

If mortgaged lands are sold by an administrator and the proceeds applied to the payment of the mortgage, and the sale be afterwards declared invalid for want of compliance with statutory requirements, the purchaser will be subrogated to the lien of the mortgage which his money paid off, and the owner will not be entitled to recover possession until he refunds the purchase price. *Valle v. Fleming*, 29 Mo. 152; 77 Am. Dec. 557. See also *Meher v. Cole*, 50 Ark. 361.

In *Johnson v. Robertson*, 34 Md. 165, mortgaged property was sold under a decree of foreclosure, and the sale ratified and confirmed, but subsequently on appeal the decree was vacated and the mortgaged property decreed to be sold again for the payment of the mortgage debt. It was held that the original purchaser having paid the purchase price which was applied to the payment of the mortgage debt, was entitled to be subrogated to the rights of the mortgagee and to have the mortgage treated as assigned to him.

A purchaser at a sheriff's sale, who, after paying money on his bid, which discharges the judgment, receives a defective sheriff's deed, may be subrogated to the lien of the original judgment, and his right of action does not depend on his possession; and if in possession he may not be disturbed in it by the original debtor until the money paid by him in discharging the judgment has been refunded. *Jones v. Smith*, 55 Tex. 383. See also *Muir v. Craig*, 3 Blackf. (Ind.) 293; 25 Am. Dec. 111; *McLean v. Martin*, 45 Mo. 395.

In *Duncan v. Gainey*, 108 Ind. 579, it was held that if an executor attempts to sell lands of his decedent without authority, they may be resold under proper proceedings to pay the debts for which they were liable; but where by

special agreement with the executor and widow the money paid by the purchaser at the unauthorized sale is applied to the payment of debts against the estate, the purchaser will be subrogated to the rights of the original holders of the claims so paid, but will not be entitled to a prior lien therefor over other debts against the estate of the same class.

Where an executor sells land under a mistake of his power, and the purchase price is applied to payment of debts, and the purchaser is ousted by the heir at law, the lands in equity will be subjected to indemnify the purchaser to the extent of his payment—the purchaser being substituted to the rights of the creditor. *Springs v. Harven*, 3 Jones Eq. (N. Car.) 96.

If an administrator procures a sale of his intestate's homestead during the minority of the intestate's children for the payment of debts, and himself purchases the land from a purchaser at such sale, the sale may be set aside after the children have attained their majority, but the administrator will be subrogated to the rights of the creditors who were paid from the proceeds of the sale. *Nichols v. Shearon*, 49 Ark. 75.

In *Perry v. Adams*, 98 N. Car. 167, it was held that a purchaser of land sold for assets, upon the sale being adjudged void, will be subrogated to the rights of the creditor and have a lien declared upon the land as against the heirs and devisees to the extent of the application of the purchase money in payment of the debts of decedent and costs of administration. *Citing Williams v. Williams*, 2 Dev. Eq. (N. Car.) 69; 22 Am. Dec. 729; *Sanders v. Sanders*, 2 Dev. Eq. (N. Car.) 262; *Scott v. Dunn*, 1 Dev. & B. Eq. (N. Car.) 425; 30 Am. Dec. 174; *Springs v. Harven*, 3 Jones Eq. (N. Car.) 96; *Laws v. Thompson*, 4 Jones (N. Car.) 104.

If money on a void probate order of sale is applied to pay off a vendor's lien, a mortgage, or a judgment, there should be a marshaling of assets as to the general creditors, and as against them the purchaser should stand in the shoes of the creditor whose lien was thus satisfied *pro tanto* or in full. *Short v. Porter*, 44 Miss. 533.

One who purchases land at a sale made to foreclose a school-fund mortgage, will, if the sale prove invalid, be subrogated to the rights of the state under the mortgage. *Wilson v. Brown*, 82

Ind. 471. See also *Shannon v. Hay*, 106 Ind. 589.

The purchaser under a void trustee's sale, if the money paid by him is applied to the extinguishment of the trust debt, becomes the equitable assignee of the debt and is subrogated to the rights of the original *cestui que trust* and as such entitled to charge the land in equity with the debt paid. This same right passes to those who claim under him. *Bonner v. Lessley*, 61 Miss. 392. See also *Clark v. Wilson*, 56 Miss. 753.

In *Harts v. Brown*, 77 Ill. 226, the directors of an incorporated company bought all the property of the company at a sale under a trust deed, the principal part of which was sold to satisfy debts secured, and the residue, by their direction, to realize funds to pay other indebtedness not secured, and which was so applied by them. It was held that while the sale as to the latter was void, yet on a bill by the original stockholders against the directors and the new corporation organized by them, to set aside the sale, it was also held that the directors, having paid debts of the old company, were entitled in equity to succeed to the rights of the creditors whose debts were paid, and that an account should be taken of the value of the property so sold after satisfaction of the trust deed, and the balance, after deducting the amount paid by them on the debts, should be taken as a fund for distribution among the stockholders of the original company.

In *Swain v. Stockton Sav., etc., Soc.*, 78 Cal. 600, it was held that a purchaser of land under an execution, sold before the time of redemption has expired and before the sheriff's deed has issued, has a lien upon the land. And under the Civil Code of California, § 2904, when necessary for the protection of his interest, may tender the amount of his debt to the holder of a lien under a prior deed of trust, in the nature of a mortgage, which had been executed by the judgment debtor on the same land, and demand to be subrogated to his rights.

In *McHany v. Schenk*, 88 Ill. 357, a person purchasing land at a sheriff's sale under execution and thus satisfying the judgment, was adjudged entitled in equity either to the land, or to realize the money so paid, with interest, from the sale; if such sale be set aside for informality, as selling the land *en masse*, he will be subrogated to the lien of the

judgment, and the rights of the judgment creditor thereunder.

In *McGhee v. Ellis*, 4 Litt. (Ky.) 244; 14 Am. Dec. 124, a bill in chancery was brought by a purchaser of a slave on execution, from whom the property had been recovered by another, against the plaintiff and defendant in the execution. It was held that the purchaser was entitled to recover in equity from the debtor because the debt being paid by the money of the purchaser he would in equity be entitled to be subrogated in the place of the execution creditor, so far at least as to enable him to maintain a valid demand against the debtor. See also *McLaughlin v. Daniel*, 8 Dana (Ky.) 182; *Geoghegan v. Ditto*, 2 Metc. (Ky.) 433; 74 Am. Dec. 413.

In *Wells v. Lincoln County*, 80 Mo. 424, it was held that a foreclosure sale which is irregular because made during a term of the county court instead of the circuit court as required by law, does not operate to assign the mortgage debt itself to the purchaser, so that he may both hold the land and collect the residue from the mortgagor on the debt.

If a mortgagor's vendee *ante litem* of a part of the mortgaged property is not a party to the foreclosure decree, a purchaser of the land under the decree is entitled to be substituted to the mortgagee's rights only to the amount which he paid and they received for the parcel at the sale. In such case, if the sale of the land was in parcels and the purchaser of all the parcels is unable to prove the order of sale or what he bid for this one, he may be restricted in the assertion of his rights to the least sum bid for a similar parcel. *Martin v. Kelly*, 59 Miss. 652.

In *Shepherd v. Burkhalter*, 13 Ga. 443; 58 Am. Dec. 523, it was held that if a mortgage be not recorded in the time prescribed by law, a judgment obtained against the mortgagor before foreclosure, in the absence of notice to the judgment creditor, is a prior lien on the land embraced in the mortgage, and the purchaser of the property sold under such judgment gets the interest which is sold, to the extent of the lien, and is subrogated to the rights of the creditor to that extent, although such purchaser may have had notice of the unrecorded mortgage. See also *Smith v. Jordan*, 25 Ga. 687.

In *Georgia*, it is held that if the land which an applicant for homestead and

exemption seeks to have set apart to himself has been purchased by a person under a sheriff's sale by virtue of an execution and judgment against the applicant, which judgment is founded upon a contract made by the applicant with the plaintiff in execution, such purchaser occupies the position of the creditor of the applicant and may urge any objections to the grant of the application which the creditor might have done—the purchaser has all the rights of the creditor. *Tappan v. Hunt*, 74 Ga. 545.

In *Long v. Long*, 111 Mo. 12, the facts were these: A senior mortgagee bought the mortgaged premises on a foreclosure sale, and subsequently quit-claimed the same to the plaintiff, a junior mortgagee, who paid in full the debt secured by the senior incumbrance. Subsequently it was decided that no title passed by the sale. The plaintiff then sold under his own mortgage, bought the property, and received a deed which conveyed to him the legal title, and entered into possession. It was held that the plaintiff was not entitled to be subrogated to the rights of the senior mortgagee, nor to foreclose the mortgagor's equity of redemption without including in the foreclosure proceeding the whole indebtedness arising under both mortgages. In this case, *Sherwood, C. J.*, for the court, said: "The plaintiff in this cause . . . occupies the anomalous attitude of holding possession of the mortgaged premises under a legal title duly acquired by virtue of a sale under the second . . . deed of trust, while at the same time seeking by means of the equitable right of subrogation to foreclose the first deed of trust, and the debt thereby secured, upon land which he alleges he bought in good faith in order to protect his prior lien. In other words, being the absolute legal owner under the second deed of trust, he seeks to occupy the attitude of the mortgagee of the same premises, and to compel the defendant, out of whom all title was divested by such sale, to occupy the position of mortgagor. This he cannot do. A party will not be permitted to occupy inconsistent positions in court." The court recognizes the rule that an ineffectual or defective sale, though it does not pass the legal title to the purchaser, operates as an assignment of the mortgage to him, if he has paid the purchase money, and it has been

without compulsion, and for no purpose of protecting any interest of their own, and under a mistake of law, and are, therefore, not entitled to the protection of courts of equity.¹ But this reasoning can hardly be sustained; such purchasers are not volunteers; they purchase at a sale made under the coercive process of law, under the honest belief that they are getting the property sold, and their money is actually applied to the benefit of the owner in paying his debt or in removing charges or liens on his

applied to the payment of the mortgage debt.

For circumstances under which a purchaser of mortgaged premises will be required to take an assignment of liens which accrued prior to his purchase, in order to protect his interest, see *Boyd v. Parker*, 43 Md. 182.

Grantee of Purchaser.—*Rogers v. Benton*, 39 Minn. 39; *Jellison v. Halloran*, 44 Minn. 199; *Richards v. Morton*, 18 Mich. 255; *Cooke v. Cooper*, 18 Oregon 142; 17 Am. St. Rep. 709; *Winslow v. Clark*, 47 N. Y. 261; *O'Brien v. Harrison*, 59 Iowa 686; *Bonner v. Lessley*, 61 Miss. 392; *Jordan v. Sayre*, 29 Fla. 100. In this last case it was said that the grantee's right to be thus subrogated, to the extent of his purchase to the mortgage security, is not dependent upon a contractual assignment of the mortgage debt, but comes about by operation of law.

Where lands sold at a sheriff's sale upon execution are misdescribed in the levy, return and notice, or upon foreclosure of the mortgage where the decree is void for want of notice and the lands are misdescribed in the decree and sheriff's deed, the purchaser receiving the sheriff's deed nevertheless takes color of title which he may convey, and his grantee succeeds to the rights of the judgment or mortgage creditor. *Ray v. Detchon*, 79 Ind. 56.

1. In *Indiana*, in an early case, the right of subrogation was denied a purchaser at a sheriff's sale, whose title was afterwards adjudged invalid, on the ground that an ordinary vendee at such a sale purchases voluntarily, and his payment operates as a discharge of the judgment; the court saying that it is only in cases where the person paying the debt stands in the relation of a surety, or is compelled to pay in order to protect his own interest, or in virtue of legal process, that equity substitutes him in the place of the creditor. *Richmond v. Marston*, 15 Ind. 134.

But in *Short v. Sears*, 93 Ind. 505, it

is held that on the general principles of equity, as well as under the Rev. Sts. of *Indiana*, 1881, § 1084, such a purchaser is entitled to be subrogated to the lien of the judgment paid by him, upon the sale being adjudged invalid and set aside. See also *Bunts v. Cole*, 7 Blackf. (Ind.) 265; 41 Am. Dec. 226; *Reily v. Burton*, 71 Ind. 118; *Carver v. Howard*, 92 Ind. 173; *Bunting v. Gilmore*, 124 Ind. 113. In this latter case it was said: "But the broad doctrine announced in the case of *Richmond v. Marston*, 15 Ind. 134, that a volunteer purchaser at a sale made by a public officer is not entitled to the right of subrogation in case the sale is ineffectual to convey title, has been overthrown by the later decisions of this court. The policy of the law is to hold out inducements to persons to become purchasers at such sales, and, therefore, whenever a sale is ineffectual to pass the title to the property offered for sale, equity recognizes the right of subrogation." To the same effect is *Bodkin v. Merit*, 102 Ind. 293.

In *Nowler v. Coit*, 1 Ohio 519; 13 Am. Dec. 640, it was held that the purchase money paid to the administrator upon a sale of intestate's land cannot be recovered of the heir where the sale is inoperative and the heirs recover the lands.

And in *Bishop v. O'Conner*, 69 Ill. 432, it was held that a purchaser of lands at an administrator's sale is not entitled in equity to be substituted to the claims of creditors which have been paid by the purchase money, when the title fails for want of jurisdiction in the court ordering the sale over the persons of the heirs.

So in *Salmond v. Price*, 13 Ohio 368; 42 Am. Dec. 204, it was held that a purchaser at an administrator's sale whose title fails, will not be allowed to set up an equity on the estate of the decedent by reason of the appropriation of his purchase money to the debts of the decedent.

property, and it would be in the highest degree inequitable and against good conscience to permit the owner, or creditors, or others, as the case may be, to hold or enjoy at once the benefit of the property sold and the money of the purchasers; and it is in order to prevent this injustice and wrong, that equity subrogates them to the rights of creditors, or to the benefit of the liens and charges, to the payment of whom, or which, the purchase money has been applied.¹

And in *Laws v. Thompson*, 4 Jones (N. Car.) 104, it was held that a purchaser at a sheriff's sale, who gets a defective title, has no right to take the place of the creditor by subrogation, and thus bring to his aid the dignity of such creditor's debt as against other judgment creditors—the claim which such a purchaser has against the defendant in the execution on account of a defective title being merely a simple contract debt.

And in *California*, it has been held that a purchaser at a judicial sale, made under a decree foreclosing a mortgage, is not entitled to have the satisfaction of the judgment under which the sale was made, set aside, and be subrogated to the rights of the plaintiff in the judgment, because the sale was void, and he acquired no title to the property purchased. *Branham v. San Jose*, 24 Cal. 585. See also *Boggs v. Hargrave*, 16 Cal. 559.

In *Childress v. Allen*, 3 La. 477, it was held that the purchaser of property at a forced sale, is not entitled to subrogation to the rights of the judgment creditor. But this decision was made under a provision of the *Louisiana Code*. The court in its opinion, said: "No conventional subrogation is shown. We must, therefore, inquire whether there was a legal subrogation. The *Louisiana Code*, art. 2157, specifies the cases in which payment, by another than the debtor, produces a transfer of the creditor's rights; and the discharging a judgment debt, by a purchase at a forced sale, is not one of them. Such an act, indeed, cannot be satisfactorily distinguished from payment made to the creditor, without a sale of the debtor's property, by a person not having an interest to discharge the debt. The law only permits this on the condition, that the party paying should not be subrogated, by the act of payment, to the rights of the creditor. *Louisiana Code*, art. 2130."

Forced Sale of Homestead.—A, and B,

his wife, occupied a rural homestead from 1851 to 1861, when the wife died. A continued to occupy the place as a homestead with his grandchildren until his death in 1869. In 1858 he gave a mortgage on the homestead to secure a debt due C. The wife did not join in the mortgage. On foreclosure, C bought the homestead at a sheriff's sale, in 1861, before the wife's death. D bought C's interest in the homestead at a bankrupt sale in 1869. In 1873, the heirs of A and B brought trespass to try title against D to recover the land. The latter prayed, in the alternative, that, if his title should turn out not to be good, he be subrogated to the rights of C, his vendor, to the amount of the latter's bid at the foreclosure sale. It was held that the sale by the sheriff to C being a forced sale of the homestead, not made to satisfy an incumbrance for purchase money, or other lien existing before the homestead right attached, did not vest in the purchaser a title to the homestead, and that the vendee of C was not entitled to be subrogated to the latter's rights to the extent of his bid at the foreclosure sale. *Campbell v. Elliott*, 52 Tex. 151.

1. "The belief of the purchaser that he is getting the property sold, and the actual application of the money to the benefit of the owner in paying his debts, in removing a charge or lien on his estate, constitute the equity. There is no conflict between this view and the maxim *caveat emptor*. That maxim applies where there is a failure of title, 'because of a want of ownership in the property by the defendant in the execution or in the intestate' or testator, 'but it does not apply to the defects in the title of the purchaser occasioned by a failure of the sale to pass the title of the defendant's intestate' or testator." *Bond v. Montgomery*, 56 Ark. 563, per Battle, J.

In *Bodkin v. Merit*, 102 Ind. 293, Elliott, J., for the court, said: "A purchaser at an invalid sheriff's sale is not

It seems that a party who has purchased land at a sale upon a decree of foreclosure, and who is denied a deed upon such sale, is not precluded from asserting a right of subrogation because of delay in paying the purchase money.¹ And this right to subrogation of a purchaser at an invalid execution sale, will not be affected by any conveyance or disclaimer of title made by the judgment debtor after the inception of the judgment lien;² nor, it seems, by the fact that he was aware at the time that the property sold belonged to a stranger, and, therefore, not subject to the execution.³

Under a statute making it a misdemeanor for an administrator to attempt to sell lands reserved from sale as a homestead, a person assuming to be the purchaser at the pretended sale commits no offense under the act—he stands as though the effort to sell was not made a criminal offense, and is entitled to be subrogated to the rights against the estate which were held by the creditors whose claims have been paid with his money.⁴ Nor will the mere fact that he assisted the administrator in appraising the lands for the sale make him an accomplice in the former's misdemeanor, and thereby bar his right; in order that his act may have this effect, it must be done with the intent to encourage and induce the administrator to make the sale.⁵ But if the purchase

a volunteer. It is the right of the citizen to bid at a sheriff's sale and it is not for the debtor whose debts the bidder's money pays, to denominate him a volunteer or to deny his right to make the debt out of the property pledged for its payment. It can make no difference to the debtor who gets the property provided it goes in discharge of his debt. This is where he pledged it to go; there is where equity decrees that it shall go."

1. *Bodkin v. Merit*, 102 Ind. 293.

2. *Campbell v. Lowe*, 9 Md. 500; 66 Am. Dec. 339. See also *Rinehart v. Long*, 95 Mo. 401; *Ryland v. Callison*, 54 Mo. 513; *Lionberger v. Baker*, 88 Mo. 447.

3. *McLaughlin v. Daniel*, 8 Dana (Ky.) 183. This was a case of the sale of a slave on execution; the slave being subsequently recovered from the purchaser in an action of *detinue* under a paramount title, the latter instituted a suit for subrogation to the rights of the judgment creditor. The court, in sustaining the claim for subrogation, observed: "Admitting that Enos Daniel knew that Jack belonged to Mary McLaughlin and was not subject to execution against the estate, this, in our judgment, presents no legal impediment to his claim upon

the estate for the amount of Clark's demand paid by him. The slave was sold as the property of the estate under the process of law. He purchased him, and by his purchase and execution of the sale bond to Clark, satisfied and extinguished that amount against the estate and for which it stood responsible. And according to the principle repeatedly recognized in this court, he has an equitable right to be substituted in the place of the creditor and to have the amount so paid refunded to him out of the estate. His equity rests not upon the ground of his want of knowledge as to the title of the slave, but on the ground of his having discharged a judgment against the estate for which it stood chargeable by a purchase of property made under the coercive process of the court, and, therefore, has an equitable right to be reimbursed out of the estate."

In *Halcombe v. Loudermilk*, 3 Jones (N. Car.) 491, such a purchaser was denied subrogation on the ground that he had a remedy at law under the statute over against the execution defendant.

4. *Bond v. Montgomery*, 56 Ark. 563; *Harris v. Watson*, 56 Ark. 574.

5. *Bond v. Montgomery*, 56 Ark. 563.

is adjudged void by reason of fraud on the part of the purchaser, he may not reclaim his purchase money.¹

If a sale of lands under insolvency proceedings be set aside at the instance of the heirs, who were not made parties thereto, and the purchaser seeks to be subrogated to the rights of the creditors whose claims were allowed and who received a dividend, it is competent for the heirs to show that such claims were barred before inception of the proceedings.²

c. JUNIOR MORTGAGEES, JUDGMENT CREDITORS, ETC.—(See also MORTGAGES, vol. 15, p. 725; REDEMPTION, vol. 20, p. 608).—A junior mortgagee,³ judgment creditor, or other incum-

1. *McCoskey v. Graff*, 23 Pa. St. 321; 62 Am. Dec. 336; *Riddle v. Murphy*, 7 S. & R. (Pa.) 230; *Gilbert v. Hoffman*, 2 Watts. (Pa.) 66; 26 Am. Dec. 103; *Jackson v. Summerville*, 13 Pa. St. 359; *Elam v. Donald*, 58 Tex. 316; *Sands v. Codwise*, 4 Johns. (N. Y.) 597; 4 Am. Dec. 305. See also the following analogous cases: *Bean v. Smith*, 2 Mason (U. S.) 252; *Milwaukee, etc., R. Co. v. Soutter*, 13 Wall. (U. S.) 517; *Borland v. Walker*, 7 Ala. 269; *Pritchett v. Jones*, 87 Ala. 317; *Wiley v. Knight*, 27 Ala. 336; *First Nat. Bank v. Kennedy*, 91 Ala. 470; *Thompson v. Bickford*, 19 Minn. 17; *Allen v. Berry*, 50 Mo. 90; *Seivers v. Dickover*, 101 Ind. 495; *Stovall v. Farmers', etc., Bank*, 8 Smed. & M. (Miss.) 305; 47 Am. Dec. 85; *Burton v. Gibson*, 32 Va. 406; *Blow v. Maynard*, 2 Leigh (Va.) 29; *Williamson v. Goodwyn*, 9 Gratt. (Va.) 503; *Wallace v. McBride*, 70 Mich. 596; *Davis v. Leopold*, 87 N. Y. 520.

2. *Sivley v. Summers*, 59 Miss. 712.

3. *Baker v. Pierson*, 6 Mich. 522; *Sager v. Tupper*, 35 Mich. 134; *Kitchell v. Mudgett*, 37 Mich. 81; *Benton v. Shreeve*, 4 Ind. 66; *Rardin v. Walpole*, 38 Ind. 146; *Lowrey v. Byers*, 80 Ind. 443; *Marshall v. Ruddick*, 28 Iowa 487; *Shimer v. Hammond*, 51 Iowa 401; *Ketchum v. Crippen*, 37 Cal. 223; *Bigelow v. Cassidy*, 26 N. J. Eq. 557; *Hamilton v. Dobbs*, 19 N. J. Eq. 227; *Milligan's Appeal*, 104 Pa. St. 503; *Hogg v. Longstreth*, 97 Pa. St. 259; *Rappanier v. Bannon* (Md. 1887), 8 Atl. Rep. 555; *State v. Brown*, 73 Md. 484; *Davis v. Winn*, 2 Allen (Mass.) 111; *Green v. Tanner*, 8 Met. (Mass.) 411; *Cobb v. Dyer*, 69 Me. 494; *Wood v. Hubbard*, 50 Vt. 82; *Ward v. Seymour*, 51 Vt. 320; *Wheeler v. Willard*, 44 Vt. 640; *Downer v. Fox*, 20 Vt. 388; *Weld v. Sabin*, 20 N. H. 533; 51 Am. Dec. 240; *Moore v. Beasom*, 44 N. H. 215; *Silver Lake Bank v. North*, 4 Johns. Ch. (N.

Y.) 370; *Burnett v. Denniston*, 5 Johns. Ch. (N. Y.) 35; *Pardee v. Van Anken*, 3 Barb. (N. Y.) 535; *Clark v. Mackin*, 95 N. Y. 346; *Sheldon v. Hoffnagle*, 51 Hun (N. Y.) 478; *Dings v. Parshall*, 7 Hun (N. Y.) 522; *Reyburn v. Mitchell*, 106 Mo. 365; *Ellsworth v. Lockwood*, 42 N. Y. 96; *Cowley v. Shelby*, 71 Ala. 122; *Wiley v. Ewing*, 47 Ala. 418; *Davis v. Cook*, 65 Ala. 617; *Russell v. Howard*, 2 McLean (U. S.) 489; *Flacks v. Kelly*, 30 Ill. 462; *Chicago, etc., R. Land Co. v. Peck*, 112 Ill. 431; *Ebert v. Gerding*, 116 Ill. 219; *Tyrrrell v. Ward*, 102 Ill. 29; *Smith v. Dinsmore*, 16 Ill. App. 115; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Bank of U. S. v. Peters*, 13 Pet. (U. S.) 123; *Searles v. Jacksonville, etc., R. Co.*, 2 Woods (U. S.) 621; *Stonehewer v. Thompson*, 2 Atk. 440; *Knight v. Knight*, 3 P. Wms. 331.

A junior mortgagee who tenders payment may be subrogated by the court, on motion, to the rights of the prior mortgagee who is about to foreclose. *Ketchum v. Crippen*, 37 Cal. 223.

A junior mortgagee may be subrogated to the benefit of a tax lien on the mortgaged premises without notice to the senior mortgagee. *Abbott v. Union Mut. Ins. Co.*, 127 Ind. 70. Junior mortgagees who pay off a prior purchase-money mortgage, will be subrogated to the lien thereof as against intervening mechanics' liens for buildings erected on the lands. *Erwin v. Acker*, 126 Ind. 133. If money be loaned on a junior mortgage with the understanding that it is to be applied to the senior mortgage, and it be partly so applied, and the junior mortgagee pays the balance of the senior mortgage, he will be subrogated to the benefit thereof. *Quinlan v. Stratton*, 128 N. Y. 659.

A subsequent mortgagee cannot be subrogated to the benefit of a prior mortgage paid off with the money of

brancer,¹ who pays off a prior incumbrance in order to protect his own interest in the incumbered estate, will, as a general rule, be subrogated to all the rights of the senior incumbrancer, and if necessary for his protection may compel an assignment of the security.² But whether the junior incumbrancer takes a formal assignment or not, such a transaction makes him in equity an as-

other persons before the execution of the second mortgage. *Etna L. Ins. Co. v. Buck*, 108 Ind. 174.

Trustees in a deed to secure holders of railroad bonds, who, in order to save the road from a judgment sale, paid off a pre-existing incumbrance held by the state, were adjudged entitled to be subrogated to the rights of the state. *Memphis, etc., R. Co. v. Dow*, 120 U. S. 287.

In *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370, a mortgagee, compelled for his own security to satisfy an execution on a prior judgment in favor of another, was held by right of subrogation to stand in the place of the judgment creditor, and entitled on a sale of the mortgaged premises, to receive out of the fund the amount of the judgment as well as the mortgage debt.

Payment of Incumbrance by Mortgagor, Who, After the Sale of the Equity of Redemption, Takes an Assignment of a Junior Mortgage.—A mortgagor who has sold the equity of redemption has the same right as any third person to purchase and take an assignment of a mortgage, and upon the payment of the prior incumbrances to the holder thereof, will be entitled to be subrogated to his rights. *Gerdine v. Menage*, 41 Minn. 417.

Tender by Junior Incumbrancer.—A mere tender by the junior incumbrancer to the senior of the amount secured by his mortgage with interest and costs before foreclosure, has been held sufficient to give him the right of subrogation, although the amount tendered was not accepted until after such sale. *Marshall v. Ruddick*, 28 Iowa 487.

In *Dings v. Parshall*, 7 Hun (N. Y.) 522, it was held that a tender of the amount due on a mortgage before sale by a junior incumbrancer for the purpose of redemption, was equivalent to actual payment if properly made, and the money tendered was set apart and kept for the prior mortgagee. *Citing Edwards v. Farmers' F. Ins., etc., Co.*, 21 Wend. (N. Y.) 467; *Stoddard v. Hart*, 23 N. Y. 556. See also *Frost v.*

Yonkers Sav. Bank, 70 N. Y. 553; 26 Am. Rep. 627; *Clark v. Mackin*, 95 N. Y. 351.

1. *Bank of U. S. v. Peter*, 13 Pet. (U. S.) 123; *Lamb v. Richards*, 43 Ill. 312; *Brainard v. Cooper*, 10 N. Y. 356; *Reyburn v. Mitchell*, 106 Mo. 365; *Gerdine v. Menage*, 41 Minn. 417; *Maggill v. DeWitt County Nat. Bank*, 126 Ill. 244; *Hackensack Sav. Bank v. Terhune Mfg. Co.*, 45 N. J. Eq. 610; *Shinn v. Budd*, 14 N. J. Eq. 237; *Kalscheuer v. Upton*, 6 Dakota 449. A redeeming judgment creditor is subrogated to the rights of the purchaser from whom he redeems. *Sweezy v. Chandler*, 11 Ill. 445; *McLagan v. Brown*, 11 Ill. 519; *Blair v. Chamblin*, 39 Ill. 521.

An attachment creditor is entitled to the same right of redemption as a mortgagee. *Chandler v. Dyer*, 37 Vt. 345. And one who pays off mortgages to which his levy is subject, becomes by such payment the assignee in equity of the mortgages, and is entitled to all the rights of the mortgagees in the premises. *Warren v. Warren*, 30 Vt. 530; *Lamb v. Mason*, 50 Vt. 346.

Redemption from Chattel Mortgage.—An execution creditor has the right, as soon as he has acquired a lien upon chattels by levy of his execution, to redeem them from a chattel mortgage which is a prior lien thereon, and upon payment of the amount due on such mortgage, he is entitled to be subrogated to the rights of the mortgagee, and to that end has a right to demand and receive an assignment of the mortgage. *Lucking v. Wesson*, 25 Mich. 445, *per Cooley*, J.

2. See *REDEMPTION*, vol. 20, p. 614; *Pardee v. Van Anken*, 3 Barb. (N. Y.) 534; *Dauchy v. Bennett*, 7 How. Pr. (N. Y.) 375; *Twombly v. Cassidy*, 82 N. Y. 155; *Renard v. Brown*, 7 Neb. 449; *Miller v. Finn*, 1 Neb. 301.

Mr. Story says: "All persons who have acquired an interest in the lands mortgaged, have a clear right to disengage the property from all incumbrances in order to make their own claims beneficial or available. . . . And when such person does so redeem,

signee, and he is entitled to all suitable remedies to enforce reimbursement;¹ and there are cases which hold that, although the prior mortgage may stand discharged of record, instead of having been assigned to the junior mortgagee, he is nevertheless entitled in equity to indemnify himself for such payment out of the mortgaged estate.² But subrogation will be denied to him when the

he becomes substituted to the rights and interests of the original mortgagee in the land exactly as in the civil law." 2 Story's Eq. Juris., § 1023. The civil law required an assignment or a cession of the debt or security. 1 Story Eq., § 494; Evans Pothier, n. 275 *et seq.*

On foreclosure of a senior mortgage, a junior mortgagee, upon paying in full the mortgage with interest and costs, is entitled to an assignment of the mortgage and the judgment for sale; and this relief may be granted on motion, notwithstanding an actual tender has not been made before moving. *Citizens' Sav. Bank v. Foster*, 22 Abb. N. Cas. (N. Y.) 425.

1. *Mattison v. Marks*, 31 Mich. 421; 18 Am. Rep. 197; *Russell v. Howard*, 2 McLean (U. S.) 489; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Dale v. McEvers*, 2 Cow. (N. Y.) 118; *McLean v. Towle*, 3 Sandf. Ch. (N. Y.) 117; *Downer v. Fox*, 20 Vt. 388.

A standard author has this to say upon the question: "In general, when any person having a subsequent interest in the premises and who is, therefore, entitled to redeem for the purpose of protecting such interest, and who is not the principal debtor, primarily and absolutely liable for the mortgage debt, pays off the mortgage, he thereby becomes the equitable assignee thereof, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit. He is subrogated to the rights of the mortgagee to the extent necessary for his own equitable protection." 3 Pom. Eq. Jur. (2d ed.), § 1212.

2. *Ebert v. Gerding*, 116 Ill. 217; *Moore v. Beasom*, 44 N. H. 215; *Rapanier v. Bannon* (Md. 1887), 8 Atl. Rep. 555; *Tyrrell v. Ward*, 102 Ill. 29; *Patterson v. Birdsall*, 64 N. Y. 295; 21 Am. Rep. 609; *Milligan's Appeal*, 104 Pa. St. 510; *Ward v. Seymour*, 51 Vt. 320; *Wheeler v. Willard*, 44 Vt. 640.

Where a subsequent mortgagee, ignorant of a prior deed, and in good faith relying on his mortgage, pays a senior mortgage for his own protection, and permits it to be discharged and its

registration canceled, the cancellation and discharge may be annulled and he be subrogated to the rights of the senior mortgagee. *Cobb v. Dyer*, 69 Me. 494.

In *Robinson v. Leavitt*, 7 N. H. 99, *Parker, J.*, said: "There are cases also in which a party who has paid money due upon a mortgage is entitled, for the purpose of effecting the substantial justice of the case, to be substituted in the place of the incumbrancer, and treated as the assignee of the mortgage, and is enabled to hold the land as if assignee, notwithstanding the mortgage itself has been canceled, and the debt discharged. *Marsh v. Rice*, 1 N. H. 167; *Peltz v. Clarke*, 5 Pet. (U. S.) 481; *Matter of Coster*, 2 Johns. Ch. (N. Y.) 503; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *Dale v. McEvers*, 2 Cow. (N. Y.) 118; *Powell on Mortgages*, 315, a.

"The true principle, I apprehend, is, that where money due on a mortgage is paid, it shall operate as a discharge of the mortgage, or in the nature of an assignment of it, substituting him who pays in the place of the mortgagee, as may best serve the purposes of justice, and the just intent of the parties. *Starr v. Ellis*, 6 Johns. Ch. (N. Y.) 395.

"Many cases state the rule in equity to be, that the incumbrance shall be kept on foot, or considered extinguished, or merged, according to the intent or the interest of the party paying the money; but the decisions themselves it is believed will generally be found in accordance with the principle above stated. *Gardner v. Astor*, 3 Johns. Ch. (N. Y.) 53; 8 Am. Dec. 465; *James v. Johnson*, 6 Johns. Ch. (N. Y.) 417; 2 Cow. (N. Y.) 246, in error; *Burnett v. Denniston*, 5 Johns. Ch. (N. Y.) 41; *Mills v. Comstock*, 5 Johns. Ch. (N. Y.) 220; *Freeman v. Paul*, 3 Me. 260; 14 Am. Dec. 237; *Thompson v. Chandler*, 7 Me. 377; *Harvey v. Hurlburt*, 3 Vt. 561; *Marshall v. Wood*, 5 Vt. 250; *Lockwood v. Sturdevant*, 6 Conn. 374; *Kirkham v. Smith*, 1 Ves. 258; *Shrewsbury v. Shrewsbury*, 1

payment was not necessary for his protection,¹ as, where the incumbrance paid off does not cover the property embraced by his mortgage;² or when to grant it would be clearly inequitable,³ as, when the right is asserted against intervening *bona fide* purchasers without notice of the rights of the junior mortgagee;⁴ or where

Ves. 233; Lord Compton v. Oxenden, 2 Ves. Jr. 264; Forbes v. Moffat, 18 Ves. 384; Earl of Buckinghamshire v. Hobart, 3 Swanst. 186.

"There is another class of cases in which he who has paid money due upon a mortgage of land to which he had some title which might be affected and defeated by the mortgage, and who was thus entitled to redeem, has the right to consider the mortgage as subsisting in himself, and to hold the land as if it subsisted, until others interested in the redemption, or who had also a right to redeem, have paid a contribution. Such are the cases, *Cass v. Martin*, 6 N. H. 25; *Taylor v. Bassett*, 3 N. H. 294; *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 491; 9 Am. Dec. 318; *Carll v. Butman*, 7 Me. 102; *Russell v. Austin*, 1 Paige (N. Y.) 192; *vide* also 1 Johns. Ch. (N. Y.) 409; *Saunders v. Frost*, 5 Pick. (Mass.) 267; 16 Am. Dec. 394.

"And it makes no difference in either of these classes, as I conceive, whether the party on the payment of the money took an assignment of the mortgage, or a release; or whether a discharge was made and the evidence of the debt canceled. *Gardner v. Astor*, 3 Johns. Ch. (N. Y.) 53; 8 Am. Dec. 465; *Snow v. Stevens*, 15 Mass. 278; *Baldwin v. Norton*, 2 Conn. 164; *Barker v. Parker*, 4 Pick. (Mass.) 505; *Wade v. Howard*, 6 Pick. (Mass.) 498."

1. *Jenkins v. Continental Ins. Co.*, 12 How. Pr. (N. Y.) 66; *Bloomington v. Barnard*, 7 Hun (N. Y.) 459; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553; 20 Am. Rep. 627; *Adams v. McPartlin*, 11 Abb. N. Cas. (N. Y.) 369; *Bayard v. McGraw*, 1 Ill. App. 134; *Norton v. Highleyman*, 88 Mo. 624; *Mosier's Appeal*, 56 Pa. St. 76; 93 Am. Dec. 783.

In *Jenkins v. Continental Ins. Co.*, 12 How. Pr. (N. Y.) 68, *Woodruff, J.*, said: "The right of the redeeming party to subrogation does not necessarily follow from the right of redemption, although the language used by some would seem to warrant that inference. The right depends upon the relation of the parties liable to be foreclosed to each other, and the particular situation

of the party claiming such right, and especially and generally, upon the inquiry, whether such subrogation is necessary for the protection of his rights and the preservation of his interest; and, therefore, upon the circumstances in which the right of redemption is sought to be exercised." In this case the junior mortgagee alleged nothing in his bill to show that it was in any manner necessary for his protection or the preservation of his security, and it was decided that he could not insist upon the right to pay off the first mortgage, and claim subrogation to the benefit of the same, and compel the holder to assign the bond and mortgage to him.

2. *Smith v. Dinsmore*, 119 Ill. 656.

3. *Garrish v. Bragg*, 55 Vt. 329; *Kelly v. Kelly*, 54 Mich. 30; *Wyckoff v. Noyes*, 36 N. J. Eq. 230; *Gring's Appeal*, 89 Pa. St. 339; *McGinnis's Appeal*, 16 Pa. St. 447.

Subrogation is founded on the principles of equity and benevolence and is not to be allowed in favor of one who has permitted the equity he asserts to sleep in secrecy until the rights of others would be injuriously affected by its assertion and enforcement. *Gring's Appeal*, 89 Pa. St. 336; *Thomas v. Stewart*, 117 Ind. 50.

4. *Ahern v. Freeman*, 46 Minn. 156; 24 Am. St. Rep. 206; *Richards v. Griffith*, 92 Cal. 493. See also *Persons v. Shaeffer*, 65 Cal. 79; *Guy v. DuUprey*, 16 Cal. 196; 76 Am. Dec. 518; *Bunn v. Lindsay*, 95 Mo. 250; 6 Am. St. Rep. 48; 2 Pom. Eq. Jur., § 650; *Gerdine v. Menage*, 41 Minn. 417.

In *Davis v. Winn*, 2 Allen (Mass.) 111, where a bill to redeem was brought against a junior mortgagee, it was held that having been compelled to pay the amount due upon a note secured by a prior mortgage to protect his title, he was entitled to the sum so paid, although such prior mortgage was discharged of record before the plaintiff's title accrued, as it appeared that the whole amount claimed by the defendant upon his mortgage was less than that which appeared to be due upon it by the record.

he might have protected himself by purchasing at a foreclosure sale under a prior mortgage, but did not.¹

The right of a junior mortgagee to redeem cannot be affected by any agreement between the prior mortgagee or lien holder and the mortgagor, nor by any litigation between them to which he was not a party.² A junior mortgagee, as to whose debt the home-stand rights of a mortgagor have not been waived, will, nevertheless, be subrogated to the benefit of such waiver in a senior mortgage which he discharges for the protection of his title.³ And where the prior incumbrance embraces property other than that of the junior incumbrance, the holder of the latter will, upon paying off the former, be subrogated to the rights of the prior incumbrancer in such property.⁴ He will be entitled to the rate of interest carried by the incumbrance from which he redeems;⁵ also, to tack to his mortgage, all necessary expenses incurred by him in removing the prior lien from the mortgaged premises.⁶ A junior mortgagee will not be entitled to subrogation on payment of an installment only of a prior mortgage debt, or of interest accumulated thereon; he must pay the whole debt before he can acquire that right⁷— not only the

1. *Bloomington v. Barnard*, 7 Hun (N. Y.) 459; *Gerdine v. Menage*, 41 Minn. 417. Nor can he stay the sale, by injunction, without showing that payment of the prior mortgage on his part, or purchasing at the sale will work him an injustice. *Bloomington v. Barnard*, 7 Hun (N. Y.) 459; *Compare Ellsworth v. Lockwood*, 42 N. Y. 89.

2. In *Frost v. Yonkers Sav. Bank*, 8 Hun (N. Y.) 26, it was held that a purchaser at an execution sale of premises covered by a junior incumbrancer could not be affected by an agreement of the judgment creditor postponing the lien of the judgment to that of the junior incumbrance. See also *Davis v. Rogers*, 28 Iowa 413.

3. *Ebert v. Gerding*, 116 Ill. 216.

4. *Peter v. Smith*, 5 Cranch (C. C.) 383.

5. *Mosier v. Norton*, 83 Ill. 519; *Harper v. Ely*, 70 Ill. 581; *Braden v. Graves*, 85 Ind. 92; *Walker v. King*, 45 Vt. 525; *Dodge v. Fuller*, 2 Flip. (U. S.) 603.

6. *Miller v. Whittier*, 36 Me. 577.

7. See *supra*, this title, *When Right to Subrogation Becomes Complete*.

A junior mortgagee who claims to be an equitable assignee, or assignee by operation of law, stands in the same position in respect to a partial payment of a senior mortgage debt as a surety does in respect to a partial payment of

a claim against his principal. *Loeb v. Fleming*, 15 Ill. App. 503; *Gannett v. Blodgett*, 39 N. H. 150; *Swan v. Patterson*, 7 Md. 164. In *Penn v. Atlantic, etc., R. Co.*, 11 Am. L. Reg. N. S. 582, *Boynton, J.*, said: "This right of subrogation results to the junior incumbrancer in virtue of his relation to the mortgaged property. His mortgage conveyed to him the right to pay off former incumbrances and thereby to strengthen his own security; and when he pays off the senior incumbrances, equity clothes him with all the rights of him to whose claim he succeeds, and treats him as the equitable assignee thereof. *Moore v. Beasom*, 44 N. H. 218; *Aiken v. Gale*, 37 N. H. 505. But the subsequent creditor can be subrogated to such rights only by full payment of the debt; *Dixon on Subrogation*, 122. But this is when the whole debt is due; for if the subsequent mortgagee cannot redeem where the debt is payable in installments until the last installment become due, his right of redemption would in many cases be greatly impaired, if not destroyed. The owner of the debt can foreclose when the first installment becomes due, and to pay such installment he can sell the property. And it is certainly correct in principle to hold that, when the right to foreclose the equity of redemption accrues, the right to redeem the premises from such foreclosure attaches on paying the sum due, for the

amount due on the mortgage, but the necessary expenses already incurred by the senior mortgagee in taking steps to enforce the security.¹ He will, however, be entitled to subrogation only to the extent of the amount paid by him, and cannot have the benefit of payment from the funds of the debtor or third parties.² A junior incumbrancer may foreclose the lien to which he is subrogated before the maturity of his own mortgage.³ The taking of a new mortgage or other security by a junior incumbrancer from a debtor to secure advances made by him to pay off prior liens for the protection of his own security, will not affect his right of subrogation.⁴ Co-mortgagees who are compelled to redeem from a prior mortgage held and about to be foreclosed by one of themselves, will be subrogated to his rights as prior mortgagee, so as to prevent his enjoyment of any interest under the junior mortgage, until he shall have reimbursed them his proportion of the amount paid by them to redeem from his prior mortgage.⁵ It has been held that an incumbrancer, who, for the protection of his interest, pays taxes assessed upon the

non-payment of which foreclosure is sought. The junior incumbrancer must be permitted to step in and redeem the premises, when the senior incumbrancer has the right to have them sold, if not redeemed. But such subrogation cannot take place to the prejudice of the senior mortgagee. *Butler v. Elliott*, 15 Conn. 187; *Dixon on Subrogation*, 116. In other words, payment ought not to place the prior mortgagee in a worse situation than if payment were made by the mortgagor, and therefore where an installment of principal or interest of the debt secured by the first mortgage is due and the same is paid by a subsequent mortgagee, his lien upon the mortgaged property, which results from such payment, will be postponed to the payment of the residue of the first mortgage debt. But when the amount so due is paid, together with costs where the action in foreclosure has been instituted, the right of the prior mortgagee to a sale of the mortgaged property ceases, and the most he can claim is the right to apply to the court for an order of sale to satisfy future installments when and as they become due, in the event they are not then paid. *Lansing v. Capron*, 1 Johns. Ch. (N. Y.) 617; *Holden v. Gilbert*, 7 Paige (N. Y.) 211." See also *Citizens Sav. Bank v. Foster*, 22 Abb. N. Cas. (N. Y.) 425; *Powers v. Golden Lumber Co.*, 43 Mich. 468.

If only interest is due, the junior mortgagee may redeem by tendering

the amount of such interest. *Searles v. Jacksonville, etc., R. Co.*, 2 Woods (U. S.) 621.

Conventional Subrogation.—But when the right of subrogation is the result of an express agreement, it is no objection that it extends only to a part of the mortgage or other security. *Loeb v. Fleming*, 15 Ill. App. 508; *Brice's Appeal*, 95 Pa. St. 145; see also *infra*, this title, *Conventional Subrogation*.

1. *Shutes v. Woodard*, 57 Mich. 213. But he may redeem without paying costs of a foreclosure suit upon a prior mortgage to which he was not made a party. *Gage v. Brewster*, 31 N. Y. 118; *Peabody v. Roberts*, 47 Barb. (N. Y.) 91; *Vroom v. Ditmas*, 4 Paige (N. Y.) 526; *Benedict v. Gilman*, 4 Paige (N. Y.) 58. He will, however, be required to pay the costs of the action to redeem, unless improperly resisted by the defendant. *Belden v. Slade*, 26 Hun (N. Y.) 635; *Raynor v. Selmes*, 52 N. Y. 582.

2. *Hammond v. Barker*, 61 N. H. 53.

3. The lien to which he is subrogated is an independent equity, and not merely appurtenant to the mortgage held by a mortgagee who has redeemed. *Powers v. Golden Lumber Co.*, 43 Mich. 468.

4. *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Patterson v. Birdsall*, 64 N. Y. 204; 21 Am. Rep. 609.

5. *Saunders v. Frost*, 5 Pick. (Mass.) 259. See also *Wyckoff v. Noyes*, 36 N. J. Eq. 227; *Sanford v. Bulkley*, 30 Conn. 344.

property, will be subrogated to the lien thereof for his reimbursement,¹ even as against the senior mortgagee.²

The doctrine of subrogation is very frequently invoked to enforce the equitable right of marshalling; the general rule being, that when one creditor may obtain satisfaction out of either of two funds, and another out of only one of them, and the former resorts to the doubly charged fund, the latter will be subrogated to his rights against the other fund, to the extent to which his own may have been exhausted.³ This principle is applied under a great variety of circumstances, but chiefly, in this country, between mortgagees, mortgagees and judgment creditors, and between judgment creditors.⁴ This subject, with all its qualifications and modifications, is elaborately discussed elsewhere in this work.⁵

d. MORTGAGORS.—Where a mortgagor has conveyed the mortgaged premises, subject to the lien of the mortgage, the amount of the mortgage debt being deducted from the purchase price, the premises remain the primary fund for the payment of the debt. And if the mortgagor is compelled to pay the same, he may be subrogated to the rights of the mortgagee under the mortgage.⁶

1. *Pratt v. Pratt*, 96 Ill. 184; *Schissel v. Dickson*, 129 Ind. 139, by statute; *Semans v. Harvey*, 52 Ind. 333; *Hogg v. Longstreth*, 97 Pa. St. 259; *National Bank v. Danforth*, 80 Ga. 55; *Gwinn v. Smith*, 25 Ga. 145; *Stanciliff v. Norton*, 11 Kan. 219; *Kortright v. Cady*, 23 Barb. (N. Y.) 497; *Weed v. Hornby*, 35 Hun (N. Y.) 380; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *Marshall v. Davies*, 78 N. Y. 414; *Sid- enberg v. Ely*, 90 N. Y. 257; 43 Am. Rep. 163; *Brevoort v. Randolph*, 7 How. Pr. (N. Y.) 398; *Windett v. Union Mut. L. Ins. Co.*, 144 U. S. 581, where the mortgagee was allowed a sum with which to buy up outstanding tax titles to the property.

A junior incumbrancer is not entitled to subrogation to the lien of the state for taxes and assessments voluntarily paid. *Etna L. Ins. Co. v. Beck*, 108 Ind. 174.

2. *Fiacre v. Chapman*, 32 N. J. Eq. 464. In this case the lien of the city for taxes was, by the city's charter, made paramount to all other claims.

3. *Marshalling Securities.*—A writer in the *American Law Register*, vol. 27, p. 739, states the rule concisely as follows: "If a paramount incumbrancer of two funds, by his election of remedies, disappoints a junior creditor, who has a lien upon one of them only, the latter shall, to that extent, be substituted to the lien of the paramount incumbrance up-

on the other fund bound by it, as against the debtor and all claiming under him, by lien or title, subsequent in time."

The general principle is explained by Judge Hare in a note to *Aldrich v. Cooper*, 2 Lead. Cas. in Eq. 266, as follows: "The equity has its root in the obligation of the debtor, but is also an equity among the creditors, that each shall, when it can be done without loss or inconvenience, so use his right that all may, as far as the circumstances admit, be satisfied in the order in which their liens severally accrue. A has a paramount lien on two tracts of land, B a lien on one of them, and C a subsequent lien on both. If A exhausts the tract which is the subject of B's lien, B will be subrogated to A's lien on the other tract, although C is thereby excluded from the fund."

4. 3 *Pomeroy Eq. Juris.* (2d ed.), § 1414.

5. See *MARSHALLING ASSETS*, vol. 14, p. 685.

6. *Jumel v. Jumel*, 7 Paige (N. Y.) 591; *Cox v. Wheeler*, 7 Paige (N. Y.) 248; *Dorr v. Peters*, 3 Edw. Ch. (N. Y.) 132; *Brewer v. Staples*, 3 Sandf. Ch. (N. Y.) 584; *Tice v. Annin*, 2 Johns. Ch. (N. Y.) 128; *Weeks v. Garvey*, 56 N. Y. Super. Ct. 557; *Kinnear v. Lowell*, 34 Me. 299; *Baker v. Terrell*, 8 Minn. 195; *Gerdine v. Menage*, 41 Minn. 417; *Barker v. Parker*, 4 Pick. (Mass.) 505; *Wood v. Smith*, 51 Iowa

A fortiori, if the vendee assumes and agrees to pay the mortgage, thereby making the debt his own, the same rule applies.¹

156; *Curry v. Hale*, 15 W. Va. 867; *Woodbury v. Webster*, 58 N. H. 380; *Greenwell v. Heritage*, 71 Mo. 459; *Welton v. Hull*, 50 Mo. 296.

A mortgagor who conveys land subject to a mortgage, and afterwards pays the mortgage debt, even voluntarily, is entitled to be subrogated to the rights of the mortgagee against the land. *Baker v. Terrell*, 8 Minn. 195.

In *Shermer v. Merrill*, 33 Mich. 284, it appeared that several mortgage notes, falling due at different dates, were secured by the same mortgage; that the mortgage was foreclosed by advertisement when only a part of the notes was due and the premises were sold under notice of a sale to be made subject to another note specified. The mortgagees became the purchasers, and, after default in redemption, sought to recover from the mortgagor on the note, subject to which the sale was made; but it was held that they could not recover. The court considered the case of a third person's having become the purchaser, in which case it was said that the mortgagor, if obliged by the mortgagees to pay the remaining note, would be subrogated to their rights against the land in the hands of the purchaser, and as the mortgagees were themselves the purchasers, they stood in no better position than would a third person, since it would be useless to give them an action at law to recover the amount of the note from the maker when he would then have a right in equity to be reimbursed from the proceeds of their land.

1. *Marsh v. Pike*, 10 Paige (N. Y.) 595; *Comstock v. Drohan*, 71 N. Y. 9; *McLean v. Towle*, 3 Sandf. Ch. (N. Y.) 117; *Tainter v. Hemingway*, 18 Hun (N. Y.) 458; *Flagg v. Thurber*, 14 Barb. (N. Y.) 196; *Calvo v. Davies*, 73 N. Y. 211; 29 Am. Rep. 130; *Cherry v. Monro*, 2 Barb. Ch. (N. Y.) 618; *Rubens v. Prindle*, 44 Barb. (N. Y.) 336; *Cornell v. Prescott*, 2 Barb. (N. Y.) 16; *Bentley v. Vanderheyden*, 35 N. Y. 677; *Tripp v. Vincent*, 3 Barb. Ch. (N. Y.) 613; *Kamena v. Huelbig*, 23 N. J. Eq. 78; *Stillman v. Stillman*, 21 N. J. Eq. 126; *Josselyn v. Edwards*, 157 Ind. 212; *Smith v. Ostermeyer*, 68 Ind. 432; *Risk v. Hoffman*, 69 Ind. 137; *Beggin v. Brehm*, 123 Ind. 160; *Corbett v. Waterman*, 11 Iowa 86; *Shinn*

v. Shinn, 91 Ill. 477; *Flagg v. Gelmacher*, 98 Ill. 293; *Baldwin v. Thompson*, 6 La. 474; *Boardman v. Larrabee*, 51 Conn. 39; *Ely v. Stannard*, 44 Conn. 528; *Hoysradt v. Holland*, 50 N. H. 433; *Orrick v. Durham*, 79 Mo. 174; *Stevens v. Goodenough*, 26 Vt. 676; *Francisco v. Shelton*, 85 Va. 779; *Kinnaird v. Trollope*, 39 Ch. Div. 636.

In such case the vendee becomes the principal debtor and the mortgagor the surety and such an extension of time by the mortgagee as would ordinarily discharge a surety will discharge the mortgagor from his obligation to pay the mortgage debt. *Calvo v. Davies*, 73 N. Y. 211; 29 Am. Rep. 130; *Paine v. Jones*, 76 N. Y. 274; *Union Mut. L. Ins. Co. v. Hanford*, 143 U. S. 187. See also *MORTGAGES*, vol. 15, p. 837.

But, to discharge the mortgagor as surety, the contract for an extension of time must be one that can be enforced. *Boardman v. Larrabee*, 51 Conn. 39.

But a release of the mortgagor from his obligation to the mortgagee does not discharge the mortgage or relieve the vendee from the obligation to pay the same. *Bentley v. Vanderheyden*, 35 N. Y. 677; *Tripp v. Vincent*, 3 Barb. Ch. (N. Y.) 613.

It is not necessary that the mortgagor should pay the amount of the mortgage debt before bringing equitable proceedings against the vendee to compel him to pay the debt, or to subject the mortgaged premises to the payment thereof. *Marsh v. Pike*, 10 Paige (N. Y.) 595; *Rubens v. Prindle*, 44 Barb. (N. Y.) 336.

But the mortgagor must pay the debt before he can bring an action against his vendee to recover the amount thereof from him. *Halsey v. Reed*, 9 Paige (N. Y.) 446.

If one of two mortgagors sells his interest in the mortgaged premises to his co-mortgagor who agrees to pay the mortgage debt, the vendor will be subrogated to the rights of the mortgagee or his assignee, if he is obliged to pay the debt or any part of it. *Shinn v. Shinn*, 91 Ill. 477.

In *Wright v. Briggs*, 99 Ind. 563, it appeared that the owner of mortgaged premises sold a part thereof, the purchaser agreeing to pay the whole of the mortgage debt as a part of the consideration for the portion purchased. The

In such case the mortgagor, after paying the mortgage debt, may, if he prefer, proceed *in personam* to collect the amount so paid from the purchaser, whether or not the vendee entered into an express covenant to assume and pay it.¹

The mortgagor's right to subrogation will be enforced as against subsequent judgment creditors of the vendee, for the full amount of the principal and interest due on the mortgage.²

c. BENEFICIARIES, HEIRS, DEVISEES, LEGATEES, AND WIDOWS.—A ward will be subrogated to the benefit of a mortgage executed by his guardian to indemnify the surety on the guardianship bond;³ but he will not be subrogated to the benefit of a mortgage given by a stranger for the purpose merely of indemnifying

owner then conveyed the rest of the land to C. who in turn conveyed it to D. Afterwards, D, to save his lot from sale, was obliged to pay the mortgage debt, and it was held that he was entitled to a decree of foreclosure against the part of the land first sold, as the purchaser thereof had by his agreement become liable for the debt.

1. *Tainter v. Hemingway*, 18 Hun (N. Y.) 458; *McLean v. Towle*, 3 Sandf. Ch. (N. Y.) 117; *Dorr v. Peters*, 3 Edw. Ch. (N. Y.) 132; *Braman v. Dowse*, 12 Cush. (Mass.) 227; *Furnas v. Durgin*, 119 Mass. 500; 20 Am. Rep. 341; *Locke v. Homer*, 131 Mass. 93; 41 Am. Rep. 199. See also *Moore's Appeal*, 88 Pa. St. 450; 32 Am. Rep. 469.

In *Massachusetts*, where the deed of conveyance contains an express covenant that the vendee assumes and agrees to pay the mortgage debt, it constitutes a contract by said vendee not merely to indemnify the grantor, but to pay the mortgage debt, and the mortgagor, after the debt has become payable, may bring his action against the vendee for the unpaid amount of that debt, although he has paid no part of it himself. *Locke v. Homer*, 131 Mass. 93; 41 Am. Rep. 199; *Furnas v. Durgin*, 119 Mass. 500; 20 Am. Rep. 341.

For the purchaser's obligation to the mortgagee, see MORTGAGES, vol. 15, p. 836.

2. *Morris v. Oakford*, 9 Pa. St. 498.

3. *Morrill v. Morrill*, 53 Vt. 74; 38 Am. Rep. 659; *Daniel v. Hunt*, 77 Ala. 567; *Cooper v. Middleton*, 94 N. Car. 86; distinguishing *Ijames v. Gaither*, 93 N. Car. 358, where the mortgage was given simply to indemnify the sureties, and the mortgaged property was not held by the mortgagee in trust for the payment of the debt.

Compare *Miller v. Wack*, 1 N. J. Eq.

204, where the mortgage given by the guardian was held to be simply for indemnity to the surety on his bond without any trust in favor of the ward.

In *Cooper v. Middleton*, 94 N. Car. 86, it was held that where a guardian conveyed certain property to a surety upon his bond in trust to "well and truly pay off his wards," and "save harmless his sureties on his guardian bond," and the wards recover judgment against the guardian for the amounts severally due them, the wards were entitled to have the land so conveyed subjected to the satisfaction of their judgments, irrespective of the liability, or solvency, of the sureties. See also *Daniel v. Hunt*, 77 Ala. 567, where it is said that the broad doctrine prevails in the state of *Alabama*, that a creditor is entitled to the benefit of all pledges or securities, given to, or in the hands of, a surety, for his indemnity; and that the rule obtains whether or not the surety has been damnified, inasmuch as such securities are regarded as a trust created for the payment of the debt. Citing *Colt v. Barnes*, 64 Ala. 108; *Saffold v. Wade*, 51 Ala. 214, and *Forrest v. Luddington*, 68 Ala. 1.

In *Jenness v. Robinson*, 10 N. H. 215, it appeared that some of the heirs, who held a mortgage against the real estate of the deceased, executed a bond for the payment of the debts of the deceased in order to prevent a sale of the real estate by the executrix to pay the same. It was held that this operated to discharge the mortgage which the obligors in the bond held against the estate, so that they could not proceed to foreclose the same; but that they were entitled to hold the land against the other heirs, respectively, as if the mortgage subsisted, until they contributed their several shares towards the redemption.

a surety on his guardian's bond.¹ So, if notes, given for the purchase price of land, are paid with money belonging to the ward, he will be entitled to the benefit of the vendor's lien on such land.²

An heir who pays the debt of his ancestor or removes an incumbrance from the estate will, as a rule, be subrogated to the rights of the creditor against the estate.³ If he pays a judgment against his ancestor in order to protect his own interests, he may

1. *Black v. Kaiser* (Ky. 1891), 16 S. W. Rep. 89.

2. In *Oury v. Saunders*, 77 Tex. 278, it appeared that the vendee of land gave his note for the purchase price and afterwards paid the note from the proceeds of property belonging to his minor children. It was held that the children, though not entitled to a resulting trust in the land, became subrogated to the vendor's lien; and that where such land had been conveyed to them in satisfaction of their lien, they had a good title as against the wife of the vendee, inasmuch as their lien was superior to her interest in the land either as a homestead or as community property.

3. **Heirs.**—*Winston v. McAlpine*, 65 Ala. 377; *Chaplin v. Sullivan*, 128 Ind. 50; *Taylor v. Taylor*, 8 B. Mon. (Ky.) 419.

In *Place v. Oldham*, 10 B. Mon. (Ky.) 403, it appeared that K. had assigned a note to T., who recovered judgment against the maker but failed to obtain the money upon execution. K. having died, T. sued his administratrix and collected the money from the estate. It was held that the heirs of K. might be subrogated to T.'s rights in the judgment against the maker of the note; and might file a bill against the administrator of the maker, who had died in the meantime, to obtain a discovery of assets and to be reimbursed in case there had been a maladministration thereof.

In *Peebles v. Horton*, 39 Miss. 406, it was held, that where one of several specific legatees has been compelled to pay the whole of a debt due by the testator, he will not be entitled to contribution against his co-legatees who have received their legacies, if the estate be solvent independent of their legacies, or in case it becomes insolvent by the *decease* of the executor.

In *Fairman v. Heath*, 19 Ind. 63, where a mortgage was given upon real estate to secure the payment of a debt,

and the mortgagee by the terms of the mortgage acquired the right only to look to the land for payment, it was held that the heir to whom that portion of the land was partitioned, when partition of the whole of the estate, incumbered and unincumbered, was made, would not be entitled to subrogation to the rights of the mortgagee, as they extended only to the mortgaged land itself; but that if he had any remedy, which it was presumed, though not decided, he had, it was against the co-heirs for a re-partition or other relief.

If the committee of a lunatic, in good faith pay a mortgage on the estate out of the lunatic's personalty, the next of kin of the lunatic cannot be subrogated to the benefit of the mortgage as against the heirs. *Adams v. Smith*, 20 Abb. N. Cas. (N. Y.) 60.

Heirs of an insolvent estate who, supposing it to be solvent, satisfy mortgages of the ancestor, will not be subrogated to the lien of the mortgages; nor, if they pay off judgments against the ancestor, after the liens of such judgments have expired, will they acquire any priority over general creditors. *Belcher v. Wickersham*, 9 Baxt. (Tenn.) 111.

If an executor pay the taxes on a decedent's estate out of the proceeds of the real estate when there is sufficient personal property to pay the same, but it is admitted that the unpreferred claims against the estate are in excess of the assets received by him, the heir at law will have no right as against the unpreferred creditors to claim a like amount from the proceeds of the personal property. *Smith v. Cornell*, 52 N. Y. Super. Ct. 499.

If the heir at law pay the debts and funeral expenses of his ancestor out of his own money as a matter of bounty, the payment will be treated as a gift, and he may not afterwards be allowed repayment out of the personal estate. *Coleby v. Coleby*, L. R. 2 Eq. 803. See *infra*, this title, *Volunteers and Strangers*.

compel an assignment of the judgment that he may have the benefit of the lien thereof.¹ But he is entitled to no such right as against one who has purchased from the ancestor a portion of his land, the portion remaining a part of the estate being primarily applicable to the payment of such debts.²

A specific devisee who pays a debt of the testator in order to protect his interests will be entitled to ratable contribution from other devisees, if the personal property is insufficient to pay the debts of the estate.³ And he will be subrogated to the rights of the creditor against the estate in order to enforce such contribution.⁴

1. In *Cole v. Malcolm*, 66 N. Y. 363, it appeared that lands were conveyed, without consideration, by a husband to his wife, through a third person. The wife died intestate. The plaintiff, a prior creditor, obtained a judgment against the husband and the heirs of the wife, setting aside the conveyance as to plaintiff and declaring his judgment a valid lien on the property so conveyed. One of the heirs, who had purchased the shares of a number of the others, tendered the amount due and demanded an assignment of the judgment that he might be subrogated to the rights of the judgment creditor; and it was held that such assignment should be compelled.

2. In *Clowes v. Dickenson*, 5 Johns. Ch. (N. Y.) 235, the rule as stated in the text is laid down by Chancellor Kent and this part of the opinion stands as law. But it appeared that the plaintiff had purchased two lots which, together with other real estate, were subject to a judgment lien. The remainder of the judgment debtor's real estate was subsequently sold, subject to all incumbrances, to satisfy a junior judgment, and was of sufficient value to satisfy both judgments without resort to the two lots purchased by the plaintiff. The purchaser at the plaintiff's sale refused to satisfy the prior judgment, but took an assignment thereof and had the plaintiff's lots sold to satisfy it. The chancellor held that while the court would have interposed to prevent the sale if the plaintiff had made seasonable application, yet, as he, with knowledge of the sale, waited four years before making application for relief, the sale would not be disturbed; but he ordered the defendant to pay the plaintiff as an equitable indemnity the amount for which the lots were sold. On this point the decree of the chancellor was reversed in 9 Cow. (N. Y.) 403, where it was held that un-

der the circumstances the lots should be restored to the plaintiff; or, if sold to a *bona fide* purchaser at the sheriff's sale, their actual value at the time of sale should be restored.

It is said that "the heir sits in the seat of the ancestor" and that the assets of the estate coming to his hands are primarily liable for the payment of the ancestor's debt. *Herbert's Case*, 3 Coke 11; *Sandford v. Hill*, 46 Conn. 42; *citing James v. Hubbard*, 1 Paige (N. Y.) 234; *Jenkins v. Freyer*, 4 Paige (N. Y.) 53; *Guion v. Knapp*, 6 Paige (N. Y.) 35; *Patty v. Pease*, 8 Paige (N. Y.) 277; 35 Am. Dec. 683; *Skeel v. Spraker*, 8 Paige (N. Y.) 182; *Shannon v. Marselis*, 1 N. J. Eq. 413; *Wikoff v. Davis*, 4 N. J. Eq. 224; *Henkle v. Allsteadt*, 4 Gratt. (Va.) 284; *Jones v. Myrick*, 8 Gratt. (Va.) 179; *Brown v. Simons*, 44 N. H. 475; *Holden v. Pike*, 24 Me. 427; *Sheperd v. Adams*, 32 Me. 63; *Wallace v. Stevens*, 64 Me. 225; *Chase v. Woodbury*, 6 Cush. (Mass.) 143; *Cooper v. Bigley*, 13 Mich. 463.

3. *Keene v. Munn*, 16 N. J. Eq. 398; *Rhoad's Estate*, 3 Rawle (Pa.) 420; *Grim's Appeal*, 89 Pa. St. 333; *Guier v. Kelly*, 2 Binn. (Pa.) 294; *Morris v. McConnaughy*, 2 Dall. (Pa.) 189; *Livingston v. Livingston*, 3 Johns. Ch. (N. Y.) 148; *Foster v. Crenshaw*, 3 Munf. (Va.) 514; *Brigden v. Cheever*, 10 Mass. 450; *Blaney v. Blaney*, 1 Cush. (Mass.) 107; *Amory v. Lowell*, 1 Allen (Mass.) 504.

4. In *Redmond v. Burroughs*, 63 N. Car. 242, it was held that the devisee of a tract of land, which by direction of the testator had been levied upon to satisfy a debt and was bound by the levy at the death of the testator, having paid the debt, was entitled to be subrogated to the claim of the creditor against the personal estate of the testator.

In *Coudert v. Coudert*, 43 N. J. Eq.

A legatee who discharges a claim against the estate of the testator in order to prevent the appropriation of his legacy to the payment of such claim, or whose legacy has been appropriated to the payment of the same, will be entitled to the benefit of any securities the creditor may hold against the estate, subject to the rules prescribing the order of liability of the different funds for the payment of debts.¹

407, it appeared that a testator had 10 children at the time of making his will, but afterwards children were born, and it was held that under the statute the will was void. After his death the widow, supposing that she was the sole devisee, paid off from her own money and canceled of record a mortgage on part of the lands devised to her, which mortgage was an incumbrance on the land at the time of the testator's purchase and its payment expressly assumed by him as a part of the purchase money. It was held that the widow was entitled to have the lien of the mortgage reinstated to secure the money so paid by her and the land sold to satisfy it.

In *Pease v. Egan*, 131 N. Y. 262, it appeared that a testator died seised of certain real estate which was incumbered by a mortgage which fell due after his children became of age. By the terms of the will, one-third of the income from the real estate was to be paid to the widow and the remainder was to be applied to the maintenance of the two children, and at the death of the widow the real estate was to be sold and the proceeds divided between the children. The personal estate was bequeathed absolutely to the children. The widow, who was the sole executrix, with the consent of the children, paid the mortgage out of the proceeds of the personal property and it was satisfied of record. One of the children died without issue, during the life of the widow, and the executor and sole beneficiary under the will of the deceased child brought an action to be subrogated to the right of the original mortgagee and to foreclose the mortgage, and it was held that the plaintiff was entitled to the relief sought.

1. In *Durham v. Rhodes*, 23 Md. 233, it appeared that a testator devised and bequeathed all his real and personal estate to his wife, without reserve. After the making of his will, he bought certain real estate, paid a portion of the purchase price thereof, and died before a conveyance to him was executed.

Under the laws of the State of *Maryland* at that time, this property did not pass to the widow under the will, but she paid the notes for the unpaid balance of the purchase price thereof. The widow afterwards died, leaving all her estate to S. D. Subsequently the real estate, above mentioned, which did not pass to the widow under the testator's will, was sold, and in a controversy as to the distribution of the proceeds, it was held that S. D. was entitled to be subrogated to the rights of the original vendor and should be allowed out of the proceeds, the balance of the purchase price paid by the widow.

The discharge of a judgment against the executors of an estate, by a portion of the legatees, substitutes such legatees to the rights of the judgment creditor. *Mitchell v. Mitchell*, 8 Humph. (Tenn.) 359.

As between the legatee, either pecuniary or specific, and the heir at law, if a debt chargeable both on the real and personal estate, is paid by the executor out of the personal property, in the first instance, the legatee will be permitted to stand in the place of the original creditors *pro tanto*, and may recover the amount of his legacy, or to the extent the personal estate was appropriated, out of the real estate descending to the heir. *Mollan v. Griffith*, 3 Paige (N. Y.) 403, citing *Culpepper v. Ashton*, 2 Ch. Cas. 117; *Tipping v. Tipping*, 1 P. Wms. 730; *Lufkins v. Leigh*, Cas. t. Talb. 53.

Pecuniary legatees are entitled to stand in the place of the vendor against an estate purchased and devised by the testator, the purchase money for which is paid after the testator's death, out of the personal estate. *Lilford v. Powys Keck*, L. R. 1 Eq. Cas. 347.

The benefit of a vendor's lien has been extended to a legatee, where, upon the death of the purchaser without payment of the purchase-money, the vendor has resorted to the personal estate for the satisfaction of his claim, and has thereby exhausted the fund out of which the legacy was to be paid. *Schnebly*

A widow who discharges a lien on the estate of which she is dowable, or whose interest has been subjected to the payment of such charges, will be subrogated to the rights of the lien creditor.¹

3. Persons Advancing Money to Pay Debts of Others—*a. VOLUNTEERS AND STRANGERS.*—One who advances money to pay the debt of another, in the absence of agreement, express or implied, for subrogation, will not be entitled to succeed to the rights and remedies of the creditor so paid, unless there is some obligation, interest, or right, legal or equitable, on the part of such person in respect of the matter concerning which the advance is made, as otherwise, he is a stranger, a volunteer, an intermeddler, to whom the equitable right of subrogation is never accorded.²

v. Ragan, 7 Gill. & J. (Md.) 126; 28 Am. Dec. 195.

1. *Crouch v. Edwards*, 52 Ark. 499; *Stinson v. Anderson*, 96 Ill. 373; *Kenyon v. Segar*, 14 R. I. 490; *Simmons v. Lyle*, 32 Gratt. (Va.) 752; *Gatewood v. Gatewood*, 75 Va. 407; *Bayles v. Husted*, 40 Hun. (N. Y.) 376; *Roach v. Hacker*, 2 Lea. (Tenn.) 633; *Woods v. Wallace*, 30 N. H. 384; *Rossitter v. Cossit*, 15 N. H. 38; *Hutson v. Sadler*, 31 W. Va. 358.

In *Simmons v. Lyle*, 32 Gratt. (Va.) 752, it was held that a widow who pays a balance of the purchase-money due for the real estate of her husband and secured by a vendor's lien, and also pays the taxes on such property, has a prior lien as against the creditors of the husband for the repayment of such money.

In *Stinson v. Anderson*, 96 Ill. 373, it was held that where a wife after the death of her husband pays off a debt secured by a deed of trust given by the husband, and takes a release of the trust deed, the deed being a valid lien, and thereby preserves the property, she will have a right to foreclose the same for her own benefit.

In *Bayles v. Husted*, 40 Hun. (N. Y.) 376, the plaintiff held four mortgages executed by the husband of the defendant and after the death of the husband he threatened to foreclose the same. The widow offered to pay the amount due on the mortgages and requested the plaintiff to assign them to a person named by her for her benefit. Plaintiff refused to assign and proceeded to foreclose them. It was held that the court might compel him to make the assignment and direct a discontinuance of the action to foreclose the mortgages, without costs.

2. *Simmons v. Walker*, 18 Ala. 664; *Carpentier v. Brenham*, 40 Cal. 222;

Moran v. Abbey, 63 Cal. 56; *Griffin v. Orman*, 9 Fla. 22; *McCormick v. Bauer*, 122 Ill. 573; *Bayard v. McGraw*, 1 Ill. App. 154; *Woods v. Gilson*, 17 Ill. 218; *Young v. Morgan*, 89 Ill. 203; *Beaver v. Slanker*, 94 Ill. 175; *Richmond v. Marston*, 15 Ind. 134; *McClure v. Andrews*, 68 Ind. 97; *Nash v. Taylor*, 83 Ind. 347; *Barber v. Lyon*, 15 Iowa 373; *Johnston v. Belden*, 49 Iowa 301; *Curtis v. Kitchen*, 8 Martin (La.) 706; *Shaw v. Grant*, 13 La. Ann. 52; *Roth v. Harkson*, 18 La. Ann. 705; *Brice v. Watkins*, 30 La. Ann. 21; *Winder v. Diffenderfer*, 2 Bland Ch. (Md.) 199; *Swan v. Patterson*, 7 Md. 164; *Gardenville, etc., Loan Assoc. v. Walker*, 52 Md. 452; *Com. v. Canal Co.*, 32 Md. 501; *Eastman v. Crosby*, 8 Allen (Mass.) 206; *Langley v. Chapin*, 134 Mass. 82; *Smith v. Austin*, 9 Mich. 465; *Campbell Printing Press, etc., Co. v. Roeder*, 44 Mo. App. 324; *Truesdell v. Callaway*, 6 Mo. 605; *Anglade v. St. Avit*, 67 Mo. 438; *St. Francis Mill Co. v. Sugg*, 83 Mo. 476; *Norton v. Highleyman*, 88 Mo. 621; *Price v. Courtney*, 87 Mo. 387; 56 Am. Rep. 453; *Bunn v. Lindsay*, 95 Mo. 250; *Morris v. Lake*, 9 Smed. & M. (Miss.) 521; 48 Am. Dec. 724; *Skaggs v. Nelson*, 25 Miss. 84; *Wadsworth v. Blake*, 43 Minn. 509; *Banta v. Garmo*, 1 Sandf. Ch. (N. Y.) 384; *Clute v. Emmerich*, 26 Hun (N. Y.) 16; *Boyd v. McDonough*, 39 How. Pr. (N. Y.) 389; *Cole v. Malcolm*, 66 N. Y. 366; *Gans v. Thieme*, 93 N. Y. 235; *Acer v. Hotchkiss*, 97 N. Y. 395; *Wilson v. Brown*, 13 N. J. Eq. 277; *Allen v. Williams*, 33 N. J. Eq. 584; *Morris v. White*, 36 N. J. Eq. 324; *Kuhn v. North*, 10 S. & R. (Pa.) 399; *Mosier's Appeal*, 56 Pa. St. 76; 93 Am. Dec. 783; *Webster's Appeal*, 86 Pa. St. 409; *Miller's Appeal*, 119 Pa. St. 620; *Terry v. O'Neal*, 71 Tex. 592; *Unger v. Leiter*, 32 Ohio St. 210; *Clark v. Moore*, 76 Va. 262; *Douglass v. Fagg*, 8 Leigh (Va.) 588;

National Bank *v.* Cushing, 53 Vt. 326; Conrad *v.* Buck, 21 W. Va. 396; Hungerford *v.* Scott, 37 Wis. 341; Pelton *v.* Knapp, 21 Wis. 63; *In re* Cooke, 19 Fed. Rep. 88; Edwards *v.* Davenport, 20 Fed. Rep. 756; U. S. *v.* Keebler, 9 Wall. (U. S.) 83; Iowa Homestead Co. *v.* Des Moines Nav., etc., Co., 17 Wall. (U. S.) 153; Wood *v.* Guarantee Trust, etc., Co., 128 U. S. 416; Morgan's Louisiana, etc., R. *v.* Texas Cent. R. Co., 137 U. S. 172; Williams *v.* Aylesbury, etc., R. Co., L. R., 9 Ch. 684.

Subrogation as a matter of right, as it exists in the civil law, from which the term has been borrowed and adopted in our own, is never applied in aid of a mere volunteer. Legal substitution to the rights of a creditor for the benefit of a third person takes place only for his benefit, who being himself a creditor satisfies the lien of a prior creditor, or for the benefit of a purchaser who extinguishes the incumbrances upon his estate, or of a co-obligor or surety who discharges the debt, or of an heir, who pays the debts of the succession. Code Napoleon, bk. 3, tit. 3, art. 1251; Civ. Code, *Louisiana*, art. 2157; 1 Pothier on Oblig., pt. 3, ch. 1, art. 6, § 2; Shinn *v.* Budd, 14 N. J. Eq. 235; *Ætna L. Ins. Co. v. Middleport*, 124 U. S. 534.

"We are ignorant," says the Supreme Court of *Louisiana*, "of any law which gives to the party, who furnishes money for the payment of a debt, the rights of the creditor who is thus paid. The legal claim alone belongs not to all who pay a debt, but only to him who being bound for it discharges it." Nolte *v.* Creditors, 9 Martin (La.) 602. See also Curtis *v.* Kitchen, 8 Martin (La.) 706.

In Sandford *v.* McLean, 3 Paige (N. Y.) 117; 23 Am. Dec. 773, Walworth, Ch., states the principle with great clearness. He says: "It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own right, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. In other cases, the demand of a creditor, which is paid with the money of a third person and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished." This language was quoted approvingly in *Ætna L. Ins. Co. v.*

Middleport, 124 U. S. 534; *DeSot v. Ross*, 95 Mich. 81.

And in Gadsden *v.* Brown, Spears Eq. (S. Car.) 41, Johnson, Ch., observes: "The doctrine of subrogation is a pure unmixed equity, and from its very nature could not have been intended for the relief of those who were in a condition and at liberty to elect whether they would or would not be bound. And so far as I have been enabled to learn its history, it never has been so applied. It has been directed exclusively to the relief of those who were already bound and who could not but choose to abide the penalty. I have seen no case in which a stranger, who was in a condition to make terms for himself and demand any security he might require, has been protected by the principle."

Again, in Wormer *v.* Waterloo Agr. Works, 62 Iowa 699, Seevers, C. J., said: "In the view we take of the case, we do not feel called upon to determine with any degree of exactness the rule as to subrogation. But from a somewhat careful examination of the authorities cited, we incline to think a person may be subrogated to the rights of another in the absence of any contract or understanding where he is a surety and pays the debt for his own protection, or where he is a junior lienholder and pays the senior lien for his protection. In such cases, he cannot be regarded as an intermeddler, because as a surety he is bound for the debt, and as a junior lienholder he has an interest in preserving and protecting the common property. But where a person is in no manner bound, and on his own motion, in the absence of a contract or expectation that he will be substituted in the place of the creditor, pays the debt, he will be regarded as an intermeddler and not entitled to subrogation."

In *Ætna L. Ins. Co. v. Middleport*, 124 U. S. 534, the facts were these: Middleport, *Illinois*, voted an appropriation in aid of a certain railroad, to be raised by levying a tax on the property of the inhabitants, and issued bonds payable with interest to bearer, for a sum sufficient to include interest and the discount for which they could be sold, and delivered the bonds to the railroad company, which were accepted by them, and sold and delivered to the plaintiff. In a suit between the plaintiff and the town, the bonds were adjudged void, as having been issued without authority of law. The plain-

To illustrate these general principles: One who lends another money to pay a debt, and takes his note for its payment, with the promise of a deed of trust to secure it also, does not by this transaction entitle himself, in addition, to be subrogated to the rights of the creditor whose debt has been paid with the money loaned.¹ And a person who advances money to another to enable him to make a loan to a third party on the security of an equitable mortgage, is not entitled to subrogation simply on the ground that he so advanced the money.²

A superintendent of railroad construction, who, without any obligation on his part, and merely to befriend the laborers, advances the amount of their wages, without an assignment of their claims, or an agreement that he shall have the benefit of their statutory liens, may not, upon the insolvency of the company, be subrogated to such liens.³

tiff contended that when he purchased these bonds he thereby paid the debt of the town to the railroad company, as voted by it, and that because he paid this money to that company on bonds which were void, he should be subrogated to the right of the company against the town to enforce the collection of the appropriation voted by the town. But the court negatived this and said: "The doctrine of subrogation in equity requires (1), that the person seeking this benefit must have paid a debt due to a third party before he can be substituted to that party's rights; (2), that in doing this, he must not act as a mere volunteer, but on compulsion to save himself from loss by reason of a superior claim or lien, on the part of the person to whom he paid the debt; as in cases of sureties, prior mortgagees, etc. The right is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another."

"We know of no case," says Ryan, C. J., in *Watson v. Wilcox*, 39 Wis. 643, 20 Am. Rep. 63, "that has ever carried the doctrine of subrogation so far as to hold that a mere loan of money for the purpose of enabling the borrower to pay a debt entitles the lender to be subrogated to the rights of the creditors whose debt is thus paid."

Again, in *McNeill v. Miller*, 29 W. Va. 480, it was said that "the doctrine of subrogation is not applied in favor of one who, officiously and as a mere volunteer, pays the debt of another, for which neither he nor his property was liable and which he was under no obligation to pay."

Legal subrogation exists in favor, not of all who pay a debt, but only of those who being bound for it, discharge it. *Harrison v. Bisland*, 5 Rob. (La.) 204.

In *Bank of U. S. v. Winston*, 2 Brock. (U. S.) 252, Marshall, C. J., said: "If a security, not assignable, be discharged by a surety whom it binds, equity keeps it in force in his favor and puts such surety in the place of the original creditor. But I think there is no case in which this has been done in favor of a person not bound by the original security who discharges the debt as a volunteer."

In *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105, it was said the real question in all such cases is whether the advance made by the stranger was a loan to the debtor prompted by a mere desire to aid him, or whether it was made with the expectation of being subrogated in the place of the creditor. If the former, he is not entitled to subrogation; if the latter, he is. See also *Tradesmen's Bldg., etc., Assoc. v. Thompson*, 32 N. J. Eq. 133.

Who Are Volunteers and Strangers.—A stranger, within the meaning of this rule, is not necessarily one who has had nothing to do with the transaction out of which the debt grew. Anyone who is under no legal obligation or liability to pay the debt is a stranger, and if he pays the debt, a mere volunteer. *Suppiger v. Garrels*, 20 Ill. App. 625.

1. *Durant v. Davis*, 10 Heisk. (Tenn.) 522. See *Small v. Stagg*, 95 Ill. 39; *Cohn v. Hoffman*, 50 Ark. 108.

2. *Van Winkle v. Williams*, 38 N. J. Eq. 105.

3. *Matter of North River Constr. Co.*,

So, a party furnishing materials to be used by a contractor in the work of repairing a court house, simply upon the contractor's promise to pay, in the absence of statute or other agreement, will not be substituted to the contractor's rights in a fund provided by the county for the repairs, although the contractor is insolvent.¹

A municipality which voluntarily pays the fees of officers appointed by the legislature to determine the boundary line between it and another municipality, under a resolution of the legislature that such fees shall be paid by the municipalities, one half by each, may not recover from the other municipality any part of the sum so paid.² And an administrator who pays the funeral expenses of one of the infant heirs of his intestate's estate, and takes no assignment of the claim, is a mere volunteer and not entitled to be subrogated to the undertaker's claim against the interest of the deceased heir in the ancestor's estate.³

A party who pays a debt for which he supposes himself to be liable as surety, when in fact he is under no legal obligation to pay, occupies no better attitude than a mere stranger or volunteer, and is not entitled to subrogation to the creditor's rights against the principal or the latter's vendee.⁴ But if the mistake be one of fact and not of law, the rule is otherwise—unless it should appear that the party had the means of correct information within

38 N. J. Eq. 434; *aff'd* Upper v. Green, 40 N. J. Eq. 340.

1. *Riggin v. Hilliard*, 56 Ark. 476.

2. *South Scituate v. Hanover*, 9 Gray (Mass.) 420; the court observing that the law does not permit the liability of a party for a debt to one person, to be shifted so as to make him debtor to another without his consent. See also *Winsor v. Savage*, 9 Met. (Mass.) 348; *Truesdell v. Callaway*, 6 Mo. 605; *Webb v. Cole*, 20 N. H. 490.

3. *Fay v. Fay*, 43 N. J. Eq. 438.

4. *Dawson v. Lee*, 83 Ky. 49; *Lee v. Hill*, 83 Ky. 49. In this case Dawson's name was signed as security to a sheriff's official bond, by the clerk of the county court, in pursuance of authority contained in a paper purporting to be a power of attorney executed in the presence of one K. who signed Dawson's name thereto, and his own as attesting witness. This, however, did not legally bind Dawson as surety upon the bond, as under § 20, ch. 22, *Kentucky Gen. Sts.*, no person may be bound as the surety of another by the act of an agent, unless the authority of the agent is in writing signed by the principal, or if the principal does not write his name, then by his sign or mark made in the

presence of at least one credible attesting witness. Under an erroneous opinion as to the legal effect of the transaction he paid the debt; but was denied subrogation.

The voluntary payment of money for another affords no ground of action against him, and a payment by a surety with knowledge of all the facts, though under the mistaken belief that he was bound to make it, is voluntary. *Bancroft v. Abbott*, 3 Allen (Mass.) 524.

A surety who pays money voluntarily on a judgment absolutely barred, loses his remedy against his principal. But a payment cannot be deemed to be voluntary so long as the judgment was enforceable in any way, either by *scire facias* or action of debt. *Randolph v. Randolph*, 3 Rand. (Va.) 490.

In *Kimball v. Cummins*, 3 Metc. (Ky.) 327, an execution upon a replevin bond in which Cummins was the surety of Kimball was issued and levied upon the property of the former, who satisfied the debt, and then by suit in equity sought to subject certain property of his principal to reimburse himself, but as more than one year had elapsed from the maturity of the replevin bond until the issuance of the execution which

his power, but negligently omitted to avail himself of them. Accordingly, where one, in the belief that he was surety on the bond of an administrator, settled with the next of kin, who were under the same impression, the administrator being insolvent, he was adjudged entitled to be subrogated to the rights of the next of kin against the real sureties on the bond.¹

The following well illustrate the rule that when the person paying the debt of another, or advancing money for that purpose, has any interest to protect, he cannot be deemed a volunteer; a stockholder has an interest in protecting the assets of the corporation, and a payment by him of corporate debts beyond his ratable share of liability, will not be deemed voluntary, but will entitle him to be subrogated to the rights of the creditors paid.² So, an agent who uses his own private means to protect the estate of his principal, with which he is entrusted, is not a volunteer, but is entitled to be subrogated to the position and rights of the principal.³ And if a county pays the indebtedness, to the state, of its defaulting treasurer, to save itself from certain statutory pains and penalties, it will not be regarded as a volunteer, but will be entitled to succeed to the rights and remedies of the state against the treasurer.⁴ And it has been held that one, who is under a moral obligation to pay, but may at the same time escape liability by reason of an irregularity in the transaction, is not a volunteer—that his moral obligation, followed by payment, constitute his equity, and make his right to subrogation complete.⁵ Other illustrations of who are, and who are not, volun-

Cummins satisfied, he was by statute released from all liability upon the bond, and consequently was not entitled upon paying the debt to look to his principal for reimbursement. After his release he was no longer a surety, and therefore, not entitled to any of the rights growing out of such relation.

In *Spilman v. Smith*, 15 B. Mon. (Ky.) 134, the same principle was held applicable where the surety in a sale bond satisfied it after he became released from legal liability.

In *Hatchett v. Pegram*, 21 La. Ann. 722, a party signed a note as surety in *Louisiana*, and after it was extinguished by prescription under the laws of that state, he removed to *Alabama* and payment was demanded there of him by the holder, and he paid the note. It was held, to enable him to recover from the maker in the courts of *Louisiana*, it was incumbent upon him to show that he was liable on the note as surety by the laws of *Alabama* and was compelled to pay it. A voluntary payment of the note by the surety will not entitle him to recover of the maker.

1. *Capehart v. Mhoon*, 5 Jones Eq. (N. Car.) 178.

2. *Redington v. Cornwell*, 90 Cal. 49.

3. *Curry v. Curry*, 87 Ky. 667; 12 Am. St. Rep. 504.

4. *Elder v. Com.*, 55 Pa. St. 485.

5. *Slack v. Kirk*, 67 Pa. St. 380; 5 Am. Rep. 438. In this case S. drew a note for his own accommodation, to the order of plaintiff. To secure its discount at bank he obtained the defendant's indorsement, who placed his name above that of the plaintiff. The latter paid one half of the note; the defendant, under threat of suit by the bank, paid the other half. It was held that the defendant was entitled to be subrogated to the rights of the bank, and to recover from plaintiff the amount paid by him. The defendant's irregular indorsement under the Statute of Frauds amounted simply to a parol promise, and was accordingly not binding. But, at the same time, there was a moral obligation upon him to perform his promise to the bank, and this, followed by actual payment, entitled him to subrogation.

teers, will be found in the notes.¹ For the rule when the advance is made upon agreement for subrogation, see succeeding subdivision.

In a very recent case, it was decided that one who advances money to a wife living apart from her husband for justifiable cause, which is expended by her for necessities, is not entitled,

1. **Illustrations of Who Are and Who Are Not Volunteers.**—In *Binford v. Adams*, 104 Ind. 41, the facts were these: Walker executed a promissory note payable to Gant, and to secure the same, executed a mortgage upon real estate. Gant sold the note and mortgage to Boyd, and indorsed the note to him, and while the note was in the latter's hands several installments of interest were paid, and the credits for these installments were duly entered upon the back of the note. Subsequently, Gant requested Walker to pay the note, and the latter obtained the money, with which to pay it, from Binford, the appellant's intestate. Boyd, the holder of the note, testified that the note was paid by Binford; that Walker was present when the payment was made, and that, to quote his own testimony, "Mr. Walker did the talking; he said he had made arrangements with Mr. Binford to pay this note off. 'Mr. Walker,' says I, 'that is all right.' Mr. Binford spoke up and said, 'In a few days I will have the money ready,' and that was all that was said about the note, and in a few days Mr. Binford came in and paid the balance of the note off, and I marked the book paid and went to canceling the note, and Mr. Binford requested me not to cancel it, and I just handed it to him without canceling." This witness also testified that nothing was said about purchasing the note, and that it was not purchased of him. It was held that Binford was a mere volunteer without any interest to protect or right to preserve, and that the case fell within the general rule that where a claim is paid by a third party having no interest in the matter it is an extinguishment thereof.

In *Flannary v. Utley* (Ky. 1887), 3 S. W. Rep. 412, the wife desired to have returned money loaned to her husband, in order that she might discharge a lien on property purchased by her. The husband raised the money on a note, on which he induced the appellants to become his sureties by representing to them that the land belonged to him, and that the money was to be used in discharging a lien thereon;

that the title to the land was perfect, and that he would secure them from liability as his sureties by giving them a mortgage upon the land. Of all this, however, the wife was ignorant. Indeed, she had nothing whatever to do with the loan. The husband handed over the money to her, and she paid it to the holder of the lien. The husband failing to pay the note, the sureties were compelled to pay, at the suit of the assignee of the note. They thereupon claimed to be subrogated to the vendor's lien upon the land for their reimbursement. It was held that they were not entitled to such relief; that the doctrine of subrogation will not be applied in favor of one who officiously or as a volunteer pays the debt for which neither he nor his property is liable, and which he is under no obligation to pay; the appellants were mere volunteers, so far as paying off the lien was concerned; their liability, and hence their right of subrogation, arose only on the note given by the husband on which they were sureties. See also *Matter of Schaller*, 10 Daly (N. Y.) 57.

In *Rheeling's Appeal*, 107 Pa. St. 161, it was held, upon the distribution of the proceeds of an execution sale of personality against the manufacturer, one who accepted and paid store orders, which the defendant had given to his employes for wages, is not entitled to subrogation to the preferred claim on the fund, given to such employes by virtue of the *Pennsylvania Act*, April 9, 1872; such payment of orders, the amounts of which were charged to the account of the maker, not being equivalent to an assignment of the labor claim so as to entitle the person paying them to such preferred claim.

In *Halstead v. Westervelt*, 41 N. J. Eq. 100, lands were devised upon condition that the devisee should maintain the testator's grandson during his natural life. The complainant alleged, that after the devisee's death she supported the grandson, etc., and recovered a judgment at law therefor, filed a bill for a decree declaring such judgment a lien upon the property, and directing that the property be sold to pay the

same. It was held that the suit was not maintainable; that the complainant did not show herself entitled to equitable subrogation.

But in *Huffmond v. Bence*, 128 Ind. 131, it was held, where the owner conveys land in consideration that the grantee shall board, nurse, and take proper care of him during the remainder of his life, he has a lien on the land for necessary medical services which he procures, on the grantee's failure to do so; and one who renders such medical services will be substituted to the grantor's rights against the grantee.

A judgment which is paid with the money of a third party, without any agreement that the security shall be assigned, or kept on foot for the benefit of the latter, is absolutely extinguished. *Hooper v. Robinson*, 98 U. S. 539; *Sandford v. McLean*, 3 Paige (N. Y.) 117; 23 Am. Dec. 773; *Banta v. Garmo*, 1 Sandf. Ch. (N. Y.) 384; *National Bank v. Cushing*, 53 Vt. 326; *Janney v. Stephens*, 3 Patt. & H. (Va.) 11; *Teny v. O'Neal*, 71 Tex. 592; *St. Francis Mill Co. v. Lugg*, 83 Mo. 476.

And voluntary payment by a stranger, of a debt due to the vendor of land, and which is a charge thereon, extinguishes the debt and the lien. *Rodman v. Sanders*, 44 Ark. 504; *Nichol v. Dunn*, 25 Ark. 129; *Kline v. Ragland*, 47 Ark. 111; *Wroelstedg v. Scott*, 69 Mo. 669; *Griffin v. Proctor*, 14 Bush (Ky.) 571; *White v. Curd*, 86 Ky. 191.

But one who pays the debt at the instance of the debtor, cannot be deemed a volunteer, and if, at the time of payment, he manifests an intention to keep the lien alive for his protection, and for this purpose retains the purchase note and deed in his possession, with the assent of the purchaser, he will be deemed in equity a purchaser of the incumbrance, and will be subrogated to the rights and remedies of the creditor. *Rodman v. Sanders*, 44 Ark. 504. See also *Caudle v. Murphy*, 89 Ill. 352; *Wolff v. Walter*, 56 Mo. 292.

In *Pearce v. Bryant Coal Co.*, 121 Ill. 590, it was held, that where it is established by the evidence that the trustee in a deed given to secure coupon bonds, who furnishes the money to pay certain of the coupons, did not purchase them, but paid them, he may not be subrogated to the rights of the coupon holder against the trust property.

Where a general insurance agent appointed a local agent, and took a bond from him, in the name of the company,

with surety, conditioned that such local agent should turn over the moneys received by him, and the general agent paid to the company premiums received by the local agent, for which the latter failed to account, it was held, in a suit upon the bond thus given, that inasmuch as the general agent had the appointment of the local agents and was bound, not only by contract with the company, but also in order to maintain his own position, to pay over to the company all the moneys received through local agents, his settlement with the company of the defalcation of the local agent entitled him to be subrogated to the rights of the company in respect of the bond. *Hough v. Aetna L. Ins. Co.*, 57 Ill. 318.

In *Gillett v. Insurance Co. of N. A.*, 39 Ill. App. 284, the agents of a fire insurance company issued a policy, which was accepted by the insured, but on which the latter failed to pay the premiums when due, and the agents, under their contract with the company, paid them. In an action brought in the name of the company for the use of the agents, it was held that the agents were entitled to be subrogated to the rights of the company as to the claim under the policy, and that no assignment was necessary to enable them to recover the premiums advanced by them.

In *Ingersoll v. Jeffords*, 55 Miss. 37, a parcel of land was assessed to A, who held a tax title to the same. It was sold by the bankrupt court as a part of the estate of B and was bought by C. Up to the time of the sale, A had been paying the taxes on the land, and the commissioner making the sale was directed by the court to refund to him the amounts so paid. A acquiesced in the decree. After the sale and on the last day for the payment of taxes for that year, A paid the taxes assessed against him on this tract, under protest, and filed a bill against C to compel the repayment of the last mentioned taxes. It was held that the assessment constituted a lien against all the property of A, and by the payment of the taxes he not only acquired a personal demand against C, but was subrogated to the lien of the state against the land, as if a purchaser under § 1718, *Mississippi Code*, 1871. It was insisted that A having no longer any connection with the land, his payment of the taxes was to be deemed that of a stranger and volunteer, and that, accordingly, he could not assert any claim against

upon the principle of subrogation, to recover from the husband.¹ There are, however, several early cases which lay down a contrary doctrine.² But according to these cases, proof is required by the lender that his money has been actually applied for the necessities, in order to establish the equitable liability of the husband.

either C or the land for reimbursement. In reference to this claim, the court said: "It is undoubtedly true that a party who has no connection with, or interest in, or claim upon, land, can neither acquire a lien upon it, nor an enforceable demand against the owner, by a voluntary and unauthorized payment of the taxes due on it. But the bill shows that the land stood in Jefford's name upon the tax-collector's books, and that it had been properly assessed to him at a time when he was the holder of the legal title by virtue of his tax deed. This assessment properly made against him constituted a lien superior to all others, and bound not only the land in question, but all the real and personal property of which he was possessed. Code, 1887, § 1665. He avers that he waited until the last day limited by law before paying the taxes, in the hope that Ingersoll would pay them, and that when the latter failed to do so, he paid them himself, under protest. Under these circumstances, he had a right to make the payment, and cannot be regarded as a mere volunteer."

One employed as a groom to take charge of a stallion, and who pays bills for the horse's feed, keep, and shoeing, is not a volunteer, but is entitled to be substituted to the liens of those to whom he makes such payments. *Hoover v. Epler*, 52 Pa. St. 522.

1. *Skinner v. Tirrell* (Mass. 1893), 37 Cent. L. J. 351. In this case the court, by Morton, J., said: "There can be no subrogation unless there is something to be subrogated to. A debt or liability cannot be created where none existed, for the purpose of effecting a substitution. There never was any liability on the part of the defendant to the parties who furnished the wife with the necessities. The goods were sold to her and paid for by her. They were not furnished on the defendant's credit, but on the wife's. The money that was advanced by the plaintiff was not advanced to the parties who furnished the necessities, but to the wife to be expended by her as she saw fit. There is no ground, therefore, for the application

of the doctrine of subrogation. Although the right of subrogation does not depend on contract, but rests on natural justice and equity, there must be an agreement either express or implied to subrogate, or some obligation, interest, or right, legal or equitable, on the part of the party making the payment or advance, in respect of the matter concerning which payment is made or money advanced in order to entitle him to subrogation."

2. In *Harris v. Lee*, 1 P. Wms. 482, the petitioner had loaned money to the respondent's wife, who had left him for cause, to enable her to pay doctors and for necessities. The court said: "Admitting that the wife cannot at law borrow money, though for necessities, so as to bind the husband, yet this money being applied to the use of the wife for her use and for necessities, the plaintiff that lent this money must, in equity, stand in the place of the persons who found and provided such necessities for the wife. And, therefore, as such persons could be creditors of the husband, so the plaintiff should stand in their place and be a creditor also; and let the trustee pay him his money, and likewise his costs."

Following this decision it was held in *Jenner v. Morris*, 3 De G. F. & J. 45 (*overruling May v. Skey*, 16 Sim. 588), where the plaintiff who had deserted his wife filed his bill to enforce a judgment against real estate of the defendant, that the latter was entitled to set off the amounts which before and after the judgment had been advanced by him to the wife for the purpose of providing her with necessities, and had been actually applied by her for that purpose. But it was apparently conceded by the Lord Chancellor in this case that *Harris v. Lee*, 1 P. Wms. 482, did not rest upon any satisfactory principle. He seems to have yielded to it simply as a precedent which he was bound to follow. He says: "It has been laid down from ancient times that a court of equity will allow the party who has advanced the money, which is proved to have been actually employed in paying for necessities furnished to

the deserted wife, to stand in the shoes of the trades-people who furnished the necessities, and to have a remedy for the amount against the husband. I do not find any technical reason given for this, but it may possibly be that equity considers that the trades-people have for valuable consideration assigned to the party who advanced the money the legal debt which would be due to them from the husband on furnishing the necessities, and that although a chose in action cannot be assigned at law, a court of equity recognizes the right of the assignee. Whatever may be the reason, the doctrine is explicitly laid down in *Harris v. Lee* (1 P. Wms. 482), and the other cases referred to." But continuing, he says: "Objection has been made to these authorities that they are very old, and that they do not appear to have been acted upon in modern times. But it may be said on the other hand, that they may have been acted upon without ever having been questioned, and that they are entitled to some respect from their antiquity. I find that they are cited and treated as good law by subsequent text-writers on this subject."

In *Deare v. Soutten*, L. R., 9 Eq. 151, it was held that a person who has advanced money to a married woman deserted by her husband, for the purpose of, and which has been actually applied to, her support, is entitled in equity, though not at law, to recover such sums from the husband.

And in *Walker v. Simpson*, 7 W. & S. (Pa.) 83; 42 Am. Dec. 216, it was held, that while the husband is not liable at law for money loaned to the wife to procure necessities, unless at his request, yet in equity, if a debtor to the husband has paid money to the wife, deserted by the husband without cause, which has been used by her for necessities, the debtor will be permitted to stand in the place of the creditor, and deduct the amount advanced, in a suit for the debt.

So in *Kenyon v. Farris*, 47 Conn. 510; 36 Am. Rep. 86, a person advancing money to a wife, deserted by her husband, for the purchase of necessities, upon proof that the money was so applied was allowed to maintain a bill in equity against the husband for the recovery of the money so advanced.

Distinction Between Money Advanced to Buy Necessaries, and Furnishing Necessaries.—At Law and in Equity.—As to the position that while money ad-

vanced to the wife is not at law regarded as necessities, yet in equity where the money has been expended in the purchase of necessities the party loaning or advancing will be put in the place of the party supplying the necessities, see *Walker v. Simpson*, 7 W. & S. (Pa.) 83; 42 Am. Dec. 216; *Kenyon v. Farris*, 47 Conn. 510; 36 Am. Rep. 86. In this latter case (a case in equity) the court advances very cogent reasons for obliterating the distinction entirely.

But in *Skinner v. Tirrell* (Mass. 1893), 37 Cent. L. J. 351, the court, by Morton, J., said: "The only remaining ground of jurisdiction is that the defendant was bound to furnish his wife with necessities; that the money which the plaintiff advanced to her was actually expended in good faith by her for necessities; that it will be no hardship upon the part of defendant to be obliged to pay for necessities which the law would have compelled him to furnish, and that in the interest of justice, equity should compel him to pay the plaintiff the sums which she has advanced. In effect, this is the same as saying that in equity money advanced to a wife living separate from her husband for justifiable cause, and expended by her in good faith in the purchase of necessities, should itself be regarded as necessities, and recoverable accordingly. At law, it is entirely clear that a married woman has no right under such circumstances to borrow money on her husband's credit even for the purchase of necessities. We see no reason why the power should be withheld at law and given in equity. There may be strong reasons why married women, compelled by their husbands' misconduct to live apart from them, should be allowed to borrow money on their husbands' credit for the purchase of necessities. Such reasons would apply equally at law and in equity. It is for the legislature, if it deem it advisable, to give them such power. In this state they are not without remedy in such cases, in addition to the right which they have at common law to pledge their husbands' credit for necessities. The probate court may upon their petition order the husbands to pay them from time to time such sums of money as it deems expedient for their support. *Massachusetts* Pub. Sts. ch. 147, § 33 *et seq.* It is probable that this statute should be taken as a declaration of the legislative sense that a married woman

A notable exception to the rule that a volunteer is not entitled to subrogation is made in the interest of commerce in favor of one who pays a protested bill of exchange for the honor of the drawer or other party thereto; in such case the payor will be subrogated to the rights of the holder against those for whose honor payment was made.¹ Instances of the application of the principles of subrogation in favor of parties advancing funds to pay wages of seamen, and like claims, will be found in the notes.²

b. CONVENTIONAL SUBROGATION.—In order that one, having no interest to protect, who pays the debt of another, or advances money for the purpose, may be entitled to succeed to the rights and remedies of the creditor in respect of the debt so paid, there

living apart from her husband, should obtain money for necessities through the aid of the probate court, and not by pledging his credit. However that may be, a majority of the court can discover no satisfactory ground on which the jurisdiction in equity of the present suit can rest."

As to what are necessities in this connection, see generally *HUSBAND AND WIFE*, vol. 9, p. 789.

1. *Winder v. Diffenderfer*, 2 Bland (Md.) 166; *Douglass v. Fagg*, 8 Leigh (Va.) 601; *Bishop v. O'Connor*, 69 Ill. 431. See also *supra*, this title, *Parties to Bills and Notes*.

2. *Subrogation in Admiralty.*—One who advances money in good faith to enable the master of a foreign vessel arriving here to pay the wages of his crew and other claims, will be subrogated to the rights of the seamen and others whose claims are so paid. *The Tangier*, 2 Low. (U. S.) 7; *The J. A. Brown*, 2 Low. (U. S.) 464. Compare *The Larch*, 2 Curt. (U. S.) 427.

And a part owner may have subrogation as against the mortgagee of the share of another part owner. *The J. A. Brown*, 2 Low. (U. S.) 464.

In *Abbott v. Baltimore, etc., S. Packet Co.*, 4 Md. Ch. 311, the captain of a vessel drew a draft upon the company upon which the clerk advanced money and applied the same to pay the wages of the crew. It was held that this order operated as an assignment of so much of the fund out of which the crew were to be paid, and subrogated the clerk to the position of the crew and entitled him to their rights as their equitable assignee.

Under § 1, ch. 18, *Arkansas Digest*, a steamboat may not be proceeded against by attachment for money loaned to it to pay wages of the crew, though used for that purpose. The crew may

thus proceed for their wages, but a stranger may not, by loaning the money to pay them, be subrogated to their rights. *Steamboat P. N. White v. Levy*, 10 Ark. 412.

In *The Robertson*, 8 Biss. (U. S.) 180, the vessel while in a foreign port was seized for supplies furnished. The libellant in this case, at the request of the owner, signed the usual stipulation for the release of the vessel, and afterwards paid the amount which was decreed against the vessel. It was held that by signing the stipulation, and paying the amount of the decree, he did not become substituted to the rights of the former libellant so as to acquire a lien upon the vessel, and that the libel could not be maintained.

In *The Sarah J. Weed*, 2 Low. (U. S.) 555, it was held that the general agent of a ship at the home port was not entitled to subrogation to the lien of seamen whose wages he has paid in the regular course of his employment. The court in this case felt itself bound by the decision in *The Larch*, 2 Curt. (U. S.) 427, but took occasion to disapprove of much of the reasoning of the court in that case. For other cases of the application of the doctrine of subrogation in admiralty, see *The Hoyle*, 4 Biss. (U. S.) 234; *The Isaac May*, 21 Fed. Rep. 687; *Roberts v. The Huntsville*, 3 Woods (U. S.) 386; *The Wyoming*, 36 Fed. Rep. 493; *The Menominie*, 36 Fed. Rep. 197; *Nippert v. The J. B. Williams*, 42 Fed. Rep. 533; *The Lime Rock*, 49 Fed. Rep. 283; *The Guiding Star*, 9 Fed. Rep. 521; *The Cumberland*, 30 Fed. Rep. 453; *The Dora*, 34 Fed. Rep. 343; *The Augustine Kobbe*, 37 Fed. Rep. 701; *The General Tompkins*, 9 Fed. Rep. 620; *The Thomas Sherlock*, 22 Fed. Rep. 254; *City of Salem*, 31 Fed. Rep. 616. And see generally *MARITIME LIENS*, vol. 14, p. 410.

must be a convention or agreement to that effect.¹ This convention or agreement may be made with either the debtor or creditor.² And there are cases which hold that a prior agreement for

1. *Sandford v. McLean*, 3 Paige (N. Y.) 122; *New Jersey Midland R. Co. v. Wortendyke*, 27 N. J. Eq. 658; *Texas etc., R. Co. v. McCaughey*, 62 Tex. 271; *Morrow v. U. S. Mortgage Co.*, 96 Ind. 21; *Fuller v. Hollis*, 57 Ala. 435; *Mitchell v. Butt*, 45 Ga. 162; *Morgan v. Hammett*, 23 Wis. 30; *Carter v. Halifax*, 1 Hawks (N. Car.) 483; *Bruce v. Bonney*, 12 Gray (Mass.) 107; 71 Am. Dec. 739. See also *DeConcilio v. Brownrigg* (N. J. 1892), 25 Atl. Rep. 383.

In *Owen v. Cook*, 3 Tenn. Ch. 78, the purchaser of land at a judicial sale was unable to pay in full his first purchase note, and the money for that purpose was advanced by a third person, under an agreement entered of record, that he should be substituted to the rights of those for whom the land had been sold, "to the extent that he shall have their lien *pro tanto* upon the said land." The assets proving deficient to pay the claims in full, it was held that this agreement did not entitle the party advancing the money to priority of satisfaction of his claim; but only to a *pro rata* satisfaction of his claim along with the other notes.

In *McMillan v. Gordon*, 4 Ala. 716, it was held that a friend of the mortgagor who advanced a part of the debt to the solicitors of the mortgagee, who had the approval of their clients for the transaction, on the assurance that a lien on the mortgaged premises would be given him for his advances and the amount refunded out of the proceeds of the sale, became entitled in equity to a *pro tanto* assignment of the mortgage as a means of securing the repayment of his advances and the payment did not operate as an extinguishment of the mortgage.

A tax collector who advanced the taxes assessed upon a bankrupt's estate by a town, the assignees not having then assets sufficient to pay the taxes, and agreeing that the collector should stand in the place of the town, will be subrogated to the rights of the town against the bankrupt's estate and be allowed to prove his payment as a privileged claim. *In re Grant* (U. S. Dist. Ct. Mass.), 14 Am. Law Rev. 301.

In *New Jersey Midland R. Co. v. Wortendyke*, 27 N. J. Eq. 658, subrogation was denied, but the court

also held that the proceedings were premature and that, in view of the claims of other lien creditors, the question could not be properly dealt with until the final hearing. On final hearing (*Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105), with the facts fully before the court, the right of subrogation was allowed, although the court concurred in the view that a case for conventional subrogation had not been made out. See also *Tradesmen, etc., Bldg. Assoc. v. Thompson*, 32 N. J. Eq. 134.

Partial Payment of Debt—Distinction Between Legal and Conventional Subrogation in This Respect.—As a general rule legal subrogation becomes complete only when the whole debt is paid. See *supra*, this title, *When Right to Subrogation Becomes Complete*. It is otherwise in the case of conventional subrogation. Thus in *Shreve v. Hankinson*, 34 N. J. Eq. 76, a brother of the mortgagor advanced several sums as part payment of the principal then due, on the express agreement between his brother and the holder of the mortgage, that he should have an interest in the mortgage to the amount of the advances made, for his security. It was held that he was entitled to be subrogated to the rights of the mortgagee under the first mortgage as against a second mortgagee, who had taken his mortgage before the payments had been advanced. See also *Loeb v. Fleming*, 15 Ill. App. 508; *Brice's Appeal*, 95 Pa. St. 145.

In *Morrow v. U. S. Mortgage Co.*, 96 Ind. 21, the agreement was that the party advancing the money on paying and taking up the notes, should be permitted to hold them, in the same manner as the company had theretofore held them; it was held that this was in effect a waiver on the part of the company of its right to insist upon the postponement of the lender's claim for reimbursement until the remainder of the mortgage was satisfied, as it might have done in the absence of such an agreement, and that he was entitled to enforce the payment of the notes as a prior and subsisting lien against the property.

2. *Harrison v. Bisland*, 5 Rob. (La.) 204; *Brice v. Watkins*, 30 La. Ann. 21; *Virgin's Succession*, 18 La. Ann. 42.

subrogation may be inferred from the subsequent acts and dealings of the parties.¹

One who advances money to pay off an incumbrance, upon an agreement with the debtor that the security shall be assigned to

In *Levy v. Baer*, 19 La. Ann. 468, drafts drawn by the mortgagor for the payment of certain promissory notes secured by mortgage on his property, recited that upon the payment of the drafts, the acceptor would be subrogated to the rights and privileges of the payee. Both of the drafts were paid and the mortgage notes delivered to the acceptors, and a formal receipt entered on the back of each of the drafts by the payees. It was contended by counsel that there was no express subrogation, and that the receipt was only an acknowledgment of the payment; but the court held that the drafts were to be considered as agreements entered into by the parties, that on the payment of said drafts, the acceptors were to be subrogated to the rights of the payees, and that they, by acknowledging receipt as stated on the back of the drafts, virtually adopted the stipulation for subrogation, as much so as if they had repeated the expression of subrogation in the receipt.

That subrogation may be accomplished by a payment in accordance with an express understanding between the debtor, the creditor and a third party, to the effect that if such third party pays the debt he may hold the security for reimbursement, there can be no doubt. *Dillon v. Kauffman*, 58 Tex. 696; *Flanagan v. Cushman*, 48 Tex. 241.

It is also recognized law that a payment upon a like agreement between a stranger and the creditor will have the same effect. *Fievel v. Zuber*, 67 Tex. 275.

"Conventional subrogation, as its name imports, results from the agreement of the parties, and can take effect only by agreement. The agreement is, of course, with the party to be subrogated, and it seems may be either by the debtor or creditor. Thus, it may happen when the creditor, receiving payment from the third person, subrogates the payer to his rights against the debtor. This may happen by express agreement, but no formal words are required. This sort of subrogation takes place only where there is a payment of the debt by a third party; not where there is an assignment, in which

case subrogation results from the assignment. . . . When the debtor borrows money from a third party to pay a debt he may subrogate the lender to the rights of the creditor, for by this change the rights of the other creditors are not injuriously affected." *Bouvier's L. Dict.*

But see *Hoyle v. Cazabat*, 25 La. Ann. 438, where it is said: "There is an act in the record by which it appears that Cazabat borrowed a sum of money from Jacob with the avowed intention of discharging notes given to Hoyle and with subrogation to Hoyle's rights of mortgage, but Hoyle was not a party to this note, and we do not understand that Cazabat had any authority in law to subrogate Jacob to Hoyle's rights without Hoyle's knowledge and consent."

1. *Rodman v. Sanders*, 44 Ark. 504. In this case the circumstances from which a prior agreement for subrogation was inferred were these: In the year 1871, one J. M. W., a citizen of *Mississippi*, purchased a tract of land in *Arkansas*, and received a bond to convey the title to him upon payment of the price. This being all paid except a note for one thousand dollars maturing a year later, the vendor brought suit for foreclosure of his lien. The vendee being unable to pay, appealed to his father, P. W. W., also a resident of *Mississippi*, for assistance. The father came to *Arkansas*, bringing the bond for title, paid off the incumbrance with his own money, and received the outstanding note together with a deed to his son. The deed was not placed upon record, nor was it delivered to the son, but the father kept both deed and note in his possession until his death in 1878, and evidently considered that he held a security for the repayment of the money which he had advanced. He took charge of the land, put his son-in-law R. in possession, and took care that the annual taxes were regularly paid. R. continued in possession until 1874, when by direction of the father he surrendered possession to another son, T. R. W.; the latter, either before he entered or subsequently, made a contract with his brother J. M. W. to purchase his interest in the land. He held possession until 1879,

him, or a new one given to him, will be subrogated to the rights of the incumbrancer;¹ and if the new security turns out to be defective, he will be substituted to the benefit of the prior incum-

when he sold out to R., who was acquainted with all the foregoing facts. In 1880, R. received from J. M. W. a conveyance for a part of the land, that being supposed to be the extent of his interest; he afterwards acquired a tax title to the residue of the land. A bill was filed by the administrator of P. W. W., the father, against R. and J. M. W. to subject the land to sale for the satisfaction of so much of the purchase debt, with interest, as the deceased had discharged. The defendants relied upon adverse possession under the Statute of Limitations, and the title papers above mentioned. The court, by Smith, J., said: "When P. W. W. paid off this charge upon his son's land he took no formal assignment of the debt. But he expected to be substituted to the place of the creditor. This is evident from the fact that he retained the purchase note and deed in his possession, and that he always looked to the land for reimbursement. This is not, however, sufficient in itself to give a right to subrogation. But the proof shows that when he returned to *Mississippi*, his son told him to keep the papers until the money was refunded. From the previous request made by the son that the father should relieve the land from the incumbrance, and his subsequent assent that the father should hold the papers until he was reimbursed, we may infer a prior agreement between the parties that the father should be substituted to the securities and remedies of the creditor. This presents an ordinary case of conventional subrogation." See also *Carter v. Halifax*, 1 Hawks (N. Car.) 483.

But in *Louisiana*, by statute, subrogation of this character, to the rights, actions, and privileges of the creditor against his debtor, can take place only by an express convention or agreement at the time of the payment, or when the debtor borrows the money to make the payment, which fact must appear by an act declaring it, and a receipt for the money executed by the debtor before a notary and two witnesses. *Louisiana Civ. Code*, §§ 2159-2161. See *Harrison v. Bisland*, 5 Rob. (La.) 204; *Brice v. Watkins*, 30 La. Ann. 21; *Virgin's Succession*, 18 La. Ann. 42; *Sewall v. Howard*, 15 La. Ann. 400.

In *Nugent v. Potter*, 21 La. Ann. 746, it was held that a third party paying a judgment to the attorney of the judgment creditor, and taking an order of court on the motion of such attorney, subrogating him to the rights of the judgment creditor, became legally subrogated thereto, and that conventional subrogation took place by the act of the attorney.

1. *Robertson v. Mowell*, 66 Md. 530; *White v. Cannon*, 125 Ill. 415; *White v. Newhall*, 68 Mich. 641; *King v. McVickar*, 3 Sandf. Ch. (N. Y.) 192; *Baker v. Baker* (S. Dak. 1891), 49 N. W. Rep. 1064; *Shattuck v. Cox*, 128 Ind. 293; *Gilbert v. Gilbert*, 39 Iowa 657; *Levy v. Martin*, 48 Wis. 206; *Edwards v. Davenport*, 20 Fed. Rep. 756.

One who advances money to pay off an incumbrance paramount to the wife's claim of homestead, in pursuance of an arrangement for substitution between the parties to the transaction, will be subrogated to the lien of the incumbrance regardless of the homestead. *Dillon v. Kauffman*, 58 Tex. 696.

A person who advances money to pay off a lien on a married woman's separate statutory estate, upon the oral promise of the wife and her husband to secure the lien by deed of trust, cannot, on a failure to execute such deed by reason of the death of the wife, be subrogated to the benefit of the lien discharged, under the laws of *Missouri*, which require that all charges on the wife's statutory estate must be in writing. *Clifton v. Anderson*, 47 Mo. App. 35.

If, after the sale of mortgaged premises under a judgment, a stranger, in ignorance of the recorded judgment and sale thereunder, advances money to pay off the prior mortgage and takes a new mortgage for his security, he will not be subrogated to the lien of the old mortgage as against the purchaser under the judgment—his want of diligence being the occasion of his loss. *Mather v. Jenswold*, 72 Iowa 550, followed in *Ft. Dodge Bldg., etc., Assoc. v. Scott* (Iowa, 1892), 53 N. W. Rep. 283.

In *Leowenthal v. McCormick*, 101 Ill. 143, where a bank advanced a sum of money to take up a note secured by a deed of trust, under an agreement with the debtor that the note should be transferred to the bank and held as a

brance, unless the superior or equal equities of others would be prejudiced thereby.¹ If the advance is made at the request of one who has an interest in the lien to be discharged, the lender will not be regarded as a mere intermeddler, and in the absence

pledge for the repayment of the money advanced, it was held that the lien created by the deed of trust would remain until the money advanced was repaid; and also that a third person who, under an agreement with the debtor, furnished the money to repay the bank the amount it had advanced, the note and deed of trust being passed to him as security for the money thus paid the bank, would be entitled in equity to be subrogated to the rights of the bank, and to hold the note and deed of trust for the amount that he advanced on the faith of the securities.

In *Treadway v. Pharis* (Ky. 1892), 18 S. W. Rep. 225, a husband endeavoring to save his wife's land from sale under judgments for unpaid purchase money, procured the use of her father's name as indorser upon his paper, with the distinct understanding that the money was to be applied to the payment of the judgments, and they to be assigned to him to protect him against his liability upon the paper; part of the money was paid by the father-in-law before his death, and the balance by his administrators; it was contended by the wife that the transaction was without her knowledge and consent, and therefore the payment of the judgment released the lien; but it was held that whether the wife consented or not was immaterial, and that the administrators were entitled to be subrogated to the rights of the original creditor.

In *Donohue v. Daniel*, 58 Md. 595, money was loaned to a guardian for the purpose of removing incumbrances upon the wards' property in the way of taxes and ground-rent; it was held that although the life tenant was bound to keep these charges down during his tenancy, and failing to do so they constituted liens for which the property could be sold, yet the guardian removing those incumbrances against his wards' property, would have a just and legitimate claim against them, and would be entitled to the benefit of the lien which he paid off, and that when he borrowed money for that purpose and it was so applied, the lender was entitled to be subrogated to the guardian's rights in respect to the wards and their property.

An administrator, who by agreement with the heirs, advances his own money to pay debts due by the intestate, which it was agreed should be repaid out of the estate, is not a volunteer, but entitled to be substituted, in the place of the creditors whose claims are thus paid. *Wallace's Appeal*, 5 Pa. St. 103.

Subrogation to Vendor's Lien.—Where one pays the purchase money of land at the instance of the vendee, he stands in the shoes of the vendor and is entitled to the vendor's equitable lien. *Cary v. Boyle*, 53 Wis. 574; *Jones v. Parker*, 51 Wis. 218; *Austin v. Underwood*, 37 Ill. 439; 87 Am. Dec. 254; *Otis v. Gregory*, 111 Ind. 504; *Dwenger v. Branigan*, 95 Ind. 221. In *Carey v. Boyle*, 53 Wis. 574, it was held that where A purchased land for the benefit of B, and B paid the purchase money and had the deed made to B, A and B stood in the relation of vendor and purchaser of the land and the former had a vendor's lien for the amount of the unpaid notes; and even if A is to be regarded as a stranger to the title, who merely advanced money to B for the sole purpose of enabling the latter to purchase the land, he is entitled to be subrogated to the rights of the vendor. *Compare* *Durant v. Davis*, 10 Heisk (Tenn.) 527; *Hicks v. Morris*, 57 Tex. 658; *Texas Land, etc., Co. v. Blalock*, 76 Tex. 85; *Brower v. Witmeyer*, 121 Ind. 83.

1. Advances upon Defective Securities.

—*Kitchell v. Mudgett*, 37 Mich. 82; *Bolman v. Lohman*, 74 Ala. 507; *Muir v. Berkshire*, 52 Ind. 149; *Gilbert v. Gilbert*, 39 Iowa 657; *Levy v. Martin*, 48 Wis. 198; *Homœopathic Mut. L. Ins. Co. v. Marshall*, 32 N. J. Eq. 103; *Chaffee v. Oliver*, 39 Ark. 531.

If a person advances money on a forged mortgage and the same be used to discharge a prior mortgage, he will be subrogated to the benefit of that mortgage; there being no intervening lien or incumbrances, and his right of subrogation passes to an innocent purchaser to whom he has assigned the mortgage. *Everston v. Central Bank*, 33 Kan. 353. See also *Detroit F., etc., Ins. Co. v. Aspinwall*, 48 Mich. 238; *Crippen v. Chappel*, 35 Kan. 500; 57 Am. Rep. 187. But see *Byerly v. Humphrey*, 95

N. Car. 151, where it was held that one who advances money on a forged mortgage to pay off a prior mortgage will not be subrogated to the benefit of the mortgage so discharged in a suit brought merely to remove the cloud on title caused by the forged mortgage. He must institute an independent suit for that purpose.

In *Milholland v. Tiffany*, 64 Md. 465, a conveyance was made to the grantor's wife in consideration of love and affection, and at the time of this conveyance there was a mortgage on the property for unpaid purchase-money which was paid off by a third party at the request of the husband, and a new mortgage given to him by the husband and wife to secure the payment. The husband subsequently became insolvent and the conveyance to the wife was set aside as voluntary and in fraud of the rights of creditors. The court held that the mortgage to the third person who had made the advance was void, he not being a *bona fide* purchaser without notice, but that he was entitled to be subrogated to the rights of the purchase-money mortgage as against the creditors; there being no intervening rights and incumbrances and no injustice done to the creditor whose rights were subject to the mortgage for purchase money in the first place.

In *Carr v. Caldwell*, 10 Cal. 380; 70 Am. Dec. 740, land occupied by the vendee as a homestead was about to be sold under a decree foreclosing a mortgage for the purchase money, and in order to prevent the sale, he borrowed money of the plaintiff, agreeing to give him a mortgage on the homestead for his security, and a few minutes after the payment, he executed this mortgage to him, but in which his wife did not join. After his death, the land was set aside to his widow as a homestead, and the plaintiff (the lender), bringing suit to subject it to his debt, it was held that the satisfaction of the former mortgage and the execution of his mortgage were cotemporaneous acts, and he was entitled to stand in the place of the holder of the former mortgage. See also *Swift v. Kraemer*, 13 Cal. 526; 73 Am. Dec. 603; *Dingman v. Randall*, 13 Cal. 512.

One who in good faith lends money to an administrator to pay off debts of the estate, under an agreement that he shall have a security upon the estate, and takes a mortgage for his security which proves invalid, will be subrogated

to the benefit of the liens held by the creditors who were paid with his money. *Detroit F., etc., Ins. Co. v. Aspinall*, 48 Mich. 238; *Lockwood v. Bassett*, 49 Mich. 546; *DeConcilio v. Brownrigg* (N. J. 1892), 25 Atl. Rep. 383.

If a person advances money to pay off a mortgage debt, and takes a new mortgage to secure that and other debts, and the old mortgage remains undischarged or is assigned to the person making the advance, he will be subrogated to the lien of the old mortgage, if that of the new mortgage should prove invalid. *White v. Knapp*, 8 Paige (N. Y.) 173; *Hill v. Beebe*, 13 N. Y. 556.

A person who lends money to a corporation will, if the loan be declared *ultra vires* on the part of the corporation, be subrogated to the rights of the creditors of the corporation whose claims were satisfied out of the loan. *Baroness Wenlock v. River Dee Co.*, 19 Q. B. Div. 155; *Cunliffe v. Blackburn, etc.*, Ben. Bldg. Soc., 9 App. Cas. 857; *Blackburn Bldg. Society v. Cunliffe*, 22 Ch. Div. 61.

In *Gilbert v. Gilbert*, 39 Iowa 657, where the plaintiff loaned money to discharge a prior incumbrance and took as a security a mortgage which turned out not to be binding as against the heirs, it was held that the plaintiff was entitled to be subrogated to the rights of the prior incumbrancer.

Where money was furnished by a third person to pay off certain chattel mortgages which were liens on the property of a firm, at the request and with the knowledge and consent of all the members of the firm, and with the understanding and agreement that he should have a new mortgage on the firm property to secure him; in the event of his new mortgage being set aside, it was held that he should be subrogated to the rights of the creditors whose claims he had paid. *Yaple v. Stephens*, 36 Kan. 680.

And again in *Snelling v. McIntyre*, 6 Abb. N. Cas. (N. Y.) 469, where the husband and wife united in a mortgage to secure the payment of money advanced by the plaintiff to pay a prior mortgage on the same premises made by the husband before his marriage, and the wife afterwards, upon a bill to foreclose the mortgage, set up plea of infancy, it was held that the plaintiff was entitled to be subrogated to the rights of the mortgagee under the first

of express agreement, one will be implied, if necessary, that the security shall be kept on foot for his use, and protection.¹ The formal discharge of the mortgage by the creditor will not prevent the subrogation of one who advanced money to pay off the mortgage, with the agreement that it should be assigned to him for his security ;² but it seems that this rule will not be enforced to the

mortgage, even as against the dower rights of the wife. *Compare* *Nash v. Taylor*, 83 Ind. 347; *Pettus v. McKinney*, 74 Ala. 108. See also *Lockwood v. Marsh*, 3 Nev. 123.

In *Johnson v. Barrett*, 117 Ind. 551, a husband and wife joined in the execution of a mortgage to secure the payment of a sum of money. The husband afterwards conveyed the same land to his wife and caused the deed of conveyance to be recorded. The mortgagee obtained a decree of foreclosure and was about to sell the land. The plaintiff at the request of the husband advanced the money to discharge the judgment and decree of foreclosure entered against him, and relying upon the assurances of the husband that his title to the land was clear and complete, did not make any further inquiry or examination as to the title of the land, and did not take an assignment of the prior mortgage, but caused the same to be discharged of record, taking a new note and mortgage on the land for his security. Upon ascertaining the facts of the case, it was held that he was entitled to have the release and satisfaction of the prior mortgage set aside and vacated, and to be subrogated to all the rights of the prior mortgagee, regardless of whether he had any other remedy or not.

1. *Gans v. Thieme*, 93 N. Y. 225; *Emmert v. Thompson*, 49 Minn. 386.

In *Sutton v. Sutton*, 26 S. Car. 33, it was held that where a third person, the debtor's son, advanced money at the request of his father, and with the consent of the creditor, to pay off a judgment lien against his father's land, it was reasonable to infer that there was an understanding between the debtor and his son that as soon as the whole amount was paid the judgment should be assigned, and that the son in this case was entitled to an equitable assignment of the judgment to the extent of his payment.

In *People's Nat. Bank v. Epstein*, 44 Fed. Rep. 403, it was held that a married woman may not charge her separate estate for the benefit of her husband, but that where the loan is applied

in part to the payment of an antecedent mortgage created by the wife in behalf of her own estate, the party making the advance will be subrogated to the rights of the mortgagee under the prior mortgage.

One who lends money to pay the deferred installments of the purchase price of land at the request of the vendee will be entitled to the benefit of the vendor's lien on the land. *Price v. Davis*, 88 Va. 939.

A person advancing money at the request of the debtor to pay off a preferred debt will be subrogated to the rights of the creditor and entitled to the preference enjoyed by him. *Zell's Appeal*, 111 Pa. St. 532.

If a note and mortgage be executed for the express purpose of securing an advance of money for a specific purpose, and a third person advance the money to the payee of the note for that specific purpose on the faith of the note and mortgage, he will be subrogated to the benefit of the mortgage and the rights of the payee against the maker of the note. *Baker v. Ward*, 7 Bush (Ky.) 240.

One who lends money to a purchaser of lands wherewith to pay the purchase price, and takes a judgment bond reciting the fact that it was for the purchase price, will not be subrogated to the right of the vendor to charge the land regardless of the widow's homestead therein. *Notte's Appeal*, 45 Pa. St. 362.

2. *Focke v. Weishuhu*, 55 Tex. 33; *Fears v. Albea*, 69 Tex. 437; *Dillon v. Kauffman*, 58 Tex. 696; *Downer v. Miller*, 15 Wis. 612. *Contra*, *Owens v. Johnson*, 8 Baxt. (Tenn.) 265. But see *Clark v. Clark*, 58 Miss. 68. In this last case money was advanced to a married woman by her merchants for the purpose of paying the purchase price of property; she agreeing to protect them by a mortgage on the land. The execution of this mortgage was invalid, her husband not joining with her. It was held that although the contract of the woman for subrogation did not bind her estate, yet the lender of the money

impairment of the legal or equitable rights of others acquired in ignorance of the agreement, and relying upon the extinguishment as shown by the record.¹

4. Personal Representatives, Fiduciaries, and Officers.—A personal representative who pays a debt of the estate out of his own means,² or makes advancements to creditors, legatees,³ or distributees, will in either case, to the extent of assets for which he is liable,⁴ be subrogated to all the rights of creditors, legatees, or

was entitled to subrogation in order to prevent the injustice of allowing her to acquire valuable property by the use of the money of another without any liability on herself, or her estate, or on the property purchased, for the advance.

Where a creditor was induced to pay off a prior mortgage by the fraudulent representations of his debtor that there were no other incumbrances on the land, and entered satisfaction of the mortgage on the record, taking a new mortgage for his security, it was held that he was entitled to be subrogated to the benefit of the mortgage discharged, and to have his lien declared superior to a judgment existing at the time the new mortgage was given to him. *Sidener v. Pavey*, 77 Ind. 241.

1. *Gaskill v. Wales*, 36 N. J. Eq. 527.

2. *Wallace's Appeal*, 5 Pa. St. 103; *Chamberlin v. McDowell*, 42 N. J. Eq. 628; *Hill v. Buford*, 9 Mo. 869; *Black v. Black*, 42 Iowa 694; *Goodbody v. Goodbody*, 95 Ill. 456; *Pinneo v. Goodspeed*, 22 Ill. App. 50; *Pierce v. Allen*, 12 R. I. 510; *Stott's Estate*, Myr. Prob. (Cal.) 168, unless made for his own relief; *Feemster v. Good*, 12 S. Car. 573; *Johnson v. Henagan*, 11 S. Car. 93; *Kinney v. Harvey*, 2 Leigh (Va.) 70; 21 Am. Dec. 597; *Gaw v. Huffman*, 12 Gratt. (Va.) 628; *Hearrin v. Savage*, 16 Ala. 286; *Sanders v. Sanders*, 2 Dev. Eq. (N. Car.) 262; *Turner v. Shuffler*, 108 N. Car. 642; *Billingslea v. Henry*, 20 Md. 282. But see *Blank's Appeal*, 3 Grant (Pa.) 192.

An administrator who discharges debts of his intestate to a larger amount than the assets in his hands, will be subrogated to the rights of the creditors so paid against the estate of the intestate in the hands of his heir. *Taylor v. Taylor*, 8 B. Mon. (Ky.) 419; 48 Am. Dec. 400; and this right will be secured to him though he be, after paying such debts, removed from the administration. *Smith v. Hoskins*, 7 J. J. Marsh. (Ky.) 502. But if, knowing the personal

estate to be insolvent, he make such payment, with an intent to make the heir his debtor, he will not be entitled to subrogation. *Williams v. Williams*, 2 Dev. Eq. (N. Car.) 69; 22 Am. Dec. 729.

An administrator who pays debts of the estate out of a fund of which the widow is dowable, and is compelled to reimburse the widow, will be subrogated to the rights of the creditors against the unadministered assets of the estate. *Crowley v. Mellon*, 52 Ark. 1. See also *Franklin v. Armfield*, 2 Sneed. (Tenn.) 305; *Graham v. Jones*, 24 S. Car. 241; *Clayton v. Somers*, 27 N. J. Eq. 230; *Wheeler v. Wheeler*, 1 Conn. 51; *Pendergrass v. Pendergrass*, 26 S. Car. 19; *Terrill v. Rowland*, 86 Ky. 67; *Gundry v. Henry*, 65 Wis. 559; *McCullough v. Wise*, 57 Ala. 623; *Robb's Appeal*, 41 Pa. St. 45.

3. An administrator paying unpreferred debts of an insolvent estate, is not entitled to credit for the full amount of such payments, but can only claim to be subrogated to the rights of the creditors, and to receive their *pro rata* dividends. *Breckenridge's Appeal*, 127 Pa. St. 81; *Byrd v. Jones*, 84 Ala. 336.

4. *Hancock v. Minot*, 8 Pick. (Mass.) 38, citing *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 318; *Chesson v. Chesson*, 8 Ired. Eq. (N. Car.) 141, declaring that an executor who is in advance to the estate, may retain specific property of the estate for his reimbursement. So, if he purchase lands with assets of the estate in his own name, he may hold the lands if he is in advance to the estate. *Buckingham v. Wesson*, 54 Miss. 526. In some cases the substitution of the administrator has been restricted to personal assets of the estate out of which the claim paid by him might have been satisfied. Thus, in *Slaton v. Alcorn*, 51 Miss. 72, it was held that an administrator was not obliged to discharge a judgment against his intestate out of his own means, and that having done so he was not entitled

distributees against the estate,¹ including priority and dignity of claim.² But he must establish his claim by the same kind of testimony which would be required of creditors, and subject to the same defenses which might be made against them.³ It has been held, however, that if he should pay debts out of the order of their priority,⁴ or be otherwise guilty of mal-administration of the estate,⁵ or if he should negligently fail to assert his right in a chancery suit for the administration of the estate to which he and the legatees were parties,⁶ subrogation will not be enforced in his behalf.

An administrator will also be entitled to subrogation in behalf of the estate where he discharges liabilities with which others are primarily chargeable out of the general assets of the estate.⁷ If

to subrogation to the rights of the judgment creditor.

If an administrator voluntarily pays off an unprobated debt against the estate which is secured by deed of trust, under the erroneous impression that the personal estate of the intestate will be sufficient to reimburse him, he will not be subrogated to the benefit of the trust deed. *Evans v. Halleck*, 83 Mo. 376.

1. *Lewis v. Nichols*, 38 Tex. 54.

An executor who has been compelled to satisfy the *devastavit* of his co-executor in paying debts of the estate out of their proper order, will be subrogated to the rights of the creditors so paid against the lands of the testator in the hands of his heirs. *Johnson v. Corbett*, 11 Paige (N. Y.) 265.

If a husband receives advancements from his wife's father in behalf of his wife, and the wife recovers the same from the administrator of her father's estate as part of her distributive share of the estate, the administrator will be subrogated to her rights against her husband in respect of such advancements. *Stayner v. Bower*, 42 Ohio St. 314.

The lien of an executor on the share of a legatee for moneys paid upon his account by the estate of the testator as surety, will have priority over a mortgage executed by the legatee upon his interest. *Willes v. Greenhill*, 29 Beav. 376.

An administrator *pendente lite* whose powers have ceased, but who with the consent of all parties in interest pays the debts of the estate out of the rents of the decedent's lands, will be subrogated to the rights of the creditors paid against the heirs or devisees. *Woolley v. Pemberton*, 41 N. J. Eq. 394.

An executor who has paid legacies

which should have been paid by the co-executor, may be subrogated to the rights of the legatees against the estate of the co-executor. *Miller's Appeal*, 127 Pa. St. 95.

A personal representative who pays taxes and assessments on property specifically devised by the testator, will be subrogated to the benefit of the liens thereon as against the devisee. *Morgan's Estate*, Myr. Prob. (Cal.) 80; *Bowers v. Williams*, 34 Miss. 324; *Hudson v. Gray*, 58 Miss. 882. See also *Millard v. Harris*, 119 Ill. 185; *Stetson v. Moulton*, 140 Mass. 597.

2. *Willis v. Loan*, 2 T. B. Mon. (Ky.) 141; *Woods v. Ribley*, 27 Miss. 119.

3. *Gist v. Cockey*, 7 Har. & J. (Md.) 134; *Collison v. Owens*, 6 Gill & J. (Md.) 4; *McCurdy's Appeal*, 5 W. & S. (Pa.) 397; *McNeill v. McNeill*, 36 Ala. 109; 76 Am. Dec. 320; *Watkins v. Dorsett*, 1 Bland (Md.) 530. See also *Loomis' Appeal*, 29 Pa. St. 237; *Ex p. Allen*, 15 Mass. 58.

4. *Moye v. Albritton*, 7 Ired. Eq. (N. Car.) 62; *Greiner's Estate*, 2 Watts. (Pa.) 414; *Findlay v. Trigg*, 83 Va. 539. See also *Carson v. McFarland*, 2 Rawle (Pa.) 118; 19 Am. Dec. 627.

5. *Foster's Succession*, 4 La. Ann. 479.

An executor claiming the right of subrogation on the ground of having paid the debts of the testator out of his own means, must show that the provision made in the will for the payment of such debts, has been faithfully administered, and has proved inadequate. *Frary v. Booth*, 37 Vt. 93. See also *Williams v. Stratton*, 10 Smed. & M. (Miss.) 418.

6. *Lambert v. Hobson*, 3 Jones Eq. (N. Car.) 424.

7. Thus, an administrator who sells land subject to a mortgage, and after-

he be compelled to make good a fraud upon the estate, he will be subrogated to the rights of the estate against the wrongdoer;¹ and if in his accounts he charge himself with liabilities with which another is primarily chargeable, he will be subrogated to the rights of the estate against that person.²

Circumstances have arisen under which other fiduciaries have invoked and received the protection of the equitable doctrine of subrogation.³ Indeed, as a general rule, a fiduciary removing a prior incumbrance upon the trust estate, may be subrogated to the benefit thereof against the estate;⁴ but he may not, by voluntarily discharging the claim secured by the trust, be subrogated to the rights of the original claimant against the estate.⁵

It has been held frequently, that an officer who becomes liable for the amount of a judgment, by reason of his failure to discharge his official duty when an execution is placed in his hands, may, upon payment of the judgment debt, be subrogated to the rights of the judgment creditor.⁶

wards pays off the mortgage out of the general assets of the estate, will be subrogated to the benefit of the mortgage against the purchaser for reimbursement. *Greenwell v. Heritage*, 71 Mo. 459. See also *Welton v. Hull*, 50 Mo. 296.

1. *Thomas v. Bridges*, 73 Mo. 530. In this case a purchaser at an administrator's sale, falsely representing himself to be the owner of an allowance against the estate, was given credit for the amount thereof as part payment of the purchase money. The administrator was afterwards compelled to pay the allowance to the real owner out of his own pocket, and it was held that he was entitled to be subrogated to the rights of the estate, and to have a vendor's lien enforced against the land in the hands of one who had received a voluntary conveyance from the purchaser, though without knowledge of the fraud.

2. *Parker v. Smith* (Tex. 1889), 11 S. W. Rep. 909. In this case an administrator having been discharged after settlement of his accounts, in which he charged himself with the unpaid purchase price of land sold at an administrator's sale, was subrogated to the rights of the estate against the purchaser, and allowed an equitable lien on the land for the amount of the price.

3. If a trustee sells partly for cash and partly on credit, and then pays one creditor too great a proportion of the cash, the trustee will be subrogated, for the benefit of the other creditors, to the rights of the satisfied creditor in the

deferred payments, as to the excess which the latter received. *Elliott v. Elliott*, 6 Gill & J. (Md.) 35.

A guardian who, on the ground of neglect to sue a former guardian, has been compelled to pay to his ward a sum of money due to him and unaccounted for by the former guardian, will be subrogated to the rights of the ward against such former guardian. *Smith v. Alexander*, 4 Sneed (Tenn.) 482. See also *Corcoran v. Allen*, 11 R. I. 567; *Salter v. Salter*, 6 Bush (Ky.) 637.

4. *King v. Cushman*, 41 Ill. 31; 89 Am. Dec. 366; *Freeman v. Tompkins*, 1 Strobb. Eq. (S. Car.) 53; *Boyd v. Myers*, 12 Lea (Tenn.) 175; *Glide v. Dwyer*, 83 Cal. 477. See also *Leslie v. French*, 23 Ch. Div. 552.

5. A trustee in a deed of trust given to secure coupon bonds, who furnished the money for the payment of certain of the coupons, is not entitled to be subrogated to the rights of a coupon-holder against the trust property. *Pearce v. Bryant Coal Co.*, 121 Ill. 590. See *supra*, this title, *Volunteers and Strangers*.

6. *Gillette v. Hill*, 102 Ind. 531; *Downer v. South Royalton Bank*, 39 Vt. 25; *Evarts v. Hyde*, 51 Vt. 183; *Bellows v. Allen*, 23 Vt. 169; *Bray v. Howard*, 7 B. Mon. (Ky.) 467; *People v. Onondaga C. P.*, 19 Wend. (N. Y.) 79; *Rees v. Eames*, 20 Ill. 283; *Allen v. Holden*, 9 Mass. 131; 6 Am. Dec. 46; *Neely v. Jones*, 16 W. Va. 625; 37 Am. Rep. 794; *Beard v. Arbuckle*, 19 W. Va. 135.

After payment of the judgment debt,

the officer may sue out execution in the name of the original plaintiff for his own benefit. *Murphy v. Swadener*, 33 Ohio St. 85; *Dillon v. Cook*, 5 Smed. & M. (Miss.) 773; *Taylor v. Hardin*, 4 B. Mon. (Ky.) 363; *Finn v. Stratton*, 5 J. J. Marsh. (Ky.) 364; *Bruce v. Dyall*, 5 T. B. Mon. (Ky.) 125; *Bray v. Howard*, 7 B. Mon. (Ky.) 467; *Burbank v. Slinkard*, 53 Ind. 493; *People v. Onondaga C. P.*, 19 Wend. (N. Y.) 79; *Everts v. Hyde*, 51 Vt. 183. But it has been held that the officer may not have an *alias* execution on the original judgment to reimburse himself. *Roundtree v. Weaver*, 8 Ala. 314; *Carpenter v. Stilwell*, 11 N. Y. 61. But if the judgment debtor approves the payment of the debt by the sheriff, the latter may bring assumpsit against him. *Roundtree v. Weaver*, 8 Ala. 314; *Evans v. Billingsley*, 32 Ala. 395.

Where a constable, in whose hands a judgment had been placed for collection, took worthless notes from the debtor in payment of the debt, and afterwards paid the same himself, it was held that he could not recover in the name of the plaintiff the amount of the debt from the judgment debtor. *Rogers v. Nuttall*, 10 Ired. (N. Car.) 347.

A sheriff who has taken a bail bond but fails to assign it, in consequence of which he is held as special bail and compelled to pay the recovery against the defendant, may sue on the obligation thus taken as a common-law bond, and recover from the obligor the amount recovered from him. *Higgins v. Glass*, 2 Jones (N. Car.) 353. But he cannot recover against the obligors of the bond until he has paid the money due to the judgment creditor, or, at least, until there is a judgment against him for it. *Pool v. Hunter*, 4 Jones (N. Car.) 144.

At common law an officer cannot maintain an action for the recovery of money paid for another on account of his own breach of duty. *Pitcher v. Bailey*, 8 East 171; *Bigelow v. Provost*, 5 Hill (N. Y.) 566; *Walker v. Bradbury*, 57 Mo. 66; *Carpenter v. Field*, 14 R. I. 73. But in *Allen v. Holden*, 9 Mass. 133, it appeared that an officer who had failed to serve an execution, was sued for his neglect, and satisfied the judgment creditor, and it was held that he might maintain an action of debt upon the judgment, in the name of the original plaintiff, for his own benefit.

If the officer voluntarily pays the

debt, without being under any legal obligation to do so, it operates as a satisfaction of the judgment. *Morris v. Lake*, 9 Smed. & M. (Miss.) 521; 48 Am. Dec. 724; *Rollins v. Thompson*, 13 Smed. & M. (Miss.) 525; *Reed v. Pruyn*, 7 Johns. (N. Y.) 426; *Sherman v. Boyce*, 15 Johns. (N. Y.) 445; *Whittier v. Heminway*, 22 Me. 238; 38 Am. Dec. 309; *Martin v. Gowdy*, 1 Hill (S. Car.) 417; *Smith v. Herman*, 1 Coldw. (Tenn.) 141; *Harwell v. Worsham*, 2 Humph. (Tenn.) 524; 37 Am. Dec. 572; *Lintz v. Thompson*, 1 Head (Tenn.) 456.

So if the officer pays money to the plaintiff without any previous demand or request for its payment by the defendant, he may not maintain an action against the judgment debtor for reimbursement. *Jones v. Nelson*, 3 Johns. (N. Y.) 434; *Menderback v. Hopkins*, 8 Johns. (N. Y.) 436. But if an officer who is not delinquent purchases the judgment without making a levy, he may, by leave of court, have an execution issued thereon for his benefit. *Albany City Nat. Bank v. Kearney*, 9 Hun (N. Y.) 535.

If the officer, to avoid legal proceedings against him when he has become liable for the payment of the judgment debt, pays the same, he will be as much entitled to subrogation as if judgment had been obtained against him. *Staples v. Fox*, 45 Miss. 667; *Burbank v. Slinkard*, 53 Ind. 493.

But in *Tennessee*, it has been held that the liability of the officer must have been fixed by judgment of a court of competent jurisdiction, and that the judgment must have been satisfied before the officer will be entitled to subrogation. *Lintz v. Thompson*, 1 Head (Tenn.) 456; *Beal v. Smithpeter*, 6 Baxt. (Tenn.) 356.

Unless the officer takes an assignment of the judgment when he pays the debt, he will not be entitled to the benefit thereof as against other creditors having liens by judgment, or otherwise. *Clevinger v. Miller*, 27 Gratt. (Va.) 740; *Sherman v. Shaver*, 75 Va. 1; *Feemster v. Withrow*, 12 W. Va. 611; *People v. Onondaga*, 19 Wend. (N. Y.) 79.

In *Denson v. Ham* (Tex. 1891), 16 S. W. Rep. 182, it appeared that a judgment creditor sued out an execution and levied upon property which the officer surrendered upon the execution of an insufficient claim bond. The creditor then sued the officer for negligence, and it was held that the officer

5. Insurance Companies—*a*. SUBROGATION AGAINST CARRIERS.
 —When goods which are insured are lost or damaged through the fault or negligence of a carrier in whose possession they are for purposes of transportation, the insurer, upon payment of the loss to the owner of the goods, will be subrogated to the rights of such owner against the carrier.¹ The insurer's right to be thus subrogated may, however, be defeated by an express contract, between the owner and carrier of the goods, that the carrier shall have the benefit of any insurance on them in case of loss.² But if the contract of insurance contain an express stipulation that the insurer shall, in such case, be subrogated to the owner's rights against the

had a right to have the obligors in the bond made parties to the action, and to have judgment over against them for the amount recovered from him, the bond being good as a common-law bond, although insufficient under the statute.

1. *Hall v. Nashville, etc., R. Co.*, 13 Wall. (U. S.) 367; *The Sydney*, 27 Fed. Rep. 119; *Garrison v. Memphis Ins. Co.*, 19 How. (U. S.) 312; *Monticello v. Mollison*, 17 How. (U. S.) 152; *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584; *The Frank G. Fowler*, 8 Fed. Rep. 360; *The Montana*, 17 Fed. Rep. 377; *Phenix Ins. Co. v. Liverpool, etc., S. S. Co.*, 22 Blatchf. (U. S.) 372; *Insurance Co. v. The C. D. Jr.*, 1 Woods (U. S.) 72; *Sun Mut. Ins. Co. v. Kountz Line*, 122 U. S. 583; *Hibernia Ins. Co. v. St. Louis, etc., Transp. Co.*, 10 Fed. Rep. 596; *Georgia, etc., Ins. Co. v. Dawson*, 2 Gill (Md.) 365; *Louisville, etc., R. Co. v. Manchester Mills*, 88 Tenn. 653; *Kentucky Marine Ins. Co. v. Western, etc., R. Co.*, 8 Baxt. (Tenn.) 26; *Brown v. Hodgson*, 4 Taunt. 189; *Coles v. Bulman*, 6 C. B. 184; 60 E. C. L. 184; *Bradburn v. Great Western R. Co.*, L. R., 10 Exch. 1. See also *CARRIERS OF GOODS*, vol. 2, p. 837, note 2, and cases there cited.

In *Hall v. Nashville, etc., R. Co.*, 13 Wall. (U. S.) 367, Strong, J., said: "It is too well settled by the authorities to admit of question that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered but one person, having together

the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty. Standing thus, as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence it has often been ruled that an insurer, who has paid a loss, may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss."

But in *Carroll v. New Orleans, etc., R. Co.*, 26 La. Ann. 447, where goods were insured and destroyed by fire while in the hands of the railroad company for transportation, the insurance company paid the loss and brought suit in the name of the assured against the railroad company, it was held (Taliaferro and Wyly, JJ., dissenting) that the insurance company had no right of subrogation against the railroad company in the absence of formal stipulation in their policy giving them such right.

2. *Mercantile Mut. Ins. Co. v. Callebs*, 20 N. Y. 173; *Platt v. Richmond, etc., R. Co.*, 108 N. Y. 358; *Phenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312; *Rintoul v. New York Cent., etc., R. Co.*, 21 Blatchf. (U. S.) 439.

In *Rintoul v. New York Cent., etc., R. Co.*, 21 Blatchf. (U. S.) 439, it appeared that the bill of lading contained a stipulation that the carrier should have the full benefit of any insurance

effected on account of the goods covered by such bill. Shipman, J., said: "In the absence of any contract on the subject, if the insured owner accepts payment from the insurers they may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss. The right rests upon the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. The suit cannot be in the name of the insurers. (*Hall v. Nashville, etc., R. Co.*, 13 Wall. (U. S.) 367; *Hart v. Western R. Co.*, 13 Met. (Mass.) 99; 46 Am. Dec. 719; *Mercantile Mut. Ins. Co. v. Calebs*, 20 N. Y. 173; *Connecticut Mut. L. Ins. Co. v. New York, etc., R. Co.*, 25 Conn. 265; 65 Am. Dec. 571.) By the contract in question the owner agrees that as between him and the carrier the latter, when he has paid for the loss, may have the benefit of the insurance. This contract will probably interfere with the benefit which the insurer would otherwise obtain by virtue of being subrogated to the rights of the owner, or by having an equitable assignment to the owner's interest in the policy. But the mere fact, in the absence of fraud, that the insurers may not occupy the same position which they would have had if the provision had not been inserted, is not sufficient to justify an opinion that the provision is unreasonable."

In *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, the bill of lading contained a stipulation allowing the carrier the benefit of any insurance procured by the owner. It was held that in the absence of fraudulent concealment or misrepresentation the insurer could maintain no action against the carrier upon any terms inconsistent with the stipulation. Gray, J., said: "Nor does this conclusion impair any lawful rights of the insurer. His right of subrogation arising out of the contract of insurance and payment of the loss is only to such rights as the assured has by law or contract against third parties. The policy contained no express stipulation upon the subject, and there being no evidence of any fraudulent concealment or misrepresentation by the owner in obtaining the insurance, the existence of the stipulation between the owner and the carrier would have afforded no defense to an action on the policy, according to two careful judgments rendered in June

last, and independently of each other, the one by the English court of appeals and the other by the supreme judicial court of *Massachusetts*. *Tate v. Hyslop*, 15 Q. B. Div. 368; *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508." Bradley, J., dissented from this view, expressing it as his opinion that the owner of the goods had no right to agree with the carrier behind the insurer's back that the insurer should have no right of subrogation against the carrier, but that the carrier should have such right against him, thus changing the law by their private agreement.

In the *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475, it appears that cotton was shipped over the defendant's road and a bill of lading given in which there was a stipulation that the carrier should have the benefit of the insurance. The cotton was insured by the plaintiff company. The certificate of insurance described the cotton as having been already shipped. Upon the destruction of the cotton the insurance company paid for the same and took from the owner a transfer of his claim against the railway company. But it was held that the insurance company was chargeable with notice of the reservation contained in the bill of lading to the effect that if loss occurred while the cotton was in charge of the railroad company and that loss was satisfied by it, the railroad company should be entitled to the insurance money due on the cotton and that the railroad company had every right which the reservation could confer when the insurance was effected.

But it appears that the fact that the contract of carriage is made prior to that of insurance is immaterial.

In *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508, cotton was bought by the plaintiff's agent in the South and shipped to him, a bill of lading containing a stipulation for the benefit of insurance, being given for the same. Plaintiff had an open policy of insurance on which he brought suit against the insurance company for the value of the cotton, which was destroyed *in transitu*. And it was held that if a policy of insurance on goods in transit contains no clause specifically subrogating the insurer to the rights of the insured in case of loss through the fault of the carrier, it is no defense to an action on the policy for a loss insured against, that the insured has by contract with the carrier given him the

carrier, the owner cannot defeat the insurer's right of subrogation by contract with the carrier without forfeiting his own rights under the contract of insurance.¹ In an action for the benefit of an insurer, who has become subrogated to the rights of the owner of

benefit of any insurance effected, if there is no fraud or concealment on the part of the insured in effecting the insurance. The court said: "As the insurance company obtains its remedy against the carrier, not by virtue of any contract of its own with him, but through the contract of the owner of the goods, such owner may make the contract of carriage so as to suit his own interests, provided there is no fraudulent concealment from the insurer and the right which the insurer obtains is subject to the agreement made with the carrier. . . . The owner is under no obligation to contract so that he shall have a remedy against the carrier under every circumstance in which the carrier has been held liable by the common law. If he may accept a receipt excusing the carrier from liability for fire and still hold the insurer, he may also make a contract that the insurance shall be for the benefit of the carrier."

In *Cincinnati, etc., R. Co. v. Spratt*, 2 Duv. (Ky.) 4, it was held that where a contract of affreightment contains a provision entitling the carrier, in the event of his own liability for damages, against which the consignor has obtained insurance, to recover the amount from the underwriter, the carrier must pay the damages before he can claim such right.

1. *Carstairs v. Mechanics', etc., Ins. Co.*, 18 Fed. Rep. 473; *Inman v. South Carolina R. Co.*, 129 U. S. 128; *Insurance Co. of N. A. v. Easton*, 73 Tex. 167.

In *Carstairs v. Mechanics', etc., Ins. Co.*, 18 Fed. Rep. 473, goods which were covered by an insurance policy were shipped under a bill of lading, which provided that in case of loss, by which the railroad company incurred liability, the railroad company should have the benefit of any insurance which might have been effected on the goods. But in the policy of insurance on the goods, it was also stipulated that the insurance company should, in case of loss, be subrogated to all claims against the carrier. The goods were destroyed in a railroad collision and the owner brought his action against the insurance company, and it was held that

by entering into a contract with the carrier, whereby he had defeated the insurance company's right of subrogation, he had forfeited his right to recover the amount of the loss from the insurance company.

In *Inman v. South Carolina R. Co.*, 129 U. S. 128, there were similar stipulations in the bill of lading and the policy of insurance respectively, and the court held that any act of the owner which would defeat his claim against the carrier to which the insurer had a right to be subrogated by the contract of insurance would operate to cancel the liability of the insurer; but it was held that the agreement in the policy of insurance that the insurer should be subrogated to the rights of the insured against the carrier would not operate, as between the owner and carrier, to relieve the carrier from the consequences of its own negligence, notwithstanding the benefit of the insurance for which it had stipulated could not be made available.

In *Insurance Co. of N. A. v. Easton*, 73 Tex. 157, there was an express warranty in the policy of insurance that the insurance should not inure to the benefit of any carrier. And in an action by the insured against the insurer it was held that his contract with the carrier, stipulating to give the latter the benefit of the insurance, was a forfeiture of his rights under the policy of insurance.

In *Fayerweather v. Phoenix Ins. Co.*, 118 N. Y. 324, it appeared that the plaintiff shipped a cargo of leather under a bill of lading which provided that the carrier should have the full benefit of any insurance which might have been effected upon the goods. The goods were insured under a policy which provided that in case of loss the insurer should be subrogated to the rights of the insured to all claims against the transporters of the merchandise not exceeding the amount paid by the insurer. The goods having been injured through the negligence of the carrier's employes, plaintiff brought his action on the policy to recover the amount of the loss from the insurance company, and it was held that the provision in the bill of lading cut off the

goods, the carrier cannot avail himself of any defenses which the insurer might have interposed in an action on the contract of insurance.¹ And it is no defense to an action by the owner of the property against the wrongdoer that the owner has received satisfaction from an insurance company. The insurer does not stand

insurer's right to be subrogated to the rights and remedies of the owner against the defaulting carrier, and that, therefore, the plaintiff's right to recover upon the policy was defeated. The case is distinguishable from *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508, where the policy of insurance contained no stipulation for the subrogation of the insurance company to the rights of the insured, and the plaintiff was allowed to recover against the insurance company; and from *Inman v. South Carolina R. Co.*, 129 U. S. 128, where the bill of lading and the policy of insurance both contained the stipulations under consideration; but the plaintiff brought his action, in which he was allowed to recover, against the carrier instead of the insurance company.

In *Gulf, etc., R. Co. v. Zimmerman*, 81 Tex. 605, it appeared that a quantity of cotton was shipped over the road of the plaintiff in error, and a bill of lading, providing that the carrier should have the benefit of any insurance on the cotton, was given the shipper. The cotton was insured, but the policy stipulated that it was not to cover the common-law liability of the common carrier; and further provided that in case the goods were lost, damaged or destroyed while in the care of any common carrier the insurance company should advance to the insured an amount equivalent to the loss so sustained pending investigation and determination as to whether such loss was one for which the carrier should be liable at common law, and if the carrier were found liable the shipper should return to the insurer, immediately upon its receipt, the amount recovered from the carrier, which should be taken as repayment in full of the amount so advanced. A portion of the cotton while on the cars was destroyed by fire through the negligence of the railroad company and the insurance company made the advance provided for in the policy. The consignor brought an action against the railroad company for the value of the cotton so destroyed and the claim was resisted on the ground that the loss had been

paid by the insurance company and that the carrier was entitled under the stipulation in the bill of lading to the benefit of such payment. But it was held that the carrier was liable for the loss. The court, speaking of the certificate of insurance issued for this particular shipment, said: "It was issued with reference to the provisions of the policy and all losses arising thereunder were adjusted according to the stipulations and conditions of the policy. A contract of insurance so limited, the parties could certainly make. And it would seem that the limitation would be reasonable and in the exercise of prudence that the insurer should not, without consideration passing to him or to the owner, be held to indemnify against the negligence of the carrier."

1. *Insurance Co. v. The "C. D. Jr."*, 1 Woods (U. S.) 72; *Amazon Ins. Co. v. The Iron Mountain*, 1 Flip. (U. S.) 616; *Pearse v. Quebec Steam Ship Co.*, 24 Fed. Rep. 285; *The Sidney*, 23 Fed. Rep. 96; *Sun Mut. Ins. Co. v. Mississippi Valley Transp. Co.*, 17 Fed. Rep. 919.

In *Insurance Co. v. The "C. D. Jr."*, 1 Woods (U. S.) 72, it was held that where insured property was committed to the custody of a common carrier for transportation and was lost, and the insurance company paid the owner the value of the property, it might maintain an action against the carrier for the same, although it was not legally bound to indemnify the insured for the loss.

In *Sun Mut. Ins. Co. v. Mississippi Valley Transp. Co.*, 17 Fed. Rep. 919, the carrier insisted that a portion of the goods lost were not covered by the policy of insurance, and therefore the insurance company had no right to pay for the same and recover against the carrier. But it was held that if the insurance company saw fit to waive the objection and treat the loss as within the policy by paying it, the carrier could not be heard to object, for the reason that its liability to the shipper was clear, and it was in no wise injured by being called upon to make payment to the insurer instead of the insured.

in the relation of a joint tort-feasor with the trespasser.¹ But in such action the carrier may set up any defense which would have been available to him in an action against him by the owner of the goods.² There is no privity of contract in such cases between the insurer and the carrier, and the insurer should, as a rule, pursue his remedy in the name of the insured;³ but in admiralty courts, the insured may proceed against the carrier in his own name.⁴

1. In *Monticello v. Mollison*, 17 How. (U. S.) 153, the court said: "The defense set up in answer that the libellants have received satisfaction from the insurers, cannot avail the respondent. The contract with the insurer is in the nature of a wager between third parties with which the trespasser has no concern. The insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others. This is a doctrine well established at common law and received in the courts of equity. See *Yates v. Whyte*, 4 Bing. N. Cas. 272; 33 E. C. L. 349; *Phil. on Ins.* 2163; *Abb. on Sh.* 318."

And in *Gales v. Hailman*, 11 Pa. St. 515, it was held that where the insured had received partial payment for his loss from an insurance company and brought an action against the carrier for the full amount of the loss, the carrier might be restrained from setting up such partial payment as a defense to the action.

2. *Germania F. Ins. Co. v. Memphis*, etc., R. Co., 72 N. Y. 90; 28 Am. Rep. 113; citing *Hall v. Nashville*, etc., R. Co., 13 Wall. (U. S.) 367.

In *Hibernia Ins. Co. v. St. Louis*, etc., Transp. Co., 120 U. S. 166, the carrier set up the defense that the goods were lost by inevitable accident, and it was held to be a good defense against the insurance company's claim. See also the *Frederick E. Ives*, 25 Fed. Rep. 447; *The B. B. Saunders*, 25 Fed. Rep. 727.

3. *Hall v. Nashville*, etc., R. Co., 13 Wall. (U. S.) 367; *Gales v. Hailman*, 11 Pa. St. 515; *Louisville*, etc., R. Co. v. *Manchester Mills*, 88 Tenn. 653; *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 58; 24 Am. St. Rep. 586.

In *Hall v. Nashville*, etc., R. Co., 13 Wall. (U. S.) 367, the court said: "There is a large class of cases in which attempts have been made by insurers who had paid a loss to recover from the party in fault for it, by suit in

their own right, and not in the right of the assured. Such attempts have failed, but in all the cases it has been conceded that suits might have been maintained in the name of the insured party for the use of the insurers. *Rockingham Mut. F. Ins. Co. v. Boshier*, 39 Me. 253; 63 Am. Dec. 618; *Peoria M. & F. Ins. Co. v. Frost*, 37 Ill. 333; *Connecticut Mut. L. Ins. Co. v. New York*, etc., R. Co., 25 Conn. 265; 65 Am. Dec. 571; and such is the English doctrine settled at an early period. *Mason v. Sainsbury*, 3 Dougl. 61; *Yates v. Whyte*, 4 Bing. N. Cas. 272; 33 E. C. L. 349; *Clark v. Blything*, 2 B. & C. 254; 9 E. C. L. 77; *Randal v. Cockran*, 1 Ves. 98."

In *Gales v. Hailman*, 11 Pa. St. 515, the court said: "As the author of the loss, therefore, the carrier is the party to bear it; and as the insurer who, in this case, bore a part of it for him, has a right to be reimbursed, there must be a remedy of some sort to enforce it. The shipper has sued on the contract of bailment, not only in his own right for the unpaid balance due to himself, but as a trustee for what has been paid by the insurer in ease of the carrier; and the supposed difficulty is to see how a legal and an equitable demand can be joined in the same action. But the title of the plaintiff is altogether legal, and his right of action is the same as that of an obligee who sues for a debt in part equitably assigned. . . . That the insurer may sue in the name of the shipper for reimbursement, where he has paid the entire loss, is shown by *Harford v. Maynard*, Marsh. Ins. 161; *Mason v. Sainsbury*, 3 Dougl. 61; *London Assurance Co. v. Sainsbury*, 3 Dougl. 245; *Clark v. Blything*, 3 Dowl. & R. 489."

4. *Monticello v. Mollison*, 17 How. (U. S.) 153; *Insurance Co. v. "C. D. Jr."*, 1 Woods (U. S.) 72; *The Sydney*, 27 Fed. Rep. 119.

In *Monticello v. Mollison*, 17 How. (U. S.) 153, the court said: "It is true that in courts of common law, the injured party alone can sue for a trespass,

b. SUBROGATION AGAINST TORT-FEASORS.—If insured buildings or other property be destroyed through the fault or negligence of some person other than the owner, the insurance company, upon payment of the loss, will be subrogated to the right of the owner to recover from the wrongdoer.¹ But it will be

as the damages are not legally assignable, and if there be an equitable claimant, he can sue only in the name of the injured party; whereas, in admiralty, the person equitably entitled may sue in his own name."

And in jurisdictions where it is provided by statute, that the real party in interest shall prosecute his own claim, the insurer, who has become subrogated to the rights of the insured, may proceed in his own name against the wrongdoer. *Marine Ins. Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 643; *Connecticut F. Ins. Co. v. Erie R. Co.*, 73 N. Y. 399; 29 Am. Rep. 171; *Hustisford Farmers' Mut. Ins. Co. v. Chicago, etc., R. Co.*, 66 Wis. 58.

1. *Clark v. Blything*, 2 B. & C. 254; 9 E. C. L. 77; *London Assurance Co. v. Sainsbury*, 3 Dougl. 245; *Quebec Assurance Co. v. St. Louis*, 7 Moore, P. C. 286; *North British, etc., Ins. Co. v. London, etc., Ins. Co.*, 5 Ch. Div. 569; *Darrell v. Tibbitts*, 5 Q. B. Div., 560; *Smidmore v. Australian Gas Light Co.*, 2 N. S. W. Law 219; *Mason v. Sainsbury*, 3 Dougl. 61; *Chicago, etc., R. Co. v. Pullman Southern Car Co.* 139 U. S. 79; *Pratt v. Radford*, 52 Wis. 114; *Deming v. Merchants Cotton Press, etc., Co.*, 90 Tenn. 306; *Home Mut. Ins. Co. v. Oregon, etc., Co.*, 20 Oregon 569; *Rockingham Mut. F. Ins. Co. v. Bosher*, 39 Me. 253; 63 Am. Dec. 618.

In *Burnand v. Rodocanachi*, 7 App. Cas. 339, Lord Blackburn said: "The general rule of law (and it is obvious justice) is, that where there is a contract of indemnity (it matters not whether it is a marine policy or a policy against fire on land, or any other contract of indemnity), and a loss happens, anything which reduces or diminishes that loss, reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back." Quoted

with approval by Cotton, L. J., in *Castellain v. Preston*, 11 Q. B. Div. 394; and by Harlan, J., in *Chicago, etc., R. Co. v. Pullman Southern Car Co.*, 139 U. S. 88.

In *Darrell v. Tibbitts*, 5 Q. B. Div. 560, it appeared that one Forbes was the owner of a house in Brighton, and demised the same to certain persons by a lease, which rendered the lessees bound to repair. Forbes insured the house in the Union Society, of which the plaintiff was secretary, by a policy against fire, covering injuries by explosion of gas. The corporation of Brighton, in repairing the streets, so injured a gas pipe that the gas escaped into the house, and injured the same by an explosion. Forbes sold the house and the policy to the defendant, who collected from the insurance company the amount of the loss. The lessors received compensation from the corporation of Brighton and repaired the injury to the house with the money received. The insurance company, upon hearing of the reinstatement of the house, claimed from the defendant the amount which it had paid him for the loss; and it was held that it was entitled to recover. Brett, L. J., said: "If the company cannot recover the money back, it follows that the landlord will have the whole extent of his loss as to the building made good by the tenants, and will also have the whole amount of that loss paid by the insurance company. If that is so, the whole doctrine of indemnity would be done away with. The landlord would be not merely indemnified, he would be paid twice over. . . . The doctrine is well established, that where something is insured against loss, either in a marine or a fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law, respecting the subject matter insured; and with regard to every contract which touches the subject matter insured, and which contract is affected by the loss, or the safety of the subject matter insured by reason of the peril insured against. So

that immediately after the insurance company had paid the landlord, they were put into his place with regard to the contract to rebuild, which was a contract respecting the subject matter insured, that is, the building; and which contract was affected by the safety or the loss of that building, by reason of the explosion, which was a peril insured against, and therefore they are to be subrogated, or to be put into the place of the landlord with regard to his rights; they might have sued in his name the tenants, if the latter had not repaired; and when the tenants have repaired, the insurance company are to have the benefit of those repairs."

In *Castellain v. Preston*, 11 Q. B. Div. 380 (reversing the judgment of Chitty, J., in the same case, 8 Q. B. Div. 614), it appeared that a house which was insured, was burned subsequently to the contract of sale, or before the conveyance was executed. The vendor collected the loss from the insurance company, but the vendee subsequently paid him the full amount of the purchase money, without abatement on account of the damage by fire; and it was held that the insurance company was entitled to recover from the vendor the amount which had been paid him on account of the damage to the property. Brett, L. J., said: "The case was tried before Chitty, J., and he in a very careful and elaborate judgment has come to the conclusion that the insurance company cannot recover against the defendants in respect to the money paid by them. It seems to me that the foundation of his judgment is this: that he considers that the doctrine of subrogation of the insurer into the position of the assured, is confined within the limits which prevent it from extending to the present case. . . .

The very foundation, in my opinion, of every rule which has been applied to insurance law, is this, viz.: that the contract of insurance contained in a marine or fire policy, is a contract of indemnity and of indemnity only; and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified; but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give the assured

a more than full indemnity, that proposition must certainly be wrong."

In *North British, etc., Ins. Co. v. London, etc., Ins. Co.*, 5 Ch. Div. 569, it appeared that certain wharfingers had a large quantity of grain and seed which belonged to other persons stored in their warehouse. They had a floating policy of insurance on the grain to cover their risk as warehousemen. A portion of the grain was also insured in other companies by the owners thereof. The grain was destroyed by fire, and in an action to determine the rights of the insurance companies *inter sese*, it was held that the grantors of the policies of insurers to the owners of the grain (in case they paid the losses), might be subrogated to rights of such owners against the wharfingers; but that the grantors of the policies to the wharfingers, having paid the losses, were not entitled to contribution from the other companies which had issued policies to the owners of the grain. See also *Deming v. Merchants' Cotton Press, etc., Co.*, 90 Tenn. 306, where a similar complication arose and was similarly decided.

Fires Caused by Railroad Locomotives.

—If insured property be destroyed by fire communicated from the engines of a railroad company, the insurance company paying the loss will be subrogated to the rights and remedies of the owner against the wrongdoers. *Connecticut F. Ins. Co. v. Erie R. Co.*, 73 N. Y. 399; 29 Am. Rep. 171; *Monmouth County Mut. F. Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107; *Weber v. Morris, etc., R. Co.*, 35 N. J. L., 409; *Hartford Ins. Co. v. Pennel*, 2 Ill. App. 609; *Peoria M. & F. Ins. Co. v. Frost*, 37 Ill. 333; *Swarthout v. Chicago, etc., R. Co.*, 49 Wis. 625; *Hart v. Western R. Co.*, 13 Met. (Mass.) 99; 46 Am. Dec. 719; *Holcombe v. Richmond, etc., R. Co.*, 78 Ga. 776; *St. Louis, etc., R. Co. v. Fire Assoc.* 55 Ark. 163; *Etna Ins. Co. v. Hannibal, etc., R. Co.*, 3 Dill. (U. S.) 1.

A judgment against a railroad company for damages to a building by fire communicated from its engines, will bar a later action by the same plaintiff for the destruction of other buildings by fire communicated from the building which was ignited by sparks from the engines, though the second action was brought for the benefit of an insurance company which had paid the plaintiff insurance on the buildings last destroyed. *Trask v. Hartford, etc., R. Co.*, 2 Allen (Mass.) 331.

entitled to no greater rights against the wrongdoer than are had by the insured.¹ In such jurisdictions as have no statutory provisions upon the subject, the action must be brought in the name of the assured.² In some jurisdictions, however, it may be brought in the name of the insurance company under statutes allowing actions to be brought "in the name of the real party in interest."³ If the underwriter refuse to contribute to the expenses of an action by the insured against the wrongdoer, he can recover from the insured only the surplus of the amount recovered by the latter from the wrongdoer after satisfying uncompensated losses and

1. *Midland Ins. Co. v. Smith*, 6 Q. B. Div. 561; *St. Louis, etc., R. Co. v. Com. Union Ins. Co.*, 139 U. S. 223; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312.

2. The assured will be allowed to conduct the action against the wrongdoer, but he will be liable for anything done by him in violation of his equitable duty toward the underwriter. *Com. Union Assur. Co. v. Lister*, L. R. 9, Ch. 483. The cause of action remains single and the insurer acquires a joint right therein with the owner; not a new and separate right of action. *London Assurance Co. v. Sainsbury*, 3 Dougl. 245; *Mason v. Sainsbury*, 3 Dougl. 61; *Yates v. Whyte*, 4 Bing. N. Cas. 272; 33 E. C. L. 349; *Clark v. Blything*, 2 B. & C. 254; 9 E. C. L. 77; 63 Am. Dec. 618; *Rockingham Mut. F. Ins. Co. v. Boshier*, 39 Me. 254; *Connecticut Mut. L. Ins. Co. v. New York, etc., R. Co.*, 25 Conn. 270; *Hart v. Western R. Co.*, 13 Met. (Mass.) 99; 46 Am. Dec. 719; *Rockingham Mut. F. Ins. Co. v. Boshier*, 39 Me. 254; 63 Am. Dec. 618.

3. *Code Civ. Proc., N. Y.* §§ 144, 147, 148; *Connecticut F. Ins. Co. v. Erie R. Co.*, 73 N. Y. 399; 29 Am. Rep. 171; *Marine Ins. Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 643; *Swarthout v. Chicago, etc., R. Co.*, 49 Wis. 625; *Hustisford Farmers' Mut. Ins. Co. v. Chicago, etc., R. Co.*, 66 Wis. 58; *St. Louis, etc., R. Co. v. Fire Assoc.*, 55 Ark. 163.

In *Swarthout v. Chicago, etc., R. Co.*, 49 Wis. 625, it was held that the owner of the property, whose claim for damages had not been fully satisfied, was properly joined as a party plaintiff with the insurance companies which were entitled to be subrogated to the rights of the owner against the wrongdoer. The court said: "But it was insisted that the facts stated show that the plaintiffs have no right to join in bringing a suit and that there is an im-

proper joinder of causes of action. It is said if the defendant is liable at all, it is separately and distinctly liable to each insurance company to the amount paid on its policy. But it seems to us it would be an intolerable rule to allow each insurance company to bring a separate suit. The railroad company might well say, where this is attempted, the claim is indivisible. There is but one wrongful act complained of; one loss, and one liability. It might well insist that the whole matter be litigated in one action. What objection there can be to allowing the owner to unite with the insurance companies in bringing one action to determine the liability of the defendant, we fail to perceive. Under the old practice, the action would probably have been brought in the name of the assured for the benefit of all concerned, but the code requires the action to be brought in the name of the real party in interest.

. . . It is obvious that if one of the insurance companies may bring a separate suit for the amount of its claim, each may. And as the aggregate amount of the policies falls short of the actual loss, Swarthout may sue for the balance. As we have said, a rule of law which would allow this to be done would operate most oppressively upon the railroad company."

And in *Home Mut. Ins. Co. v. Oregon R., etc., Co.*, 20 Oregon 569, it was held that where the value of the property destroyed exceeds the amount of insurance paid, the insurer paying the loss acquires thereby, only to the extent of the loss paid, a joint interest with the owner in the cause of action against the wrongdoer; and that in prosecuting such cause of action the owner of the property destroyed must be joined with the insurer paying the loss as a co-plaintiff. See also *Continental Ins. Co. v. Loud, etc., Lumber Co.*, 93 Mich. 139.

expenses incurred in the suit.¹ The owner must be fully indemnified for the loss of his property, before subrogation will be allowed to the insurer.² The insured cannot bar the insurer's right of action by executing a release of damages to the wrongdoer,³ though he may release the wrongdoer from all claim for

1. *Newcomb v. Cincinnati Ins. Co.*, 22 Ohio St. 382; 10 Am. Rep. 746.

2. *Pentz v. Aetna F. Ins. Co.*, 9 Paige (N. Y.) 568; *Dixon on Subrogation* 155 *et seq.*; *Kernochan v. New York Bowery F. Ins. Co.*, 17 N. Y. 436; *Woodsworth v. Corn Exchange, etc., Ins. Co.*, 5 Wall. (U. S.) 87; 2 Phillips' Ins. (5th ed.) 240, § 1512; *People's Ins. Co. v. Straehle*, 2 Cinn. Sup. Ct. (Ohio) 186; *Newcomb v. Cincinnati Ins. Co.*, 22 Ohio St. 382; 10 Am. Rep. 746; *National F. Ins. Co. v. McLaren*, 12 Ont. Rep. 682; *Home Mut. Ins. Co. v. Oregon R., etc., Co.*, 20 Oregon 569.

3. *Monmouth County Mut. F. Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107; *Tyler v. Aetna F. Ins. Co.*, 16 Wend. (N. Y.) 397; *Gracie v. New York Ins. Co.*, 8 Johns. (N. Y.) 245; *Timan v. Leland*, 6 Hill (N. Y.) 237; *Hart v. Western R. Co.*, 13 Met. (Mass.) 99; 46 Am. Dec. 719; *Brighthope R. Co. v. Rogers*, 76 Va. 443; *Smidmore v. Australian Gas Light Co.*, 2 N. S. W. Law 219; *Defourcet v. Bishop*, 18 Q. B. Div. 378; *Tate v. Hyslop*, 15 Q. B. Div. 368.

In *Connecticut F. Ins. Co. v. Erie R. Co.*, 73 N. Y. 399; 29 Am. Rep. 171, certain buildings were insured for a portion of their value. They were subsequently destroyed by fire through the negligence of the defendant. The owner received from the defendant a sum of money for his damages, and executed a release containing the statement that it was not to discharge the insurance company from his claim against it. The insurance company afterward paid the amount of the insurance to the owner of the building and brought its action against the wrong-doer to recover from it the amount so paid; and it was held that the release by the owner did not operate to discharge the wrong-doer from its obligation to reimburse the insurer. *Church, C. J.*, said: "It is insisted that as the assured has settled and released all his claim for damages, the plaintiff could acquire no right or remedy through him by equitable subrogation, or from him by assignment. This proposition implies an assumption of the controverted fact whether the as-

sured did release all claim. The answer to it is that the assured released only such damages as he could without interfering with his claim against the plaintiff; and the legal consequences must be regarded as a part of the exception, viz.: the right of the plaintiff to remedy over. This was as much reserved as the right to enforce the policy. That right could not be reserved without reserving the remedy. The power to enforce the policy having been expressly reserved, the parties could not take away the right of the plaintiff to the remedy which that reservation vested in him by law. Having made this agreement, so as to prevent the plaintiff from interposing this defense, they cannot object to the consequences which legally flow from it. The exception necessarily embraces the right of subrogation. It is not needful to consider whether the effects would not have been different if the assured had received the full amount of the loss. No injustice is done the defendant by the result indicated. It was liable for the whole loss, and the payment to the plaintiff of the amount of the policy will, with that already paid, not exceed that amount. It did not profess to pay the assured but a part of that amount, nor did the assured intend to receive but a part, and the legal construction of the contract accords with the principles of right and justice."

In *Niagara F. Ins. Co. v. Fidelity, etc., Co.*, 123 Pa. St. 516; 10 Am. St. Rep. 543, it appeared that a policy of fire insurance expressly provided that when the insurers should claim that the fire was caused by the wrongful act, or omission of another creating a cause of action, the insured on receiving payment on the policy should assign such cause of action to the insurer. After a gas explosion, chargeable to the negligence of the gas company, and resulting in damages to the building and loss by fire, the assured, before payment on the policy, settled with and released the gas company, the release not to affect the claim of the assured against the insurance companies. In an action on the contract of insurance it was held that the performance by the insurers could

injuries not covered by the policy, without impairing his rights against the underwriter.¹ If he obtain satisfaction from the wrongdoer, having previously received payment of the loss from the insurer, he must account therefor to the latter.² Payment by the insurer is no defense to the wrongdoer.³ The insurer cannot

not be enforced without an assignment of the claim of the assured, or an offer of such assignment as provided in the policy of insurance. See also *Phoenix Ins. Co. v. Parsons*, 56 N. Y. Super. Ct. 423.

In *Insurance Co. of N. A. v. Fidelity, etc., Co.*, 123 Pa. St. 523; 10 Am. St. Rep. 546, it was held that the insurers could not demand such assignment in advance of the discharge of their own liability on the policy, in the absence of an express covenant by the assured to assign to the insurer his cause of action against the wrongdoer through whose action the loss occurred.

In *Fidelity Title, etc., Co. v. People's Natural Gas Co.*, 150 Pa. St. 8, it appeared that property which was insured was injured by explosion in natural gas, caused by the negligence of the defendant. The owner of the property in consideration of a sum named, released the defendant from all claims of every kind arising out of the explosion, it being understood that the release did not affect the claim of the property owner against the insurance companies for loss occasioned by fire resulting from the explosion. It was held that the release was no bar to an action for the benefit of the insurers to recover the amount of the fire damages from the defendant; and that parol evidence was inadmissible to show that the intention of the parties was to bar the recovery of damages by fire as well as by explosion.

But in *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. Car. 213, it was held that an insurance company should not be subrogated to a right of action which the assured had agreed to release before the policy of insurance was issued.

1. *Insurance Co. of N. A. v. Fidelity, etc., Co.*, 123 Pa. St. 523; 10 Am. St. Rep. 546.

2. *Commercial Union Assurance Co. v. Lister*, L. R., 9 Ch. 483; *Darrel v. Tibbetts*, 5 Q. B. Div. 560; *North British, etc., Ins. Co. v. London, etc., Ins. Co.*, 5 Ch. Div. 569; *Burnand v. Rodocanachi*, 7 App. Cas. 333; *Castellain v. Preston*, 11 Q. B. Div. 380; *Randal v. Cockran*, 1 Ves. 98; *Yates v. Whyte*, 4 Bing. N. Cas. 272; 5 Scott 640; 33 E. C. L. 349; *Hart v. Western R. Co.*, 13

Met. (Mass.) 107; 46 Am. Dec. 719 (per Shaw, C. J.).

In *Hart v. Western R. Co.*, 13 Met. (Mass.) 99; 46 Am. Dec. 719, fire was communicated from the locomotive of a railroad company to a house which was insured. The owner of the house recovered the loss from the insurance company and then sued the railroad company for the whole loss and it was held that he was entitled to recover. Shaw, C. J., said: "The liability of the railroad company is, in legal effect, first and principal, and that of the insurer secondary; not in order of time but in order of ultimate liability. The assured may first apply to whichever of these parties he pleases; to the railroad company by his right at law, or to the insurance company in virtue of his contract. But if he first applies to the railroad company to pay him, he thereby diminishes his loss by the application of a sum arising out of the subject of the insurance; to wit, the building insured and his claim is for the balance. And it follows as a necessary consequence that if he first applies to the insurer and receives his whole loss, he holds the claim against the railroad company in trust for the insurers. Where such an equity exists, the party holding the legal right is conscientiously bound to make an assignment in equity to the person entitled to the benefit; and if he fails to do so, the *cestui que trust* may sue in the name of the trustee and his equitable interests will be protected."

3. *Mason v. Sainsbury*, 3 Dougl. 61; *Yates v. Whyte*, 4 Bing. N. Cas. 272; 33 E. C. L. 349; *Clark v. Blything*, 2 B. & C. 254; 9 E. C. L. 77; *Cunningham v. Evansville, etc., R. Co.*, 102 Ind. 478; *Perrott v. Shearer*, 17 Mich. 48; *Hayward v. Cain*, 105 Mass. 213; *Weber v. Morris, etc., R. Co.*, 35 N. J. L. 409; *Harding v. Townshend*, 43 Vt. 536; 5 Am. Rep. 304. See the analogous cases of *Sherlock v. Alling*, 44 Ind. 184; *Ohlo, etc., R. Co. v. Dickerson*, 59 Ind. 317.

In *Weber v. Morris, etc., R. Co.*, 35 N. J. L. 409, buildings which were insured were burned by actionable negligence

bring action against the wrongdoer for a portion only of the claim of the insured, for damages.¹

c. MARINE INSURANCE—(See also MARINE INSURANCE, vol. 14, p. 355).—If a ship be abandoned at sea, either because of the dangers of navigation or an unlawful seizure, the property vests in the underwriter as of the date of the abandonment.² And whatever is afterwards recovered, either of the property itself or of money in compensation for the loss thereof, belongs to the underwriter.³ An underwriter who has paid a loss resulting from

of the railroad company. The owner recovered the entire loss from the insurance company, and then sued the railroad company to recover the same for the benefit of the insurance company. The defendant demurred to the declaration, on the ground that it appeared in the same, that the plaintiff had received entire compensation for his loss from the insurance company. The demurrer was overruled. The court said: "Notwithstanding such payment, an action will lie by the insured against the railroad company. The insurance is to be treated as a mere indemnity, and the insured and insurer regarded as one person; therefore payment by the insurer before suit brought, cannot affect the right of action.

"In *Mason v. Sainsbury*, 3 Dougl. 61, suit was brought on the riot act to recover damages for the demolition of a house in the riot of 1780. The property having been insured in a fire office, which paid the loss, the action was in the name of the insured, for the benefit of the insurance office.

"Lord Mansfield held that payment by the insurer was not in ease of the Hundred, and not as co-obligors, and that the case must be considered as if not a farthing had been paid. 'He likened it to the case of abandonment in marine insurance, where the insurer is constantly put in the place of the insured.'

"Chief Justice Abbott, in citing the case of *Mason v. Sainsbury*, in *Clark v. Blything*, 2 B. & C. 254; 9 E. C. L. 77, says he could not entertain any doubt of its propriety; and he held that where the owner of certain stacks of hay and corn, which were maliciously set on fire, received the amount of his loss from the insurance office, he might, nevertheless, maintain his action against the Hundred.

"In *Yates v. Whyte*, 4 Bing. N. Cas. 272; 33 E. C. L. 349, which was the case of a collision at sea, the plaintiff recovered his whole loss, notwithstand-

ing his prior recovery of a portion of it from the underwriters, the court saying that the plaintiff would hold in trust for the underwriters such portion as they had paid him.

"These cases are referred to, and their authority recognized, by Chief Justice Shaw, in *Hart v. Western R. Co.*, 13 Met. (Mass.) 99; 46 Am. Dec. 719; and in the *Monmouth County Mut. F. Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107, this rule is said to be settled."

1. In *Continental Ins. Co. v. Loud, etc.*, *Lumber Co.*, 93 Mich. 139, it appeared that insured property was destroyed by fire through the negligence of the defendant company. The property so lost was insured in several companies which paid their proportionate parts of the loss. The plaintiff company undertook to recover from the wrong-doer its proportionate part of the loss in a separate action. The court held that all the insurance companies, entitled to be subrogated to the owner's claim for any part of the loss, should have been made parties to the action; and reversed a judgment for the plaintiff on the ground that causes for action, either in tort or contract, could not thus be split up.

2. See MARINE INSURANCE, vol. 14, p. 398, note 2.

3. In *Randal v. Cockran*, 1 Ves. 98 (per Lord Hardwicke), it appeared that the king of *England* had granted letters of reprisal against the merchant ships of *Spain*, and a number of ships having been taken thereunder, it was ordered that the net proceeds of the ships so taken should be distributed, one half among the officers and sailors of the ships which had made the captures, and the other half among such of the king's subjects as had suffered by the unjust seizures and depredations of the Spaniards. The moiety of the proceeds which was ordered to be distributed among the sufferers from Spanish depredations was claimed by the underwriters

who had paid their losses, and it was held that they were entitled to it, as they were to take the place of the original sufferers and to have all their rights.

To the same effect is *Blaauwpot v. Da Costa*, 1 Eden 130 (per Lord Northington).

So where ships are unlawfully seized or destroyed, and the government, whose citizens are at fault, grants indemnity to the sufferers, the underwriters who have paid for the property so taken or destroyed have a right to the indemnity so granted. *Comegys v. Vasse*, 1 Pet. (U. S.) 214 (per Story, J.); *Gracie v. New York Ins. Co.*, 8 Johns. (N. Y.) 237 (per Kent, C. J.).

But in *Burnand v. Rodocanachi*, 5 C. P. Div. 424, it appeared that the defendant had effected with underwriters valued policies of insurance, including war risks on a cargo which was afterwards destroyed by the Confederate cruiser *Alabama*, and the underwriter paid the valued amounts as for a total loss, which amounts were less than the real value of the property. The *United States* subsequently paid to the defendant out of the fund provided by *Great Britain* to make good such losses, the difference between the real loss and the amount he had received from the insurers of the cargo. Under the act of Congress providing indemnity for such sufferers, no claim was allowed for any loss for which compensation was received from any insurer, but if such compensation were not equal to the actual loss, allowance might be made for the difference. The underwriters sued the defendant to recover such compensation money, and it was thought by Lord Coleridge, C. J., that the rights of the defendants arose out of the subject-matter of the insurance, and that the valuation in the policy was conclusive between the plaintiffs and defendants, and he gave judgment for the plaintiffs, relying upon the authority of *Randal v. Cockran*, 1 Ves. 98; *Blaauwpot v. Da Costa*, 1 Eden 130, and the opinion of Chancellor Kent, in *Gracie v. New York Ins. Co.*, 8 Johns. (N. Y.) 237.

The case was appealed in the court of appeals, 6 Q. B. Div. 633, which reversed the judgment, on the ground that the money could not have been recovered by the defendant in any court, and that as he had no enforceable rights to which the plaintiffs could be subrogated, the indemnity must be

considered as a pure gift from the government of the *United States*; especially as the act of Congress expressly excluded insurance companies from the benefits of such indemnity. On appeal to the House of Lords, 7 App. Cas. 333, the order of the court of appeals was affirmed. Lord Selburn said: "Here it is admitted that there is in the act of Congress everything said and done which a supreme legislature could possibly say or do for the purpose of excluding the present claim and attributing that fund which has been appropriated in this case to the sufferers by the capture, not to the valued part but to the unvalued part of the loss. That distinction, which, in my opinion, does exclude for this purpose the part covered by the valuation of the policy of insurance is made by the act of Congress. It was a true and *bona fide* valuation, but did not cover the actual loss. The fund awarded by the act of Congress of the *United States* is only for that part of the actual loss which the valuation did not cover and which the insurers have not paid."

A distinction was made between *Randal v. Cockran*, 1 Ves. 98, and *Blaauwpot v. Da Costa*, 1 Eden 130. In these cases the proclamation of the king awarding the indemnity to the sufferers did not confine it to the unvalued part of the losses, whereas in the case at bar it was expressly confined to such unvalued part.

In *Mercantile Marine Ins. Co. v. Corcoran*, 1 Gray (Mass.) 75, it appears that goods insured by a marine policy were seized by the government of *Mexico* and abandoned to the underwriters, who accepted the abandonment and paid the amount insured; subsequently the *United States* government entered into a convention with *Mexico* providing for the appointment of commissioners to decide upon claims against *Mexico*; and the commissioners so appointed made an award in favor of the original assured, who afterwards assigned his interest in said award. By the treaty of 1848 the *United States* agreed to pay these claims and the amount so awarded to the assured was by the *United States* commissioners allowed to his assignee. The underwriters made no claim before either set of commissioners and first gave notice after the allowance had been made that they claimed an interest in the property insured. It was held that the abandonment to the underwriters and

injury to, or destruction of, a ship or cargo, is entitled to be subrogated to any rights the owner may have to indemnity from those primarily liable for the loss.¹

It is not necessary that there be an abandonment of the property insured upon a marine policy in order that the underwriter may be subrogated to the rights of an owner who has been fully

their acceptance thereof passed to them the property in the goods abandoned with all the rights of the assured to compensation for the seizure by the Mexican government; but by reason of their laches in asserting their rights they could not maintain the action against him as for money had and received.

1. North of England, etc., Ins. Assoc. v. Armstrong, L. R., 5 Q. B. 244; Yates v. Whyte, 4 Bing. N. Cas. 272; 5 Scott 640; 33 E. C. L. 349; White v. Dobinson, 14 Sim. 273; Quebec Assurance Co. v. St. Louis, 7 Moore, P. C. 286; The Thyatira, 8 Pro. Div. 155; Dickenson v. Jardine, L. R., 3 C. P. 639; Wilson v. Rafalovich, 7 Q. B. Div. 553; Simpson v. Thompson, 3 App. Cas. 279; Mercantile Marine Ins. Co. v. Corcoran, 1 Gray (Mass.) 75; Lord v. Neptune Ins. Co., 10 Gray (Mass.) 126; Mercantile Marine Ins. Co. v. Clark, 118 Mass. 288; Home Ins. Co. v. Western Transp. Co., 4 Robt. (N. Y.) 257; Atlantic Ins. Co. v. Storrow, 5 Paige (N. Y.) 285; Williams v. Hays, 64 Hun (N. Y.) 202; Globe Ins. Co. v. Sherlock, 25 Ohio St. 50; Fretz v. Bull, 12 How. (U. S.) 466; The Bristol, 29 Fed. Rep. 867; The Potomac, 105 U. S. 630; Phoenix Ins. Co. v. Erie, etc., Transp. Co., 117 U. S. 312; Liverpool, etc., Steam Co. v. Phoenix Ins. Co., 129 U. S. 397 and 464.

Where shipowners are liable to the assured for a loss by theft for which the underwriters are also liable, if there is an abandonment for total loss, and the insurer pays the amount of such loss, he is entitled in equity to be subrogated to the rights of the assured as against the shipowners. And if the assured cancels the bill of lading or discharges the claim against the shipowners for the loss after he has obtained judgment against the underwriters, the court of chancery will relieve the latter against the judgment *pro tanto*. Atlantic Ins. Co. v. Storrow, 5 Paige (N. Y.) 285.

Upon the payment of the damages the insurer may be subrogated to all the rights of the insured against persons answerable for bad stowage and

dunnage. Georgia Ins., etc., Co. v. Dawson, 2 Gill (Md.) 365.

The fact that judgment has been recovered by the master as part owner, against the underwriter on a policy issued to him, does not affect the right of the underwriter or his assignee, to maintain an action against the master through whose negligence the loss occurred, to recover insurance paid to other part owners on another policy. Williams v. Hays, 64 Hun (N. Y.) 202.

In case goods insured upon a marine policy are jettisoned, it is not necessary that the owner claim general average contributions from the owners of the vessel and the rest of the cargo before proceeding against the underwriter. He may collect his insurance and the underwriter will be subrogated to his right to claim contribution. Maggrath v. Church, 1 Cal. (N. Y.) 196; 2 Am. Dec. 173 (per Kent, J.); Lord v. Neptune Ins. Co., 10 Gray (Mass.) 109, 126; Potter v. Providence, etc., Ins. Co., 4 Mason (U. S.) 298.

In Lapsley v. Pleasants, 4 Binn. (Pa.) 502, the court refused to follow the rule laid down in Maggrath v. Church, 1 Cal. (N. Y.) 198, and held that the owner of jettisoned goods must claim contribution from the other owners before proceeding against the underwriter. The question arose in the court of common pleas in *England* in Dickenson v. Jardine, L. R., 3 C. P. 639, and Bovill, C. J., delivering the opinion of the court said: "I think the rule is correctly stated in Phillips on Insurance (3d ed.), vol. 2, § 1348, as follows: 'It is not a condition that the assured on goods must claim contribution of the other parties for a jettison before he can demand indemnity from his underwriters. He may demand of them in the first instance.' There seems to have been a decision in the court of *Pennsylvania*, Lapsley v. Pleasants, 4 Binn. (Pa.) 502, to the contrary effect. But there had been an earlier decision in the court of *New York*, Maggrath v. Church, 1 Cal. (N. Y.) 196; 2 Am. Dec. 173, in which the underwriters had been held liable for

indemnified.¹ But in case there is no abandonment, the owner must be fully indemnified for his loss before the underwriter can claim the right of subrogation.²

the whole amount insured. And in a later case in the circuit court of the *United States*, *Potter v. Providence, etc., Ins. Co.*, 4 Mason (U. S.) 298, Story, J., delivering the judgment of the court, after citing both cases, followed the earlier decision and laid down the rule as Phillips has done. Pothier's *Traite du contra d'Assurance*, § 52, is to like effect."

1. *The Frank G. Fowler*, 8 Fed. Rep. 360; *Pearse v. Quebec Steamship Co.*, 24 Fed. Rep. 285.

In *Hall v. Nashville, etc., R. Co.*, 13 Wall. (U. S.) 367, the court said: "But it is a mistake to assert that the right of insurers in marine policies to proceed against a carrier of goods after they have paid a total loss, grows wholly, or even principally out of an abandonment. There can be no abandonment where there has been total destruction. There is nothing upon which it can operate and an insured party may recover for a total loss without it. It is laid down in Phillips on Insurance, § 1723, that 'a mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may afterwards be recovered from other parties on account of the loss,' and that 'the effect of a payment of a loss is equivalent in this respect to that of abandonment.'"

2. In *Tunno v. Edwards*, 12 East 488, it appeared that goods insured upon a valued policy were seized, confiscated, and sold by order of the enemy's government. The underwriters upon application of the owners for payment of the loss agreed to adjust and pay fifty per cent. of the amount at once. But no abandonment was made by the assured. In the meantime the foreign government restored to the consignees one-half the proceeds of the goods, which one-half amounted to more than the whole sum at which they were valued in the policy. The underwriters laid claim to the indemnity, but it was held that they were not entitled to it, as there had been an actual loss of one-half of the goods, for which the owner was no more than compensated, and there was no abandonment to the underwriters. Lord Ellenborough, C. J., said: "Now though the assured has lost one-half his goods and only one-half, and the underwriter has paid but

for one-half, the latter claims to be paid his fifty pounds per cent. upon the ground that this was a total loss and that the assured has received the full value of the sum insured of the proceeds of the other one-half. But in order to make it a total loss, there ought to have been an abandonment, which there has not been. Therefore, there is no ground for the underwriter's claim."

But if there is an abandonment or a payment as for a total loss, which is equivalent to an abandonment, the underwriter will be entitled to the indemnity, even though the owner is not himself fully indemnified. To illustrate: In *North of England, etc., Ins. Assoc. v. Armstrong, L. R.*, 5 Q. B. 244, it appeared that a ship was insured upon a valued policy; the agreed value being much less than the actual value. The ship was run down by another ship and the underwriters paid the owners the amount named in the policy as for a total loss. Afterwards damages were recovered in the court of admiralty against the owners of the ship which ran her down, and the underwriters claimed the full amount of such damages, notwithstanding the assured had not been compensated for the full amount of his loss. It was held that as between the underwriters and the assured, the value must be taken as named in the policy for all purposes, and that the damages recovered belonged entirely to the underwriters. Cockburn, C. J., said: "We are satisfied that our judgment must be in favor of the plaintiffs; and I ground my judgment upon the general proposition, that where the value of a thing insured is stated in the policy in a manner to be conclusive between the two parties, the insurer and the insured, as regards the value, then, in respect of all rights and obligations which arise upon the policy of insurance, the parties are estopped between one another from disputing the value of the thing insured as stated in the policy. Now, I take it to be clearly established, in the case of a total loss, that whatever remains of the vessel in the shape of salvage, or whatever rights accrue to the owner of the thing insured and lost, they pass to the underwriter the moment he is called upon to satisfy

The underwriter does not acquire by subrogation any rights which the assured himself could not enforce.¹ If he rejects a proffered abandonment, and compromises with the assured, he thereby loses his right of subrogation.² After abandonment, the insurer of a ship will be entitled to her freight earnings; before abandonment, they belong to the owner. The gross sum will be apportioned between them *pro rata itineris*.³ In the admiralty

the exigency of the policy, and he does satisfy it. It is admitted that if the ship has been recovered from the bottom of the sea by any of the contrivances of modern skill and science available for that purpose, the body of the vessel would have passed to the underwriters. If, moreover, her value had proved to be more than the estimated value in the policy, the underwriters would still have been entitled to the vessel so recovered. And I think it is clear, also, where we have, instead of the ship, the supposed value of the ship, or so much of it as the delinquent vessel could be called upon to contribute for the loss, that what is recovered must be taken to represent the lost ship; and then, just as the underwriters would be entitled to the ship, if it could have been bodily got back, so they are entitled to that which is the representative of the ship in the shape of damages to be paid by the owners of the vessel which caused the collision." See also *Randal v. Cockran*, 1 Ves. 98; *Blaauwpot v. Da Costa*, 1 Eden 130; *Comegys v. Vasse*, 1 Pet. (U. S.) 214; *Gracie v. New York Ins. Co.*, 8 Johns. (N. Y.) 237; *Mercantile Marine Ins. Co. v. Corcoran*, 1 Gray (Mass.) 75.

1. *Simpson v. Thomson*, 3 App. Cas. 279; *Magdeburg General Ins. Co. v. Paulson*, 29 Fed. Rep. 530-533; *Rice v. Cobb*, 9 Cush. (Mass.) 302; *Wilson v. Raffalovich*, 7 Q. B. Div. 553.

In *Simpson v. Thomson*, 3 App. Cas. 279, it appeared that two ships belonging to the same owner collided, and the underwriter paid the insurance effected on the ship which was lost, and then claimed to rank *pari passu* with the owners of the cargo destroyed in the distribution of the fund lodged in court by the owner as proprietor of the ship which did the damage, and it was held that the underwriters have no such right, although they had paid for a total loss and were entitled to be subrogated to the rights of the proprietor of the injured ship, yet if the owner could not assert the right for damages against the wrongdoer, neither could the under-

writers. And as the owner was also the owner of the ship which did the mischief, it was plain that he could not bring an action against himself, and neither could those who were subrogated to his rights, bring such an action.

To the same effect, are *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50; *The Bristol*, 29 Fed. Rep. 867.

2. *Brooks v. MacDonnell, Y. & C.* 502.

In *New York Ins. Co. v. Roulet*, 24 Wend. (N. Y.) 505, it appeared that a cargo of merchandise, which was insured, was seized and condemned by the French Government, under the Berlin and Milan decrees, and a compromise was subsequently made between the underwriters and assured by which the latter accepted from the former, \$5,000 in satisfaction of their claim against the underwriters, which was for \$15,000, and surrendered the policy. He did not surrender or cede the right to claim an indemnity from the French Government. The underwriters subsequently obtained \$5,000 under the convention between the American and French Governments, providing indemnity for spoliation upon the American commerce, and it was held that the money thus obtained, by the underwriters, was held in trust for the assured, and it was decreed that they should pay over the same.

3. *Stewart v. Greenock Ins. Co.*, 2 H. L. Cas. 159; *Benson v. Chapman*, 6 M. & Gr. 792; 46 E. C. L. 791; *McCarthy v. Abel*, 3 B. & P. 479; *Miller v. Woodfall*, 8 El. & Bl. 493; 92 E. C. L. 491; *Kennedy v. Baltimore Ins. Co.*, 3 Har. & J. (Md.) 367; 6 Am. Dec. 499; *Teasdale v. Charleston Ins. Co.*, 2 Brev. (S. Car.) 190; 3 Am. Dec. 705. See also *MARINE INSURANCE*, vol. 14, p. 385.

In *Sea Ins. Co. v. Hadden*, 12 Q. B. Div. 706, it appeared that a vessel sailed under a charter party which provided for payment of a certain tonnage rate of freight to the owners. The ship was insured by the plaintiff company, and the freight intended to be earned, by other underwriters. The ship by reason of a collision became a total loss, which was occasioned by negligence in

courts of the *United States*, the underwriter may enforce his right of subrogation in his own name;¹ but in *England* he must pursue his remedy in the name of the assured.²

d. INSURANCE OF MORTGAGED PROPERTY.—It has been held repeatedly that where a mortgagee, at his own expense, procures the insurance on the mortgaged property for the better security of his debt, the insurer, if obliged to pay a loss occasioned by injury to such property, may be subrogated to the rights of the mortgagee under the mortgage.³

navigating another vessel. The insurers of the ship settled with the defendants as for a total loss of the ship, and no freight was earned under the charter-party. Afterwards the assured recovered from the owners of the ship at fault for the loss of the ship and her freight, and it was held that the underwriters of the ship were not entitled to recovery from the owners thereof any part of the amount recovered by said owners for the loss of freight intended to be earned. Brett, M. R., said: "If there be an insurance of the ship to one underwriter and an insurance of the freight to another, whatever is a salvage in respect of the ship if she is lost, and if the underwriter pays for her as a total loss, goes to the underwriter on ship; but whatever is a salvage in respect of the freight for which the underwriter on freight has to pay as a total loss ought to go to him."

1. *Monticello v. Mollison*, 17 How. (U. S.) 153; *Insurance Co. v. The "C. D. Jr."*, 1 Woods (U. S.) 72; *The Sydney*, 27 Fed. Rep. 119.

2. In *Simpson v. Thomson*, 3 App. Cas. 279, where the injury was caused by the collision of two vessels belonging to the same owner, Cairns, Lord Chancellor, in speaking of the cause of action for the benefit of the underwriters, said: "But this right of action for damages they must assert not in their own name but in the name of the person insured; and if the person insured be the person who has caused the damage, I am unable to see how the right can be asserted at all." See also *Wilson v. Raffalovich*, 7 Q. B. Div. 553.

3. *Kernochan v. New York Bowery F. Ins. Co.*, 17 N. Y. 428; *Excelsior F. Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; *Ætna F. Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385; *Foster v. Van Reed*, 70 N. Y. 19; 26 Am. Rep. 544; *Ulster County Sav. Inst. v. Leake*, 73 N. Y. 161; 29 Am. Rep. 115; *DeWolf v. Capitot City Ins. Co.*, 16 Hun (N. Y.) 116;

Thomas v. Montauk F. Ins. Co., 43 Hun (N. Y.) 218; *Kip v. Mutual F. Ins. Co.*, 4 Edw. Ch. (N. Y.) 86; *Dick v. Franklin F. Ins. Co.*, 10 Mo. App. 376; *aff'd* 81 Mo. 103; *Bound Brook Mut. F. Ins. Assoc. v. Nelson*, 41 N. J. Eq. 485; *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. L. 555; *Honore v. Lamar F. Ins. Co.*, 51 Ill. 409; *Norwich F. Ins. Co. v. Boomer*, 52 Ill. 442; 4 Am. Rep. 618. See also *Concord Union Mut. F. Ins. Co. v. Woodbury*, 45 Me. 447, where the question was discussed but not decided.

In *Carpenter v. Providence, etc., Ins. Co.*, 16 Pet. (U. S.) 501, Story, J., said: "No doubt can exist that the mortgagor and the mortgagee may each separately insure his distinct interest in the property. But there is this important distinction between the cases, that where the mortgagee insures solely on his own account, it is but an insurance of his debt, and if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation; and even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby; neither can the mortgagor take advantage of the policy, for he has no interest whatever therein. On the other hand, if the premises are destroyed by fire before any payment or extinguishment of the mortgage, the underwriters are bound to pay the amount of the debt to the mortgagee if it does not exceed the insurance. But then upon such payment the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same amount from the mortgagor either at law or in equity according to circumstances; for the payment of the insurance by the underwriters does not in such a case discharge the mortgagor from the debt, but only changes the creditor."

In *Dick v. Franklin F. Ins. Co.*, 10

Mo. App. 384, Thompson, J., said: "Where a mortgagee, or the trustee in such a deed, effects an insurance of his separate interest in the mortgaged or granted property, and a loss supervenes, which the insurer pays, the insurer is held, in most jurisdictions, entitled to subrogation in equity to the rights of the mortgagee or grantee as against the mortgagor or grantor, independently of any stipulation in the policy conferring such a right."

In *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. L. 555, the court said: "The principle is certainly well established that the insurer is entitled to be subrogated to all the rights and remedies of the assured to obtain compensation for his loss from other persons."

In *Aetna F. Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 397, Walworth, Ch. said: "This principle of equitable subrogation or substitution of the underwriters in the place of the assured is recognized by every writer on the subject of insurance, and is constantly acted upon in courts of law as well as in equity. So that where the assured has any claim to indemnity for any loss against a third person who is primarily liable for the same, if the assured discharges such third person from his liability before the payment of the loss by the underwriters, he discharges his claim against them *pro tanto*; or if he obtains payment from such third person afterwards, it is in the nature of salvage which he holds in trust for the underwriters who have paid his loss."

But in order that the insurer may be subrogated to the rights of the mortgagee against the mortgagor, the entire debt owing to the mortgagee must be paid. The insurer will not be entitled to such subrogation upon payment of a loss equivalent to only a part of such debt. *Phenix Ins. Co. v. First Nat. Bank*, 85 Va. 765; 17 Am. St. Rep. 101.

But in *Massachusetts*, the insurer is not in such cases entitled to be subrogated to the rights of the insured under the mortgage. In *King v. State Mut. F. Ins. Co.*, 7 Cush. (Mass.) 1; 54 Am. Dec. 683, it appeared that a mortgagee had procured insurance for himself and at his own expense upon a certain house which was destroyed by fire before the mortgage debt was paid. The insurance company refused to pay the loss unless the mortgagee would assign to it an interest in the mortgage and debt equivalent to the loss to be

paid. Shaw, C. J., at the conclusion of an elaborate opinion, in which the insurer's right of subrogation was denied, said: "On a view of the whole question the court are of opinion that a mortgagee who gets insurance for himself, when the insurance is general upon the property, without limiting it in terms to his interest as mortgagee, but when, in point of fact, his only insurable interest is that of a mortgagee, in case of a loss by fire, before the payment of the debt and discharge of the mortgage, has a right to recover the amount of the loss for his own use."

In *Suffolk F. Ins. Co. v. Boyden*, 9 Allen (Mass.) 123, the insurance company offered to pay the loss and the amount due on the mortgage above the loss, and brought a bill in equity to have the mortgage assigned to them and to be subrogated to the rights and remedies of the insured under the mortgage. But it was held that the insurer in such cases acquired no interest in the debt and mortgage, either in equity or law, by the payment of the loss. The court said: "Without extending the discussion, it is sufficient to say that the doctrine which we now reaffirm was one of the grounds upon which the decision in *King v. State Mut. F. Ins. Co.*, 7 Cush. (Mass.) 1; 54 Am. Dec. 683, was expressly made to rest; that the conclusion that the insurer has no interest in the mortgage debt is as decisive against his claim in equity as at law, and that if the title of the insured was that of a mortgagee, it is immaterial whether it was insured *eo nomine* or otherwise."

In *International Trust Co. v. Boardman*, 149 Mass. 161, the court, by Allen, J., said: "It has often been declared by this court, that where a mortgagee, at his own expense and without any agreement or understanding with the mortgagor, obtains insurance upon his interest as mortgagee, and collects the money from the insurer after a loss, he is not bound to account for it to the mortgagor, nor is the insurer entitled to be subrogated to the mortgagee's claim against the mortgagor. The insurance is a wholly collateral contract, which the law allows the mortgagee to make." *Citing White v. Brown*, 2 Cush. (Mass.) 412; *King v. State Mut. F. Ins. Co.*, 7 Cush. (Mass.) 4; 54 Am. Rep. 683; *Foster v. Equitable Mut. F. Ins. Co.*, 2 Gray (Mass.) 216; *Loomis v. Eagle Ins. Co.*, 6 Gray (Mass.) 401; *Suffolk F. Ins. Co. v. Boyden*, 9 Allen (Mass.) 123;

Where the mortgagor pays the premiums, or is liable for the same, he is entitled to the benefit of the insurance, and the insurer will not be subrogated to the mortgagee's rights against him.¹ But if the policy of insurance contains an express stipulation that the insurer shall be subrogated to the mortgagee's rights in case of the payment of a loss to him, it will defeat the mortgagor's right to the benefit of insurance, notwithstanding his liability for the payment of the premiums.²

Clark v. Wilson, 103 Mass. 221; 4 Am. Rep. 532; Haley v. Manufacturers' F. & M. Ins. Co., 120 Mass. 296; Washington Mills Emery Mfg. Co. v. Weymouth, etc., Mut. F. Ins. Co., 135 Mass. 506.

1. Pendleton v. Elliott, 67 Mich. 496; Baker v. Fireman's Fund Ins. Co., 79 Cal. 34; Kernochan v. New York Bowery F. Ins. Co., 17 N. Y. 428; Waring v. Loder, 53 N. Y. 581; Aetna Ins. Co. v. Baker, 71 Ind. 102; Home Ins. Co. v. Marshall, 48 Kan. 235; Phenix Ins. Co. v. Chadbourne, 31 Fed. Rep. 300; Provincial Ins. Co. v. Reesor, 21 Grant's Ch. (Can.) 206.

In Pendleton v. Elliott, 67 Mich. 496, the court said: "The law is well settled that if the mortgagee obtains insurance on his own account and the premium is not paid by or charged to the mortgagor, he cannot claim the benefit of a payment of the insurance. Concord Union Mut. F. Ins. Co. v. Woodbury, 45 Me. 447; White v. Brown, 2 Cush. (Mass.) 412; Stinchfield v. Milliken, 71 Me. 567. If, however, the policy contains no stipulation for subrogation in the case of payment to the mortgagee, and there is any arrangement between the mortgagor and mortgagee, either verbal or written, by which the mortgagor becomes liable to pay for the insurance, he is entitled to the benefit thereof, and to have it applied in liquidation of the mortgage debt *pro tanto*; and his right in this respect does not depend upon the fact that he has paid for the insurance, nor whether the mortgagee procured the insurance intending to look to the mortgagor for reimbursement of the premium, but it depends upon whether he is liable to the mortgagee therefor under any agreement express or implied. And in such case, if the insurer receives the premium knowing it is paid by the mortgagor or for him, he will not, in the absence of a stipulation therefor in the policy, be entitled to be subrogated to the rights of the mortgagee against the mortgagor." Citing Kernochan v. New York Bow-

ery F. Ins. Co., 17 N. Y. 441; Cone v. Niagara F. Ins. Co., 60 N. Y. 619.

2. Dick v. Franklin F. Ins. Co., 10 Mo. App. 386; *aff'd* 81 Mo. 103.

In Foster v. Van Reed, 70 N. Y. 19; 26 Am. Rep. 544, it appeared that the mortgage contained a covenant that the mortgagor would insure, and that in default thereof the mortgagee might insure and the premium should be deemed secured by the mortgage. The mortgagor failing to insure, the mortgagee insured his interest as such by a policy providing that in case of loss he should assign to the insurer an amount equal to the amount of loss paid. The question was whether this stipulation in the policy defeated the mortgagor's right to the benefit of the insurance under the covenant in the mortgage. And it was held that the contract in the policy of insurance was paramount to that in the mortgage, and that the mortgagor's right to the benefit of the insurance was defeated. Miller, J., said: "It is difficult to see how the insurer can be deprived of the right to subrogation when it is made a part of the contract that he shall enjoy such right. And whether the company knew of the agreement in the mortgage at the time of issuing the policy or assented to it or otherwise, makes no difference, for in either case the contract between Mrs. Plank and the company is unaffected by it. Kernochan v. New York Bowery F. Ins. Co., 17 N. Y. 428. The views expressed are met by various objections, and it is among other things claimed that the debt was extinguished by the payment of the plaintiff to the mortgagee of the amount of the insurance to that extent. The authorities cited to sustain this proposition are cases where there was no agreement as to subrogation, and do not establish such a proposition in cases in which there was a clause in the policy authorizing an assignment in case of loss."

And where a policy, which would insure to the benefit of the mortgagor, has

c. LIFE INSURANCE.—A contract of life insurance is not a contract of indemnity, and the insurer who pays a loss under such a contract is not entitled to be subrogated to any rights which the personal representative of the deceased may have against other persons.¹ So where the death of the insured is caused by the wrongful act of another, the insurer acquires no right of action against the wrongdoer by paying the loss.² Neither is the pay-

become forfeited as to him, he has no further interest in it. And an agreement between the mortgagee and the mortgagor to preserve the life of the policy so far as the interests of the mortgagee are concerned, on condition that the insurer shall be subrogated to his rights under the mortgage in case of a loss, will not revive the mortgagor's right to the benefit of the insurance. *Ulster County Sav. Inst. v. Leake*, 73 N. Y. 161; 29 Am. Rep. 115; *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389; 3 Am. Rep. 711. Compare *Allen v. Watertown F. Ins. Co.*, 132 Mass. 482.

But where the mortgagor is liable for the premiums, the mortgagee and insurer cannot, in the absence of a subrogation clause in the policy, defeat the mortgagor's right to the benefit of the insurance, either by assignment of the mortgage and debt to the insurer as a condition of the payment of the loss to the mortgagee or otherwise. *Waring v. Loder*, 53 N. Y. 581.

To the Rights of a Vendor.—In *State Mut. F. Ins. Co. v. Updegraf*, 21 Pa. St. 513, it appeared that a vendor of real estate after articles of agreement and before conveyance, insured the buildings thereon at their full value. Upon destruction of the buildings by fire, the insurance company claimed to be subrogated to the right of the vendor to collect the unpaid balance of the purchase money from the vendee. But it was held that the insurance was on the property and not on the debt, and that the insurer was liable for the amount of the loss without any right of subrogation. The court said: "The policy is, in form, an insurance upon the house and not upon the debt, and no evidence whatever was given to change its character or to show that anything more or less was intended by the parties. It follows that the plaintiff below was entitled to recover, under a trust as to the surplus, for the benefit of the vendee. The underwriters have shown no equitable right to intermeddle between the vendor and the vendee under such circumstances. They must be content to respond to the party with

whom they made the contract of insurance." See also *Morrison v. Tennessee M. & F. Ins. Co.*, 18 Mo. 262; 59 Am. Dec. 299.

1. In *Godsall v. Boldero*, 9 East 72, it appeared that a creditor made insurance on the life of Mr. Pitt, who died insolvent while the policy was in force, and an action was commenced to collect the insurance. Before the case came to trial, the debt was paid by the executors from funds furnished by Parliament for the purpose of paying Mr. Pitt's debts. The insurance company then set up the defense that this was a contract of indemnity, and that Mr. Pitt's debts having been paid there could not be a right to recover against it. Lord Ellenborough, proceeding upon the hypothesis that it was a contract of indemnity, held that this was a good defense. The case was overruled in the exchequer chamber in *Dalby v. India, etc. L. Ins. Co.*, 15 C. B. 365; 80 E. C. L. 364, where it was held that the contract of life insurance is a mere contract to pay a certain sum of money upon the death of a person, in consideration of the due payment of certain annual premiums during his life, and that it is not a contract of indemnity. In this case it appeared that a policy effected by a creditor on the life of his debtor was valid at the time it was entered into, and it was held that the circumstance of the interest of the assured in such life ceasing before the death did not invalidate the policy. The court, speaking of *Godsall v. Boldero*, 9 East 72, said: "We do not think we ought to feel ourselves bound, sitting in a court of error, by the authority of this case, which itself could not be questioned by writ of error, and as so few, if any, subsequent cases have arisen in which the soundness of the principle there relied upon could be made the subject of judicial inquiry, and, as in practice, it may be said that it has been constantly disregarded." See also in *Burnand v. Rodocanachi*, 7 App. Cas. 340—*Ld. Blackburn*.

2. *Mobile L. Ins. Co. v. Brame*, 95 U.

ment of the insurance any defense to the wrongdoer in an action against him for damages, nor may such payment be shown by him in mitigation of damages.¹

III. LOSS AND ENFORCEMENT OF RIGHT—1. Waiver.—The right of subrogation may be expressly waived,² or a waiver may be implied from the acts of the claimant.³ Negligence and laches in the enforcement of a claim to subrogation will sometimes be held a waiver.⁴ Especially where such enforcement would result

S. 754; *Connecticut Mut. L. Ins. Co. v. New York, etc.*, R. Co., 25 Conn. 265; 65 Am. Dec. 571.

1. In *Hicks v. Newport, etc.*, R. Co., tried at *nisi prius*, and reported in note to *Pym v. Great Northern R. Co.*, 4 B. & S. 403; 116 E. C. L. 401, Lord Campbell instructed the jury that, in estimating the damages for which the defendant was liable, insurance upon the life of the plaintiff's decedent might be considered by them.

In *Beckett v. Grand Trunk R. Co.*, 13 Up. Can. App. 174, which was an action against a railroad company for causing the death of the plaintiff's decedent, it appeared that the jury were directed at the trial to deduct the amount of the insurance policy effected upon the decedent's life from the verdict. The amount of the insurance was afterwards added by the divisional court, and the decision of the divisional court was affirmed on appeal by an equally divided court.

But in *England* and in the *United States*, the law is now settled as stated in the text. *Grand Trunk R. Co. v. Jennings*, 13 App. Cas. 800; *Bradburn v. Great Western R. Co.*, L. R., 10 Exch. 1; *Rowley v. London, etc.*, R. Co., L. R., 8 Exch. 221; *Pittsburgh, etc.*, R. Co. v. *Thompson*, 56 Ill. 138; *Baltimore, etc.*, R. Co. v. *Wightman*, 29 Gratt. (Va.) 431; 26 Am. Rep. 384; *Sherlock v. Alling*, 44 Ind. 184; *Althorff v. Wolfe*, 22 N. Y. 355; *Kellogg v. New York Cent., etc.*, R. Co., 79 N. Y. 72; *Harding v. Townshend*, 43 Vt. 536; 5 Am. Rep. 304; *Aetna Ins. Co. v. Hannibal, etc.*, R. Co., 3 Dill. (U. S.) 1.

2. *Midland Banking Co. v. Chambers*, L. R., 7 Eq. 179; *Ex p. Hope*, 3 M. D. & De G. 720; *Ex p. Miles*, 1 De G. 623.

A junior incumbrancer may waive the benefit of a senior lien which he has discharged. *U. S. Bank v. Peter*, 13 Pet. (U. S.) 123.

3. Where the proceeds of a sheriff's sale of the land of a surety have been

applied to the payment of the judgment against the principal, the creditors of the surety have an equity to be subrogated, to the extent of the balance of the general account when stated between the principal and surety, to the lien of the first judgment. But such right will be destroyed by a receipt of money belonging to the surety which the creditors might have applied to the satisfaction of their lien. *Neff v. Miller*, 8 Pa. St. 347.

Where one of two principal debtors binds himself to the other to pay the whole debt and gives security therefor, a surety of the two principal debtors, if compelled to pay the debt, is entitled to the benefit of the security so given. But, if he takes a bond or other security from one of the principal debtors, he thereby waives his right to claim the benefit of security given by the other in pursuance of the agreement between the principals. *Cornwell's Appeal*, 7 W. & S. (Pa.) 305.

A surety who refuses to take control of a judgment and execution offered him by the creditor thereby waives his right of subrogation. *Hubbell v. Carpenter*, 5 N. Y. 173.

A senior mortgagee who pays a tax lien on the mortgaged premises under an agreement with the junior mortgagee for reimbursement, and joins in a conveyance to the junior mortgagee under a foreclosure sale, thereby waives his right of subrogation to the tax lien. *Manning v. Tuthill*, 30 N. J. Eq. 29.

4. *Goswiler's Estate*, 3 P. & W. (Pa.) 200, it was held that a surety, who permitted a judgment to stand against himself and his principal for eight years without having it marked of record for his use, was not thereafter entitled to the benefit of the same as against other judgment creditors of the principal.

In *Gring's Appeal*, 89 Pa. St. 336, where it appeared that a surety, who had paid a judgment against himself and his principal, neglected to have it marked for his use for more than a year

in injury to the rights of others.¹ Payment by a surety without compulsion will not be held a waiver if payment by him might have been compelled.² Nor will the acceptance of new security by a junior incumbrancer have that effect.³ Nor will the surety waive his right by acceptance of an indemnity from a stranger;⁴ nor by taking other security from the principal,⁵ unless the rights

after its payment, it was held that he had lost his right of subrogation as against subsequent judgment creditors.

In *Noble v. Turner*, 69 Md. 519, it appeared that the principal debtor had deposited certain certificates of stock with the creditor as collateral security. The surety was obliged to pay the debt and was entitled to the use of the stock certificates, but he neglected to have the stock transferred on the books of the company until the certificates were seized and sold as the property of the principal debtor and a transfer made to the sheriff's vendee. It was held that he had lost his right of subrogation by laches.

Twenty years delay on the part of sureties in asserting their right to subrogation, is such laches as will prevent their recourse against persons ultimately liable to their demand. *Smith v. Thompson*, 7 Gratt. (Va.) 112; 54 Am. Dec. 126. Eleven years delay in asserting a right of subrogation was held fatal in *Buffington v. Bernard*, 90 Pa. St. 63.

1. *Sheld. Sub.*, § 43; *Conner v. Welch*, 51 Wis. 431; *Wilcox v. Foster*, 132 Mass. 320; *Gring's Appeal*, 89 Pa. St. 336.

2. *McNeilly v. Cooksey*, 2 Lea (Tenn.) 39, citing *Winchester v. Beardin*, 10 Humph. (Tenn.) 247; 51 Am. Dec. 702; and *State v. Blakemore*, 7 Helsk. (Tenn.) 638, where it is said that a payment legally compellable is not officious.

But a surety who pays the debt of his principal after it is barred by the statute will have no right of subrogation against the principal. *Hatchett v. Pegram*, 21 La. Ann. 722; *Randolph v. Randolph*, 3 Rand. (Va.) 490. If the debt has been reduced to judgment, payment cannot be said to be voluntary as long as the judgment can be enforced in any way, by *scire facias*, action of debt or otherwise. *Randolph v. Randolph*, 3 Rand. (Va.) 490.

Payment by one who is not bound to pay and has no interest in discharging the debt will give him no right of subrogation. *Weil v. Enterprise Ginney*,

etc., Co., 42 La. Ann. 492. See also *supra*, this title, *Volunteers and Strangers*.

3. *Burchard v. Phillips*, 11 Paige (N. Y.) 66; *Patterson v. Birdsall*, 64 N. Y. 294; 21 Am. Rep. 609.

In *Eagle F. Ins. Co. v. Pell*, 2 Edw. Ch. (N.Y.) 631, it appeared that a mortgagee had paid taxes due on the mortgaged premises, and afterward took a bond from the mortgagor's vendee for the repayment of the same, and it was held that such bond did not necessarily bar the mortgagee from his remedy against the mortgagor.

In *Patterson v. Birdsall*, 64 N. Y. 294; 21 Am. Rep. 609, a junior mortgagee foreclosed, bid in the premises and advanced the money to pay off a prior mortgage, and conveyed the premises to a third person, who executed a new bond and mortgage, and the prior mortgage was satisfied. Subsequently the new bond and mortgage were adjudged void for usury. It was held that the plaintiff was entitled to be subrogated to the rights of the prior mortgagee and to foreclose the prior mortgage.

Where a purchaser of mortgaged premises procured a release of the first mortgage, by payment of the purchase money to its holder, and took from his vendor a mortgage on other property to indemnify himself against another and intervening mortgage on the land sold to him, it was held that the taking of the mortgage indemnity did not affect his right to be subrogated to the lien of the first mortgage. *Smith v. Dinsmoor*, 119 Ill. 656.

Where a creditor, who is secured by a deed of trust upon real estate, advances money to discharge a prior lien on the same property, his taking a second deed of trust to secure the repayment of the money so advanced, will not deprive him of his right to be subrogated to the rights of the prior lienor. *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602.

4. *Wesley Church v. Moore*, 10 Pa. St. 273.

5. In *Gossin v. Brown*, 11 Pa. St. 527, it was held that the acceptance, by

of third parties have intervened;¹ nor by renewing the note with his principal.² The doctrine of estoppel *in pais* is not applicable to a claim of subrogation, unless the claimant has made false representations or fraudulently concealed facts to the injury of him against whom the claim is asserted.³

2. Limitations.—The general rule is, that the claimant must take steps to enforce his right of subrogation within the period prescribed as a limitation to the enforcement of simple contracts, for this merely equitable right will not be enforced at the expense of a legal one.⁴ In some of the states, if a surety pays a judgment against himself and his principal, and the fact of his suretyship appears in the record of the judgment, he

the surety, of choses in action as collateral security, would not, in the absence of special circumstances manifesting an intention to obliterate the original obligation, deprive him of the benefit of securities held by the original creditor whose claim he had paid.

The taking of a mortgage by a surety of a collector of taxes, as an indemnity against loss, is no waiver of any right of subrogation, in favor of the sureties, to the lien in favor of the state on the collector's lands, where such sureties have been compelled to pay the state for the default of the collector. *Crawford v. Richeson*, 101 Ill. 351.

1. A surety for the payment of the consideration of land sold, who has paid the price, but who took a mortgage from his principal for his indemnity, and which proved insufficient, will not be subrogated to the original lien of the vendor to the prejudice of a purchaser from the vendee, especially when the purchase was made with his knowledge and not objected to. *Henley v. Stemmons*, 4 B. Mon. (Ky.) 131.

2. *Brinkerhoff v. Lansing*, 4 Johns. Ch. (N. Y.) 65; *Chapman v. Jenkins*, 31 Barb. (N. Y.) 164; *Pomroy v. Rice*, 16 Pick. (Mass.) 22; *Pond v. Clarke*, 14 Conn. 335, *overruling* *Peters v. Goodrich*, 3 Conn. 146.

3. *Hurt v. Riffle*, 11 Fed. Rep. 790.

4. *Bank of Pennsylvania v. Potius*, 10 Watts (Pa.) 158; *Fink v. Mahaffy*, 8 Watts (Pa.) 384; *Morrison v. Page*, 9 Dana (Ky.) 428; *Joyce v. Joyce*, 1 Bush (Ky.) 474; *Johnston v. Belden*, 49 Iowa 301; *Arbogast v. Hays*, 98 Ind. 26; *Simpson v. McPhail*, 17 Ill. App. 499; *Neilson v. Fry*, 16 Ohio St. 552; 91 Am. Dec. 110; *Neal v. Nash*, 23 Ohio St. 483; *Junker v. Rush*, 136 Ill. 179; *Bledsoe v. Nixon*, 68 N. Car. 521.

A person seeking subrogation to the rights of a vendor stands, with respect

to the Statute of Limitations, in exactly the same position as the vendor would have occupied. *Rodman v. Sanders*, 44 Ark. 504.

The limitation to a demand of a surety for money paid on the debt of his principal is that applicable to simple contracts; and if that bar has accrued, the surety cannot be subrogated to the rights of the creditor on a judgment obtained by the latter against the sureties of the sheriff for failing to collect an execution against the principal debtor. *Bank of Pennsylvania v. Potius*, 10 Watts (Pa.) 148.

A proceeding by a surety, who has paid a judgment against himself and principal and taken an assignment thereof, to revive the judgment, is an action for equitable relief, and may be brought within ten years, and not an action on an assumpsit to which the limitation of six years applies. *Neal v. Nash*, 23 Ohio St. 483.

A surety by payment does not become *ipso facto* subrogated to the judgment, but only acquires the right to such subrogation, and before the substitution or equitable assignment can actually take place, he must actively assert his equitable right thereto; and this assertion, to be effectual, must be made before his legal right to recover on the implied contract of his principal to reimburse him is barred. *Junker v. Rush*, 136 Ill. 179.

In *Kreider v. Isenbice*, 123 Ind. 10, Coffey, J., said: "It is true that the appellee had the right to bring his action at any time within the Statute of Limitations, to try the question of his suretyship in said judgment, and to be subrogated to the rights of the judgment plaintiff. . . . It cannot be an action on the judgment . . . for that contains no promise to pay him anything; but it must be upon the im-

may enforce the judgment at any time in which the plaintiff might enforce it; but if the fact of his suretyship does not so affirmatively appear, he must assert his right of subrogation within the period applicable to simple contracts.¹ The statute begins to run against the surety's right of subrogation from the time he pays the debt of his principal.² If the debt be in the form of a judgment, the statute begins to run from the time of payment and not from the date of the judgment.³

3. Pleading, Parties, and Practice.—The right of subrogation is equitable in its nature, and can only be enforced by a proceeding in equity in those jurisdictions where a separate equitable procedure is maintained.⁴ The right of subrogation does not include

plied promise of the principal to indemnify the surety. . . . All the analogies deducible from the limiting statutes lead us to the conclusion that a surety's right of subrogation cannot be enforced after his claim against his principal has been barred by the Statute of Limitations."

In *Rittenhouse v. Levering*, 6 W. & S. (Pa.) 190, the court, by Rogers, J., said: "Where the surety has done no act before his claim is barred at law, manifesting his intention to put himself in the place of the original creditor and thereby subrogating himself to his rights, the remedy is only for money paid. Where he has omitted to bring suit in proper time, or to do some act equivalent thereto, he cannot afterwards be subrogated to the rights of the creditor. The error arises from the assumption that *ipso facto* on payment of the money, the surety is subrogated to the rights of the creditor; whereas the remedy is not *prima facie* on the bond, but for money paid. Although the surety may if he chooses invoke the aid of the equitable principle of subrogation." In this case a surety who had paid the specialty of his principal was barred in an action against the estate of the principal begun more than six years after the payment. See also *Fink v. Mahaffy*, 8 Watts (Pa.) 384.

A surety's right of subrogation to securities held by the creditor, cannot be enforced after his claim against his principal has been barred by the Statute of Limitations. *Arbogast v. Hays*, 98 Ind. 30.

1. The statutory provision that "when any defendant surety shall be compelled to pay any judgment, the same shall not be discharged but shall remain in force for the use of the surety," applies only to judgments in cases

where the fact of suretyship affirmatively appears; so that in a case where the fact of suretyship does not affirmatively appear the limitation of six years in cases of simple contract applies; and where it does affirmatively appear, the limitation of twenty years to the enforcement of a judgment applies. *Dewitt v. Boring*, 123 Ind. 4; *Kreider v. Isenbice*, 123 Ind. 10.

2. *Thayer v. Daniels*, 110 Mass. 345; *Rucks v. Taylor*, 49 Miss. 552; *Scott v. Nichols*, 27 Miss. 94; 61 Am. Dec. 503; *Bushong v. Taylor*, 82 Mo. 660; *Hearne v. Keath*, 63 Mo. 84; *Wesley Church v. Moore*, 10 Pa. St. 273; *Bennett v. Cook*, 45 N. Y. 276; *Hammond v. Myers*, 30 Tex. 375; 94 Am. Dec. 322; *Marshall v. Hudson*, 9 Yerg. (Tenn.) 57; *Maxey v. Carter*, 10 Yerg. (Tenn.) 521.

3. *Reeves v. Pulliam*, 9 Baxt. (Tenn.) 153; *Maxey v. Carter*, 10 Yerg. (Tenn.) 521.

4. *Hodgson v. Shaw*, 3 Myl. & K. 183; *Allen v. Wood*, 3 Ired. Eq. (N. Car.) 386; *Miller v. Woodward*, 8 Mo. 169.

Ordinarily, to secure the benefit of a judgment lien against a co-security or co-accommodation indorser, the one paying the amount of the judgment should proceed by bill, suit, petition, or some proceeding in equity, wherein the equitable rights of the respective parties may be adjudicated and enforced. *Cuyler v. Ensworth*, 6 Paige (N. Y.) 32; *Speiglemyer v. Crawford*, 6 Paige (N. Y.) 254; *Goodyear v. Watson*, 14 Barb. (N. Y.) 481; *Townsend v. Whitney*, 75 N. Y. 425; *Smith v. Rumsey*, 33 Mich. 183; *Neal v. Nash*, 23 Ohio St. 483; *Furnold v. State Bank*, 44 Mo. 336; *Lidderdale v. Robinson*, 12 Wheat. (U. S.) 594; *German-American Sav. Bank v. Fritz*, 68 Wis. 390.

Where a court of law has acquired

the form and forum of the remedy, where the extent of the remedy is not affected by the form or forum.¹ A defendant claiming the benefit of subrogation, must ask for such relief in his answer.² The surety, having failed to establish his claim at law, cannot enforce a right of subrogation in equity.³ As a general rule, the person to whose rights subrogation is sought, must be made a party to the proceeding.⁴ Various decisions relating to points of practice in proceedings to enforce a right of subrogation, will be found in the notes below.⁵

jurisdiction of the subject-matter, it will retain it and enforce full justice between the parties. *German-American Sav. Bank v. Fritz*, 68 Wis. 390. And so of a court of equity. *McDaniel v. Lee*, 37 Mo. 204. See also *Brown v. Hodgson*, 4 Taunt. 189, where it is held that the principles of subrogation may be applied as well in an action at law as in equity.

It has been held that relief by way of subrogation can not be granted in an action of ejectment. *Meyer v. Mintonye*, 106 Ill. 414.

Nor in action to try title. *Allison v. Pattison* (Ala. 1891), 11 So. Rep. 194. But see *Oellrechs v. Georgia R. Co.*, 73 Ga. 389, where such equitable relief was granted in an action of ejectment under the code of *Georgia*.

A surety must proceed in equity and not at law, to have the benefit of a payment made by the principal to a co-surety, on account of the secured debt. *Allen v. Wood*, 3 Ired. Eq. (N. Car.) 386. But since the adoption of the code in *North Carolina*, the right to subrogation must be asserted by a civil action, commenced by service of a summons. *Calvert v. Peebles*, 82 N. Car. 334.

1. *McDonald v. Asay*, 37 Ill. App. 469; *affirmed* in 139 Ill. 123.

2. *Knoblauch v. Foglesong*, 37 Minn. 320; *Barton v. Moore*, 45 Minn. 98.

And if he pleads facts which show that he is entitled to subrogation, the court, before rendering judgment, may require the plaintiff to execute and file a transfer of the security to be delivered to the defendant upon payment of the judgment. *Knoblauch v. Foglesong*, 37 Minn. 320.

3. *Fink v. Mahaffy*, 8 Watts (Pa.) 384. A defendant who pleads title by purchase, will not be allowed, after judgment rendered against him, to set up title by subrogation. *Weil v. Enterprise Ginnery, etc., Co.*, 42 La. Ann. 492.

A surety who pays the note of his principal is entitled to be subrogated to

the right on the contract, or to bring assumpsit for money paid to the use of the principal. *Hill v. Voorhies*, 22 Pa. St. 68.

4. *Harris v. Watson*, 56 Ark. 574; *Logan v. Hale*, 42 Cal. 645.

A creditor claiming subrogation to the rights of a husband against the property of the wife, must make the husband a party to his proceeding. *Chappell v. Boyd*, 61 Ga. 662.

If a judgment creditor seeks to be subrogated to the rights of his debtor in a contract of sale executed by the debtor as vendee, he must make the debtor a party to such proceeding. *Logan v. Hale*, 42 Cal. 645.

If a surety pays the debt of the principal and brings an action against his co-surety to obtain the benefit of securities held by him, it is not necessary that the creditor be made a party to the proceeding. *Rosenthal v. Sutton*, 31 Ohio St. 406.

Co-sureties are necessary parties to a suit by a surety to be subrogated to the benefit of a lien on the land of the principal held by the creditor. *Hook v. Richeson*, 115 Ill. 431.

One who seeks to be subrogated to the lien of a judgment which he has satisfied, need not make the judgment creditor a party to his proceeding, where no decree is prayed against him. *Fridenburg v. Wilson*, 20 Fla. 359.

5. *Practice—Miscellaneous Decisions*.—The question whether a person who has paid a judgment and procured the same to be marked to his use by the court, is a surety entitled to subrogation, or a mere volunteer, cannot be raised in a collateral proceeding in the orphans' court for the distribution of the judgment debtor's estate. *Parker's Appeal* (Pa. 1888), 13 Atl. Rep. 481.

A surety for one who borrows money and deposits it in bank will not be entitled to an injunction to restrain the principal from collecting dividends on the deposit, the bank having become in-

SUBSCRIBE—(See also **SIGN** and the references there given).—To subscribe is literally to “write under;” and is sometimes opposed to “sign,” which does not necessarily imply that the signature is to be placed at the end of the instrument.¹

SUBSCRIBING WITNESS.—See **ATTESTATION**, vol. 1, p. 938; **WILLS**; **WITNESSES**.

SUBSCRIPTION LIST.—See **LIST**, vol. 13, p. 913; **NEWSPAPERS**, vol. 16, p. 491.

solvent, until he can recover judgment at law against his principal. *Carlton v. Simonton*, 94 N. Car. 401.

A defendant may by cross petition bring in those upon whom he would fix a liability under the principles of subrogation. *Resor v. McKenzie*, 2 Disney (Ohio) 210.

Where property is sold upon execution to pay a balance of the purchase price, the purchaser at such sale, if he wishes to have the benefit of the vendor's lien, must seek his remedy in a separate suit in equity, and not by injunction to restrain a subsequent mortgagee from selling the property under a decree of foreclosure. *Allen v. Phelps*, 4 Cal. 256.

A person entitled to subrogation has such an interest as will empower him to procure the revocation of an *ex parte* order rescinding a decree of subrogation in his favor. *Buck v. Blair*, 34 La. Ann. 767.

A surety in an action for contribution cannot recover costs from a co-surety, unless he has given notice of the payment in respect of which subrogation is claimed. *Neillson v. Fry*, 16 Ohio St. 552; 91 Am. Dec. 110.

If both a senior and junior mortgagee are parties to a suit to foreclose a tax lien, and the junior mortgagee pays off the lien, he may be subrogated to the benefit thereof by order of court without notice to the senior mortgagee. *Abbott v. Union Mut. L. Ins. Co.*, 127 Ind. 70.

On a summary motion to dismiss an attachment levied on goods claimed by a third party, the right of the plaintiff to be subrogated to the position of the defendant with respect to such property, cannot be determined. *Falvey v. Adamson*, 73 Ga. 493.

1. See **SIGN**. *Stone v. Marvel*, 45 N. H. 481; *Davies v. Shields*, 26 Wend. (N. Y.) 357. See also *Atty. Gen'l v. Bradlaugh*, 14 Q. B. Div. 667.

“The etymology and definition of the word ‘subscribe’ shows that its

meaning, when applied to the signature to an instrument in writing, is the signature or writing of one's name beneath or at the end of the instrument.” *James v. Patten*, 6 N. Y. 12; 55 Am. Dec. 376.

“‘Subscribe,’ in its habitual use and according to both its popular and literal signification, requires a signature at the end of a printed or written instrument.” *Coon v. Rigden*, 4 Colo. 282.

“To subscribe is to set one's hand to a writing.” *Prigden v. Prigden*, 13 Ired. (N. Car.) 260.

By an *Indiana* statute it was necessary to the valid execution of a bond that it should be “subscribed and delivered.” It was held that where the party's name appeared at the commencement of the bond, it could not be regarded as an execution of it by him. The court, by Downey, C. J., said: “Burrill in his dictionary says: ‘To subscribe is to write under; to write at the bottom or end of a writing or instrument; to write the name under;’ tit. *Subscriber*. See also *Bouv. L. Dict.*, tit. *Subscription*. If this is the proper construction of the statute in question, and we think it is, it becomes at once apparent that as to B, the deceased, there was no valid execution of the bond.” *Wild Cat Branch v. Ball*, 45 Ind. 216.

But a contrary position has been taken by the English courts, as to the effect of the term “subscribed” in the English statute of wills, which provides that the will shall be “subscribed” by the attesting witnesses in the presence of testator, etc. In *Roberts v. Phillips*, 4 E. & B. 450; 82 E. C. L. 450, where the will covered three pages, and an attesting witness placed his name upon the second page, while the signatures of the testator and the other two witnesses were on the third page, the will was held to be valid. This subject has been already touched upon in the articles **ATTESTATION**, vol. 1, p. 938, and **SIGN**. See also **WILLS**.

SUBSCRIPTIONS.—See also MUNICIPAL SECURITIES, vol. 15, p. 1204; STOCK, vol. 23, p. 582; STOCKHOLDERS, vol. 23, p. 776; SUNDAY, vol. 24.

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I. DEFINITION.—A subscription is the act by which a person contracts in writing to furnish a sum of money for a particular purpose.¹

II. SUBSCRIPTIONS FOR PUBLIC, CHARITABLE, RELIGIOUS, OR EDUCATIONAL PURPOSES.—1. **Validity**—a. **EXPRESS ACCEPTANCE.**—When the offer contained in a subscription paper has been accepted in terms by any one, there is imposed on him an obligation to carry out the object of the paper, and, there being thus a promise for a promise, a sufficient consideration exists to uphold the contract.²

1. 2 Bouv. L. Dict. 679.

A subscription is a written contract by which one engages to contribute a sum of money for a designated purpose, either gratuitously, as in the case of subscribing to a charity, or in consideration of an equivalent to be rendered, as a subscription to a periodical, a forthcoming book, a series of entertainments, or the like. Black's L. Dict. 1131.

To subscribe is to agree in writing to furnish a sum of money, or its equivalent, for a designated purpose; as, to assist a charitable or religious object or to take stock in a corporation. And. L. Dict. 985.

2. *Parsonage Fund v. Ripley*, 6 Me. 442; *Maine Cent. Institute v. Haskell*, 73 Me. 140; *Amherst Academy v. Cows*, 6 Pick. (Mass.) 427; 17 Am. Dec. 387; *Ladies' Collegiate Inst. v. French*, 16 Gray (Mass.) 201; *Williams College v. Danforth*, 12 Pick. (Mass.) 541; *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164; *Troy Conference Academy v. Nelson*, 24 Vt. 189. Compare *Collier v.*

Baptist Education Soc., 8 B. Mon. (Ky.) 68; *Coleman v. Eyre*, 45 N. Y. 38.

In *Amherst Academy v. Cows*, 6 Pick. (Mass.) 433; 17 Am. Dec. 387, the defendant had given his note for the amount of his subscription made to Amherst Academy. The principal defense in the suit upon this note was want of consideration. Said the court, by Parker, C. J.: "Was there a consideration for this note when it was given? In one sense there was not; that is, the promisor had received nothing at the time from the payees which was of any pecuniary value. But it is quite sufficient to create a consideration, that the other party, the payee, should have assumed an obligation in consequence of receiving the note, which he was compellable either at law or equity to perform, unless the promisor should be able to show when sued that the payee had refused, or was unable, or had unreasonably neglected, to perform the engagement on his part; in which cases a defense might be raised on the ground of a failure of the con-

b. IMPLIED ACCEPTANCE—(1) In General.—In cases where subscriptions have not been accepted in terms, there is much conflict of authority as to their validity. In several early cases they were held altogether void for lack of consideration.¹ In the great majority of instances, however, they have been held binding, although on various grounds. Thus, in some cases it has been said that the promise of each subscriber is a consideration for the promise of the others, and that the subscription paper may therefore be enforced against all.² Another ground that

sideration. The defense is not put upon that ground, and so it must be presumed that the corporate body to whom the promise is made has applied its funds to the purposes for which they were raised, or is ready and willing to do it whenever the different contributors to it shall have performed their engagements. In a court of equity of general jurisdiction they could be compelled to discharge their duty. Without such a court they would be subjected to a loss of their charter by refusal or neglect; for without doubt the legislature are the visitors of all corporations founded by them for public purposes, where there is no individual founder or donor, and may direct judicial process against them for abuses or neglects which by common law would cause a forfeiture of their charters. . . . We do not find that it has ever been decided that where there are proper parties to the contract, and the promisee is capable in law of carrying into effect the purpose for which the promise is made, and is in fact amenable to law for negligence or abuse of his trust, such a contract is void for want of consideration."

In *Parsonage Fund v. Ripley*, 6 Me. 445, the court, by Mellen, C. J., said: "The professed object of those who subscribed to the parsonage fund was to avoid those difficulties and divisions which arise in supporting a minister by parish taxes, and to preserve the interesting connection between a pastor and his church and people. The subscribers have expressed in plain terms the conditions on which their donations are made; and by these, require of the trustees the performance of several duties attended with labor and some expense. The acceptance of the donations on these conditions amounts to an undertaking on the part of the trustees to perform this labor and incur the necessary expense of recording the list of donations and the directions

of the donors, and furnishing copies as required by them. This acceptance and undertaking of the trustees at the request of the donors, form a good consideration for the note in question."

Where the subscription was made for the support of the minister, it was held that a subsequent change of the articles of faith adopted by the church, though made in some essential particulars, did not absolve the parties from the obligation of such agreement. *Parsonage Fund v. Ripley*, 6 Me. 442.

When the trustees of an institution incorporated for educational purposes are capable of receiving money and carrying out the design of a subscription, wherein the subscribers promise to pay to the order of such trustees the sums set against their names in six years from date, to create a building fund for said institution, such trustees are amenable to law in case of negligence or abuse of their trust; and when such subscription is accepted, there is an implied promise for its faithful execution, and that is sufficient consideration for the promise of each subscriber to the fund. *Maine Cent. Institute v. Haskell*, 73 Me. 140.

The plaintiff undertook to expend money in the erection of a manufactory in the City of St. Paul, upon the condition that certain sums should be subscribed and paid by citizens thereof in aid of the enterprise and upon the faith of such subscriptions. It was held that this was a sufficient consideration for the subscriptions. *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164.

1. *Boutell v. Cowdin*, 9 Mass. 254; *Phillips Limerick Academy v. Davis*, 11 Mass. 112; 6 Am. Dec. 162; *Bridge-water Academy v. Gilbert*, 2 Pick. (Mass.) 579; 13 Am. Dec. 457; *Stewart v. Hamilton College*, 2 Den. (N. Y.) 403; *aff'd* 1 N. Y. 481. Compare *Lathrop v. Knapp*, 27 Wis. 214.

2. *Petty v. Church of Christ*, 95 Ind. 278; *Christian College v. Hendley*, 49

has been taken for maintaining the validity of subscriptions is the moral obligation of the subscriber to pay.¹ But the doctrine supported by the weight of authority is that, in order to render a subscription binding, it is not necessary that it be formally accepted in express terms;² an acceptance may be implied, either from a performance of the conditions stipulated in the subscription paper, or from some unequivocal act done on the faith of the subscription, such as expending money or assuming liability; but that, in the absence of one or the other of the above circumstances, the subscription is *nudum pactum*, a mere offer, and cannot be enforced.³

(2) *By Performance of Conditions.*—Subscriptions are frequently made on certain conditions; as that something be done, or that a certain amount of money in the aggregate be subscribed. Where this is the case, the performance of the condition on the part of

Cal. 347; *Watkins v. Eames*, 9 Cush. (Mass.) 537; *Trustees of Church, etc., v. Stetson*, 5 Pick. (Mass.) 506; *Allen v. Duffie*, 43 Mich. 1; 38 Am. Rep. 159; *Homan v. Steele*, 18 Neb. 652; *Congregational Soc. v. Perry*, 6 N. H. 164; 25 Am. Dec. 455; *Osborn v. Crosby*, 63 N. H. 583; *Edinboro Academy v. Robinson*, 37 Pa. St. 210; 78 Am. Dec. 421. But see *Presbyterian Church v. Cooper*, 112 N. Y. 517; 8 Am. St. Rep. 767.

The objection to this view is that, if the mutual promises do constitute a sufficient consideration for each other, so as to create a valid contract, it is a contract between the co-signers only, and not between them and a third person who is not a signer. See 16 Am. L. Reg. 550; *Curry v. Rogers*, 21 N. H. 255. And compare 1 *Parsons on Cont.* (7th ed.) 454, where it is said: "To say that they [*i. e.*, subscriptions] are obligatory, because they are all promises, and the promise of each subscriber is a valid consideration for the promise of every other, seems to be reasoning in a vicious circle. The very question is, are the promises binding, for if not, then they are no consideration for each other. To say that they are binding because they are such considerations, is only to say that they are binding because they are binding; it assumes the very thing in question."

Such mutual promises might, however, support an action against a single individual, who refused to pay, brought by his co-subscribers, they having accomplished the object for which the subscription was gotten up. *George v. Harris*, 4 N. H. 533; 17 Am. Dec. 446.

1. *Caul v. Gibson*, 3 Pa. St. 416.

2. *Richelieu Hotel Co. v. International Military Encampment Co.* (Ill. 1892), 29 N. E. Rep. 1044. But a stipulation that the trustees of a certain fund, to be raised by subscription, shall signify their acceptance of the trust in writing, is a condition precedent to their right to enforce such subscription. *Wiswell v. Bresnahan*, 84 Me. 397.

Acceptance Inferred.—Where a subscription was entered into for the payment of certain sums of money to a contemplated corporation, to be formed for a purpose from which the subscribers were to derive benefits, no formal acceptance of the subscription, nor notice of such acceptance, is necessary to make it binding; but an acceptance may be inferred from the subsequent action of the corporation; which, when formed, may enforce the subscription. *Richelieu Hotel Co. v. International Military Encampment Co.* (Ill. 1892), 29 N. E. Rep. 1044.

Under *Indiana Rev. St.* 1881, § 5101, providing that "the board of commissioners shall have power to receive subscriptions and donations in money or property, real or personal, which shall be applied to the construction or improvement of such road," a written subscription is not invalid because not dated, and in a suit thereon it will be presumed that it has been received and accepted. *Allen v. Clinton Co.*, 101 Ind. 553.

3. See *infra*, the next two subdivisions; *Broadbent v. Johnson* (Idaho, 1887), 13 Pac. Rep. 83; *Cottage St. M. E. Church v. Kendall*, 121 Mass. 528; 23 Am. Rep. 286.

the promisee, or the person who accepts the offer contained in the subscription, constitutes a valuable consideration for the contract of subscription, which accordingly is binding.¹ But where the condition, or a material part thereof,² is not complied with,

1. *Miller v. Ballard*, 46 Ill. 377; *Kentucky Baptist Education Soc. v. Carter*, 72 Ill. 247; *Williams College v. Danforth*, 12 Pick. (Mass.) 541; *Bort v. Snell*, 39 Hun (N. Y.) 388; *Darnall v. Lyon* (Tex. 1892), 19 S. W. Rep. 506; *Lafayette Co. Monument Corp. v. Magoon*, 73 Wis. 627; *Lafayette Co. Monument Corp. v. Ryland*, 80 Wis. 29. Compare *Broadbent v. Johnson* (Idaho, 1887), 13 Pac. Rep. 83; *Richelieu Hotel Co. v. International Military Encampment Co.* (Ill. 1892), 29 N. E. Rep. 1044; *Schuler v. Myton*, 48 Kan. 282; *Homan v. Steele*, 18 Neb. 652; *Culver v. Banning*, 19 Minn. 303.

One who agrees with a county board to give a certain sum for a certain purpose, on condition that the county shall make a donation for the same purpose, becomes bound by his agreement when the county raises and gives the specified amount; and a corporation organized under the agreement to become trustee to receive the money and carry out the purpose has no power, without consent of the county, to agree to other conditions, on breach of which the subscriber will be released from his obligation. *Lafayette Co. Monument Corp. v. Ryland*, 80 Wis. 29.

The defendant subscribed a paper, whereby he agreed to pay the plaintiff, an incorporated college, a certain sum, provided the college remained in the place where it then was; otherwise the subscription to be void, and the money, if paid, to be refunded; and also provided the corporation should, within one year, accept the subscription, and, by vote, order an entry of the paper upon their records. These conditions having been complied with, it was held that the promise was made for a sufficient consideration, and was binding on the defendant. *Williams College v. Danforth*, 12 Pick. (Mass.) 541.

Defendant proposed to the county supervisors that if the county, within two years, would raise by taxation the sum of \$2,000 towards the payment of a soldiers' monument, proposed to be erected by plaintiff, defendant would himself give \$1,000 for the same object. The county, under this proposition,

raised the \$2,000 within the prescribed time and paid it to plaintiff. It was held that defendant's proposal was a conditional subscription, and became absolute upon such performance by the county, and was supported by a valid consideration. *Lafayette Co. Monument Corp. v. Magoon*, 73 Wis. 627. See also *Darnall v. Lyon* (Tex. 1892), 19 S. W. Rep. 506.

And if performance of condition is not intended to precede payment, the subscriber may not set up the failure of performance of the condition when sued upon his subscription. *Keller v. Johnson*, 11 Ind. 337; 71 Am. Dec. 355.

2. *Low v. Studabaker*, 110 Ind. 57; *Sickels v. Anderson*, 63 Mich. 421.

Where subscriptions to the removal and establishment of a manufactory elsewhere are upon the condition precedent that the manufactory shall be completed by a day certain, time is essential, and the subscriptions are obligatory only upon the strict performance of the condition. *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164.

A promise to pay money upon the completion of a railroad, described in the contract as the Delphos, Bluffton & Frankfort Railroad, can only be enforced by the promisee upon proof that the railroad named has been completed, and it will not be sufficient to entitle the promisee to a recovery to prove that a railroad has been built, for it must be shown that the railroad described has been built. *Low v. Studabaker*, 110 Ind. 57.

In fulfillment of a donation to aid the construction of a railroad, the donors gave a note to the contractors in part payment of the debt due by the railroad company, payable "one day after the grading shall be done, and the ties on the ground sufficient for the roadbed of the O. & N. W. R. R., between O. and E." The O. & N. W. R. R. quit work before the grading and tying had been done and abandoned its roadbed. Twelve years after, another company built a road between O. and E., partly on the old line and partly on a shorter and more direct line. There was no evidence that the new company succeeded to the rights of, or had any connection

the subscription, if unpaid, cannot be enforced,¹ and if paid, can

with, the original company. It was held that the roadbed mentioned in the note being a material part of the contract, and not completed within a reasonable time, no recovery could be had. *Sickels v. Anderson*, 63 Mich. 421.

1. *First M. E. Church v. Sweny* (Iowa, 1892), 52 N. W. Rep. 546; *Wiswell v. Bresnahan* (Me. 1892), 24 Atl. Rep. 885; *Brown v. Dibble*, 65 Mich. 520; *Cincinnati, etc., R. Co. v. Bensley*, 51 Fed. Rep. 738.

A stipulation that the trustees of a certain fund to be raised by subscription should signify their acceptance of the trust in writing, is a condition precedent to their right to enforce such subscriptions. *Wiswell v. Bresnahan* (Me. 1892), 24 Atl. Rep. 885.

The agreement by which subscriptions were made to the erection of a factory provided that the money should be paid to a trust company on August 1st, but should not be paid to the beneficiary, unless its factory was in operation by September 1st, failing which it was to be refunded to the subscribers. The time was afterwards extended to November 1st. It was held that the extension was subject to the same condition as to refunding the money subscribed. *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164.

A subscribed, in aid of a railroad company, \$5,000, "one-half of said sum to be due and payable when said company shall construct or secure a continuous line of railway from T to M." Trains ran from T into M over the road in the specified time, but the road belonging to the company only extended to D, and the distance from D to T was run over the road belonging to another company under an arrangement by which the company was permitted to use the track thereof, but in subordination to the use of the company owning. It was held that there was no performance under which A could be held upon his subscription. *Brown v. Dibble*, 65 Mich. 520.

In *Schuler v. Myton*, 48 Kan. 282, the facts were these: Plaintiffs subscribed and guaranteed the payment of a sum of money and the conveyance of land, on the condition that a college should be erected on a certain tract of land, and defendant, who would derive benefit therefrom, subscribed and engaged to pay plaintiffs

a certain sum of money, but his subscription, which was in writing, was, for some reason, on the express condition that the college should be located on the southwest quarter of that tract. The college was built on the tract, but not on the southwest quarter thereof; the plaintiffs paid their subscription. Subsequently the defendant made a new oral promise to pay the amount of his subscription without reference to the location of the college. It was held that, as plaintiffs were bound by their subscription notwithstanding the location, the new promise of defendant was without consideration, and that they could not recover from him the amount of his subscription.

The members of the plaintiff church, contemplating the erection of a new church building, organized a society "to procure funds for the furnishing of the new church on its completion." Many members thought the building would be erected on a lot the property of the church, and such lot was subsequently fixed upon as the location. Later, the location became a matter of contention, whereupon the society ceased its efforts, and finally the location was changed. Several contributors asked that their money be refunded if the building was not to be erected on the lot originally selected. In an action by the church to recover the funds contributed, the treasurer of the society testified that she contributed with the understanding that the church would be built on such lot. One of the officers of the church testified that it was generally understood that such would be the site. It was held sufficient to sustain a finding that the contributions were made on condition that the church be erected on that location. *First M. E. Church v. Sweny* (Iowa, 1892), 52 N. W. Rep. 546.

One who might have avoided his subscription on account of the alteration of the paper, may be held by his silence and conduct to have ratified the alteration. *Landwerlen v. Wheeler*, 106 Ind. 523.

In an action on a subscription, where it is shown that defendant signed the subscription paper set out in the complaint, but has never paid the amount subscribed, and there is evidence of a material alteration in the instrument, there is a question for the jury and it

be recovered back with interest from the date of payment.¹ However, to discharge the subscriber, there must be an actual failure of fulfillment of the condition, and a possible or probable failure is not sufficient.² When the condition upon which the subscription is promised, is that the subscriptions shall aggregate a certain sum, the other subscriptions must all be valid in order to render the first binding.³ Where the subscribers severally append different conditions to their subscriptions, the liability of any one is not affected by the conditions annexed by the others,⁴ each being liable only on his own subscription as qualified by himself.⁵ It is sufficient that upon the faith of the subscription the conditions of the instrument were performed, and it is not necessary that the payees of the instrument themselves should perform the work and expend the money, nor does it vitiate the promise that the performance should be delegated to a corporation.⁶

(3) *By Bestowing Labor or Incurring Liability.*—Where, before notice of the withdrawal of the subscription,⁷ any one, on the faith of the offer contained in the subscription paper, does some act which would result in loss, inconvenience, injury, or the risk thereof, to him, in case the sums subscribed were not paid, a valuable consideration arises to support the transaction, and the subscribers are bound.⁸ Thus a subscription will be held valid,

is error to direct a verdict for defendant. *Hale v. Ripp*, 32 Neb. 259.

1. *Fort Wayne Electric Light Co. v. Miller* (Ind. 1892), 30 N. E. Rep. 23.

2. *Lafayette Co. Monument Corp. v. Magoon*, 73 Wis. 627, holding that the possible or probable failure of plaintiff to raise \$6,000 for the monument fund within one year after defendant's subscription to the fund became due, required as a condition subsequent by the terms of the subscription, is no defense to an action on a check given in payment thereof, in which judgment was rendered prior to that date. Defendant has a remedy by motion in the circuit court to have the judgment discharged, if it shall be made to appear that such condition is valid, and that it has been broken since the rendition of the judgment. *Lafayette Co. Monument Corp. v. Magoon*, 73 Wis. 627.

3. *Presbyterian Church v. Cooper*, 45 Hun (N. Y.) 453; *Twenty-third St. Baptist Church v. Cornwell*, 56 N. Y. Super. Ct. 260.

4. *Miller v. Preston*, 4 N. Mex. 314. In this case the defendant subscribed a sum towards the completion of a railroad, writing the condition above his name, "On completion of the road." Others subscribed various sums on the

same list, adding certain conditions as to payment. It was held that the conditions annexed by the other subscribers in no way affected defendant's liability. *Miller v. Preston*, 4 N. Mex. 314.

5. *Davis v. Shafer*, 50 Fed. Rep. 764.

6. *Miller v. Ballard*, 46 Ill. 377.

7. See *infra*, this title, *Revocation of Subscription*; *Gittings v. Mayhew*, 6 Md. 113.

8. *Sturges v. Colby*, 2 Flap. (U. S.) 163; *Pryor v. Cain*, 25 Ill. 292; *Griswold v. Peoria University*, 26 Ill. 41; 79 Am. Dec. 361; *McClure v. Wilson*, 43 Ill. 356; *Whitsitt v. Preemption Presbyterian Church*, 110 Ill. 125; *Hudson v. Green Hill Seminary Corp.*, 113 Ill. 618; *Richelieu Hotel Co. v. International Military Encampment Co.* (Ill. 1892), 29 N. E. Rep. 1044; *Friedline v. Carthage College*, 23 Ill. App. 494; *United Presbyterian Church v. Baird*, 60 Iowa 237; *University of Des Moines v. Livingston*, 65 Iowa 202; *White v. Scott*, 26 Kan. 476; *Foxcroft Academy v. Favor*, 4 Me. 382; *Carr v. Bartlett*, 72 Me. 120; *Haskell v. Oak*, 75 Me. 519; *Gittings v. Mayhew*, 6 Md. 113; *Homes v. Dana*, 12 Mass. 190; 7 Am. Dec. 55; *Farmington Academy v. Allen*, 14 Mass. 172; 7 Am. Dec. 201; *Bryant v.*

where, on the faith of it, obligations are contracted or liabilities incurred,¹ as by borrowing money,² or where money is advanced or expended to promote or effect the subscription purposes;³

Goodnow, 5 Pick. (Mass.) 228; Mirick v. French, 2 Gray (Mass.) 420; Ives v. Sterling, 6 Met. (Mass.) 310; Underwood v. Waldon, 12 Mich. 73; Conn. v. McCullough, 12 Mo. App. 356; Swain v. Hill, 30 Mo. App. 436; Homan v. Steele, 18 Neb. 652; Osborn v. Crosby, 63 N. H. 583; Miller v. Preston, 4 N. Mex. 314; Barnes v. Perine, 15 Barb. (N. Y.) 249; *aff'd* 12 N. Y. 18; M'Auley v. Billenger, 20 Johns. (N. Y.) 89; Ohio Wesleyan Female College v. Higgins, 16 Ohio St. 20; Stoke's Estate, 14 Phila. (Pa.) 251; Hopkins v. Upshur, 20 Tex. 89; 70 Am. Dec. 375; Doyle v. Glasscock, 24 Tex. 200; Cooper v. McCrimmin, 33 Tex. 383; 7 Am. Rep. 268; Williams v. Rogan, 59 Tex. 438; Gulf, etc., R. Co. v. Neely, 64 Tex. 344; University of Vermont v. Buell, 2 Vt. 48; State Treasurer v. Cross, 9 Vt. 289; 31 Am. Dec. 626. *Compare* Davis v. Shafer, 50 Fed. Rep. 764; Lincoln University v. Hepley, 28 Ill. App. 629; Caul v. Gibson, 3 Pa. St. 416.

1. Thompson v. Mercer Co., 40 Ill. 379; Beach v. First M. E. Church, 96 Ill. 177; Friedline v. Carthage College, 23 Ill. App. 494; Carr v. Bartlett, 72 Me. 120; Cottage St. M. E. Church v. Kendall, 121 Mass. 528; 23 Am. Rep. 286; Gittings v. Mayhew, 6 Md. 113; Homan v. Steele, 18 Neb. 652; Collier v. Baptist Education Soc., 8 B. Mon. (Ky.) 68; Ohio Wesleyan Female College v. Higgins, 16 Ohio St. 20; Irwin v. Webster, 7 Ohio Cir. Ct. Rep. 269; Stoke's Estate, 14 Phila. (Pa.) 251; Hopkins v. Upshur, 20 Tex. 89; 70 Am. Dec. 375; Doyle v. Glasscock, 24 Tex. 200; Wesleyan Seminary v. Fisher, 4 Mich. 514; Davis v. Johnson, 4 Mo. App. 240. *Compare* Lincoln University v. Hepley, 28 Ill. App. 629.

L. executed and delivered to an educational corporation an agreement as follows: "To all whom it may concern. I, L., agree to give one thousand dollars of my estate to the within-named objects: Seven hundred and fifty dollars to the M. Society, and two hundred and fifty dollars to the O. College; said sums to be paid out of my estate as provided in my will." The sum of \$1,000 was afterwards, by L.'s will, made a charge upon certain

lands devised, but without stating how it should be applied. It was held that this was a subscription, and liabilities having been incurred on the faith of it, its collection could not be defeated by an alleged want of consideration. *Ohio Wesleyan Female College v. Higgins*, 16 Ohio St. 20.

2. McClure v. Wilson, 43 Ill. 356; United Presbyterian Church v. Baird, 60 Iowa 237.

Thus, where a party subscribed towards the payment of a debt due for the building of a church edifice, and the trustees of the church afterwards, in their corporate capacity, but on the faith of the subscription list, borrowed money to pay the church debt, it was held that the payment of such subscription could be enforced, as coming within the rule that where a person subscribes to a public enterprise, and work is done, money expended or liability incurred on the faith of such subscription, it becomes binding. *M. E. Church v. Gawey*, 53 Ill. 401.

And it seems, the fact that the money so borrowed was used by the trustees to discharge a pre-existent debt, does not alter the fact that they incurred a new and different liability. *M. E. Church v. Gawey*, 53 Ill. 401.

But a subscription for the purpose of paying off an old debt, where no new liability or obligation is assumed upon the faith of the same is without consideration. *University of Des Moines v. Livingston*, 57 Iowa 307; 42 Am. Rep. 42.

3. Sturges v. Colby, 2 Flip. (U. S.) 163; Friedline v. Carthage College, 23 Ill. App. 494; Pryor v. Cain, 25 Ill. 292; Hudson v. Green Hill Seminary Corp., 113 Ill. 618; Griswold v. Peoria University, 26 Ill. 41; 79 Am. Dec. 361; McClure v. Wilson, 43 Ill. 356; Whitsitt v. Preëmption Presbyterian Church, 110 Ill. 125; Richelieu Hotel Co. v. International Military Encampment Co. (Ill. 1892), 29 N. E. Rep. 1044; University of Des Moines v. Livingston, 65 Iowa 202; Gittings v. Mayhew, 6 Md. 113; Homes v. Dana, 12 Mass. 190; 7 Am. Dec. 55; Farmington Academy v. Allen, 14 Mass. 172; 7 Am. Dec. 201; Bryant v. Goodnow, 5 Pick. (Mass.) 228; Amherst Academy v. Cowls, 6 Pick. (Mass.) 433; 17 Am. Dec. 387;

materials furnished;¹ labor bestowed,² as in erecting a building³ or bridge;⁴

Underwood v. Waldron, 12 Mich. 73; *Swain v. Hill*, 30 Mo. App. 436; *Osborn v. Crosby*, 63 N. H. 583; *Maine Cent. Institute v. Haskell*, 73 Me. 140; *Miller v. Preston*, 4 N. Mex. 314; *Hopkins v. Upshur*, 20 Tex. 89; 70 Am. Dec. 375; *Doyle v. Glasscock*, 24 Tex. 200; *Gulf, etc., R. Co. v. Neely*, 64 Tex. 344; *Eycleshimer v. Van Antwerp*, 13 Wis. 610.

Where the defendant subscribed \$500 "for the purpose of erecting an Athenaeum in the City of Baltimore," to be paid "when the whole amount of \$25,000 shall have been subscribed, and in such installments as may be required by the building committee," it was held that the fact that advances were made, or expenses or liabilities incurred by others in consequence of voluntary subscriptions, before notice of withdrawal, was sufficient to make them obligatory, provided the advances were authorized by a fair and reasonable reliance on the subscriptions; and the defendant having, by his signature, authorized others to enter into engagements for the accomplishment of the enterprise, the law requires that he should save them harmless to the extent of his subscription; and further, the facts that the required amount was subscribed, and the committee made contracts and erected and completed the building, relying upon the good faith of the subscribers, constitute a sufficient consideration for the contract. *GitTINGS v. Mayhew*, 6 Md. 113.

It is a sufficient consideration to support a subscription for a college that, relying on it, the college has incurred expense and trouble in raising other funds for repairs and endowment. *University of Des Moines v. Livingston*, 65 Iowa 202.

If a subscription be made to a charitable fund after the incorporation of the body who are its trustees, and afterwards a promissory note be given, purporting to be for value received, payable to the same party, and referring expressly to the subscription and the purposes of it as the consideration of the note, and these purposes are in the process of execution, the note is founded on a sufficient consideration, and binding on the promisor. *Amherst Academy v. Cows*, 6 Pick. (Mass.) 427; 17 Am. Dec. 387.

In *Farmington Academy v. Allen*, 14 Mass. 172; 7 Am. Dec. 201, the defendant subscribed a paper with others, by which each engaged to pay a certain sum of money for raising a fund for the establishment of an academy. The defendant, upon application by the trustees for payment of a portion of his subscription, furnished some materials towards the finishing of the building which the trustees had erected. It was held that he was liable to the trustees for the remainder of his subscription, on the ground of money paid and laid out by them for his use.

1. *Pryor v. Cain*, 25 Ill. 292; *Hudson v. Green Hill Seminary Corp.*, 113 Ill. 618.

2. *Robertson v. March*, 4 Ill. 198; *Pryor v. Cain*, 25 Ill. 292; *Kentucky Baptist Education Soc. v. Carter*, 72 Ill. 247; *Hudson v. Green Hill Seminary Corp.*, 113 Ill. 618; *Swain v. Hill*, 30 Mo. App. 436; *Williams v. Rogan*, 59 Tex. 438; *Presbyterian Soc. v. Beach*, 74 N. Y. 72.

3. *White v. Scott*, 26 Kan. 476; *Conn v. McCollough*, 12 Mo. App. 356; *Barnes v. Perine*, 15 Barb. (N. Y.) 249; *aff'd* 12 N. Y. 18; *University of Vermont v. Buell*, 2 Vt. 48; *State Treasurer v. Cross*, 9 Vt. 289; 31 Am. Dec. 626. *Compare Davis v. Shafer*, 50 Fed. Rep. 764.

In *White v. Scott*, 26 Kan. 476, a number of parties subscribed for the purpose of erecting a building, on the faith of which subscriptions the building was erected under direction of a committee duly appointed by the parties; nearly all the subscribers paid, but the delinquency of one, left a small debt against the building enterprise: it was held that the delinquent subscriber could not defend against an action brought by those who had paid to enforce the payment of the amount subscribed by him. And where, in an action on a subscription paper, in which no consideration was expressed, the declaration averred that the consideration was the agreement of the plaintiffs to remove an old church and build a new one, and that they had done both, and the proof was according to the averments, it was held that the plaintiffs were entitled to recover. *Barnes v. Perine*, 15 Barb. (N. Y.) 249.

4. *Cooper v. McCrimmin*, 33 Tex.

or where the business of a corporation is continued.¹

c. WHERE MADE ON SUNDAY.—For the effect of a subscription made on Sunday, see SUNDAY, vol. 24.

d. EFFECT OF FRAUD.—If a subscription be procured through fraud, the subscriber will be relieved from liability thereon.² A common instance of fraud in this connection is the obtaining fictitious or honorary subscriptions in order to influence the conduct of others; and should it appear, when the subscription is conditioned on raising a certain sum, that some of the subscriptions are of this character, the parties making the other subscriptions will not be bound.³

2. Parties.—A subscription, to be valid, must be made by a person or association capable of entering into a binding contract.⁴ It is not always necessary that the person to whom the subscription is payable should be designated or known at the time of the making of the subscription.⁵

383; 7 Am. Rep. 268; and if the subscription be made payable on demand, an action will lie for the recovery thereof before the erection of the bridge. *Brimhall v. VanCampen*, 8 Minn. 13; 52 Am. Dec. 118.

1. The stockholders of a corporation, the liabilities of which were greater than the assets, subscribed an agreement to pay certain sums to the treasurer to make up the difference. All but one subscriber paid accordingly, and the business of the corporation went on. It was held, that the treasurer could maintain *assumpsit* against the delinquent subscriber for the benefit of those who were creditors at the time of the subscription. *Haskell v. Oak*, 75 Me. 519.

2. *Middlebury College v. Loomis*, 1 Vt. 189; *Richelieu Hotel Co. v. International Military Encampment Co.* (Ill. 1892), 29 N. E. Rep. 1044; *New York Exch. Co. v. DeWolf*, 31 N. Y. 273; *Coil v. Pittsburgh Female College*, 40 Pa. St. 439.

3. *Middlebury College v. Loomis*, 1 Vt. 189. See also *Middlebury College v. Williamson*, 1 Vt. 212. Compare *Blodgett v. Morrill*, 20 Vt. 509. Confidential subscriptions made for the purpose of making up the required sum are a fraud upon the other subscribers, and should not be treated as valid subscriptions, and where, by deducting such confidential subscriptions, the required sum is not subscribed, the contract of subscription does not become operative so as to bind the subscribers. *New York Exch. Co. v. DeWolf*, 31 N. Y. 273. See also

supra, this title, *By Performance of Conditions*.

4. In *Presbyterian Church v. Cooper*, 45 Hun (N. Y.) 453, it was held that a subscription by a "Ladies' Association" was not legally binding upon the twenty-five or thirty ladies who assembled and passed a resolution to raise the money, but did not pass it to make the subscription, and who had no actual organization such as would render the association as such capable to contract; and that a subscription "Sunday school, by R. F. Todd," was invalid, Todd not assuming to bind himself, and assuming to be the agent of a "Sunday school" which was incapable of binding itself. On the authority of this case the superior court of New York City held invalid subscriptions of a "Ladies' Aid Society," "Young Men's Mission Society," and a "Youths' Mission Society." *Twenty-third St. Baptist Church v. Cornwell*, 56 N. Y. Super. Ct. 260.

5. In *Comstock v. Howd*, 15 Mich. 237, it was held that a subscription to provide a dinner was binding, although no promisee was named, and that it might be collected in the name of one of the subscribers selected by the rest to collect and disburse the money.

In *Thompson v. Page*, 1 Met. (Mass.) 565, the contract of subscription to the stock of a meeting-house to be built provided for payment to such person as the majority of shareholders present at a meeting to be held for that purpose should elect as treasurer. The court, by Shaw, C. J., said: "Until some person is chosen a treasurer it might be

3. Nature of Liability.—The signers of a subscription paper in the ordinary form are severally, not jointly, liable.¹ Hence one subscriber is not in any way responsible for the payment of the sum promised by a co-subscriber.²

considered as an offer only, or a revocable promise; but if before any revocation of such promise the plaintiff was chosen and qualified, then it was the same as if the promise were made to the plaintiff by name; and that "it was therefore an express promise to pay to the treasurer of the associates when chosen and qualified as therein specified, with an express authority to him to sue for the same if not paid voluntarily."

In *Hopkins v. Upshur*, 20 Tex. 89; 70 Am. Dec. 375, it was held that a voluntary subscription to donate cash or property to the vestry of a church, as trustees of the temporal affairs of the church, for the erection of a church building, and delivered to one of said vestry, ripened into an enforceable contract as soon as the trustees were permitted to incur legal liabilities and expense upon the faith of it; and that a subscription for the purpose of erecting a church building might be assigned by the vestry in payment therefor, and that the contractor who undertook to build the church, and to whom the subscription was assigned, might sustain an action therefor in his own name.

1. *Robertson v. March*, 4 Ill. 198; *Gibbons v. Butte* (Minn. 1892), 53 N. W. Rep. 756; *Landwerlen v. Wheeler*, 106 Ind. 523. In this latter case the subscription paper read: "We, the undersigned, promise to pay the following subscriptions," etc. Below were names, and opposite them, amounts. It was held that the obligations of the subscribers were several and not joint. In *Davis v. Belford*, 70 Mich. 120, plaintiffs contracted with a large number of subscribers to build a creamery for the aggregate amount of their subscriptions; the latter agreeing "to pay the above amount," and to organize into a company, and not to be liable for any indebtedness, "except that which is hereby created and to be paid to the parties of the first part." It appeared that the signatures were obtained by an agent, with the understanding that each subscriber would be liable only for the amount opposite his name, and that plaintiffs wrote to one of the subscribers that they would back whatever the agent agreed to. It was held a several and not a joint

contract. *Bort v. Snell*, 39 Hun (N. Y.) 388; *Compare Darnall v. Lyon* (Tex. 1892), 19 S. W. Rep. 506, in which the terms of the subscription were that each subscriber was to be liable only for the amount set opposite his name, and the contract was accordingly held to be several. But in *Davis v. Shafer*, 50 Fed. Rep. 764, the contract of subscription was, under the peculiar circumstances, held both joint and several. In this case a contract between plaintiffs and defendants, "the undersigned subscribers," provided that plaintiffs should build and equip for defendants a cheese factory, and that defendants should furnish at their own expense suitable land for the building, and should be credited therefor with \$200 as a payment on the contract. The contract recited: "We, the subscribers, agree to pay" \$6,850 for the factory when completed; and provided that, when said amount should be subscribed, defendants should incorporate with a capital stock of not less than \$6,850, to be divided into shares of \$100 each, to be issued to the subscribers in proportion to their paid-up interest. To the contract was attached a heading for the subscribers thus: "Names of subscribers. No. of Shares. Amount of Stock, after Incorporation," and it was signed by defendants, as such subscribers, for various shares. It was held that the contract imposed a joint and several obligation on the subscribers to pay the whole \$6,850, and did not merely bind them severally to the extent of the sums respectively subscribed by them. This case was disapproved in *Davis, etc., Building & Mfg. Co. v. Barbour*, 51 Fed. Rep. 148. It is to be observed, however, that in this latter case there was a clause providing "that each stockholder shall be liable only for the amount subscribed by him;" and this was held by the court as indicating that the contract was several, and could not be regarded as merely regulating the rights among the stockholders themselves. In all other respects the contracts in the two cases were identical.

2. *Nellis v. Coleman*, 98 Pa. St. 465. In this case it was held that where, in

4. Construction of Contract—(See INTERPRETATION, vol. 11, p. 507).—Such contract is to be construed according to the ordinary rules of interpretation prescribed for contracts in general.¹

a contract of subscription by several, there is no agreement between the various subscribers to pay or to guaranty the payment of each other's loans, and afterwards one subscriber fails to advance the amount which he has agreed to loan, another subscriber who has paid his subscription cannot, upon obtaining judgment against the borrower therefor, compel the delinquent promisor, as garnishee in an attachment execution, to pay what he has promised to loan.

1. Where the defendant wrote the following under the signatures of several other persons to a subscription paper for the building of a new church: "I agree to give a lease of my house . . . which now rents for \$172 a year for three years, towards building a new Baptist church . . . and will pay village tax and insurance, which at present rent is \$516. W. A. Robinson, Jr.," it was held that his agreement was to be construed as a subscription for the amount of the rent, and not as an agreement to give a lease of the house which the society could sub-let at such rent as could be obtained for the same. *First Baptist Soc. v. Robinson*, 21 N. Y. 234.

A subscription paper, setting forth that the signors "subscribe the sums set opposite our respective names," and containing other language indicating that the intention was to subscribe sums of money, followed by subscribers' names with figures opposite, of which one has the figures "1,000" opposite, will be deemed to be, as to such subscriber, a subscription of \$1,000. *Richelieu Hotel Co. v. International Military Encampment Co.* (Ill. 1892), 29 N. E. Rep. 1044.

In *Smith v. Sowles* (Vt. 1887), 10 Atl. Rep. 536, the plaintiff signed a subscription paper payable to the defendants, but denied that he was bound by his subscription, and refused to pay the same, alleging that its original conditions and its conditions as modified by a letter from one of the defendants, had not been complied with. It was held that the subscription paper was not ambiguous, but plain and complete in itself, and must be construed independently of the letter; that the only condition of the subscription was that the defendants and another should convey

certain property for a specified purpose; and that the phrase "on six thousand dollars being subscribed hereto," was not a condition of the subscription strictly, but a condition on behalf of the defendants, they not being obliged to convey until such an amount was subscribed.

A subscription to build a medical college was payable one-third "when the walls should be completed." It was held that such subscription was payable when the walls were so far completed as to receive the roof, although the walls had not then been covered with mastic, according to the complete designs of the building. *Worcester Medical Inst. v. Harding*, 11 Cush. (Mass.) 285. See also *Worcester Medical Inst. v. Bigelow*, 6 Gray (Mass.) 498.

In *Stillwell v. Glascock*, 47 Mo. App. 554, it was held that a provision in a contract of subscription that non-payment of the sum subscribed should operate a forfeiture of the benefits to which the subscription entitled the subscriber, but should not relieve him from liability for his subscription, is valid, and the subscription may be enforced notwithstanding the subscriber is denied such benefits owing to such non-payment on his part.

It being proposed to purchase a certain site for a board of trade building, subscriptions for that purpose were solicited of the owners of neighboring property, on the theory that the value thereof would be largely enhanced by the erection of such a building. Defendants engaged to pay a certain sum in consideration of the proposal to sell the site, and of the probable increase in value of the neighboring property "and the further consideration that the said board of trade shall erect and complete said proposed building and occupy the same for its regular sessions within two years from January 1, 1881." It was held that the latter condition went to the whole promise, and on a breach thereof suit was not maintainable on the contract. *Cincinnati, etc., R. Co. v. Bensley*, 51 Fed. Rep. 738.

G. executed the following writing: "When twenty thousand dollars, including the amount herein specified, are raised as a capital to endow Potts professorship in Westminster College,

5. **Revocation**—*a*. **EXPRESS**.—A promise to pay a subscription to some charitable object is a mere offer, which may be revoked at any time before it is accepted by the promisee.¹ And an ac-

I promise to pay the trustees of Westminster College one thousand dollars as a part of the endowment of said professorship, and be used only for that purpose." It was held that the amount was raised in accordance with the condition of such promise when the same was assured by the undertaking of solvent and responsible obligors. *Westminster College v. Gamble*, 42 Mo. 411.

Defendant and other residents of a town signed a subscription paper, engaging thereby to pay a certain sum, purporting to be a donation to a certain named college, to be built in the town, but the contract did not state to whom the money should be paid. It appeared, however, that prior to the signing of the subscription paper, defendant and the other subscribers had been discussing plans for raising money for the erection of the college, and had determined upon the organization of a corporation to purchase land and sell the same in lots, and from the money thus raised to erect the college building. In pursuance of this determination the plaintiff investment company was organized and the subscription paper turned over to it. There was a provision in the contract that the subscribers should receive lots to the amount of their subscriptions in the investment company's addition. Plaintiff bought the land, sold the lots and built the college. It was held that the contract under the circumstances imported an undertaking between plaintiff and defendant. *Fulton v. Sterling Land, etc., Co.*, 47 Kan. 621.

In *Lock v. Belmont Congregational Soc.* (Mass. 1893), 32 N. E. Rep. 949, the facts were these: A religious society, in order to liquidate its debt, appointed a committee to solicit subscriptions, and voted that the subscribers should receive the amount of their subscriptions in unsold pews of the meeting house, and on a sale of the pews the proceeds should be divided among the subscribers. The society discontinued all assessments on pews, and thereafter depended for funds entirely upon voluntary subscriptions, permitting the subscribers to use the unsold pews, and making no further effort to sell the same; this was done with the acquiescence of the parties

represented by plaintiffs. Subsequently the meeting house was sold. It was held that the subscription was a gift, and the society was under no contract to repay, and it was under no obligation except to allow the subscribers to take the pews or the proceeds arising from the sale of the same; and, further, the society was not liable on the ground that by a sale of the meeting house it had put it out of its power to allow the subscribers to take their pay in pews or money arising from their sale, as the acquiescence of the subscribers in the change from an assessment to a non-assessment policy showed an abandonment of their rights under the vote of the society for the benefit of the society, and that all parties must be presumed to have acted in view of the possibility that circumstances might arise requiring the society to sell or rebuild the meeting house.

In *Judson University v. Kinkaid* (Kan. 1893), 31 Pac. Rep. 1074, the instrument read as follows: "For value received, upon demand, after the performance of the condition herein mentioned, I promise to pay to the order of the Judson University one thousand dollars, in payments as follows: The condition of the above agreement is that, if the trustees of the Judson University of Wichita shall, within thirty days from the 7th of March, 1887, by a formal resolution, permanently locate the buildings of said university, which are to cost not less than one hundred thousand dollars, upon the following described tract of land, situated in Sedgwick county, Kansas, to wit: lot 1, section 4, township 28, range 1, east, 6 p. m., then this agreement to remain in full force and effect; otherwise, to be null and void." (Signed) Clark Kinkaid. It was held that the only condition precedent to payment was the location; it was not necessary that buildings costing not less than one hundred thousand dollars should be erected before payment could be enforced, these words in the instrument being simply a statement of the cost of the buildings to be erected.

1. *Grand Lodge v. Farnham*, 70 Cal. 158; *Pratt v. Baptist Soc.*, 93 Ill. 475;

ceptance can be shown only by some act on the part of the promisee whereby some legal liability is incurred or money is expended on the faith of the promise.¹ But where the subscription list, when signed, amounts at once to a binding contract on both sides, the subscriber may not withdraw.²

b. IMPLIED—DEATH OR INSANITY.—A subscription to a charitable, educational, or other similar object, is, until acted upon, in the nature of an offer constantly repeated, and requires some one capable of making a repetition of the offer; accordingly the death³

Beach v. First M. E. Church, 96 Ill. 177; *Stoke's Estate*, 14 Phila. (Pa.) 251; *Helfenstein's Estate*, 77 Pa. St. 328; 18 Am. Rep. 449; *Williams v. Rogan*, 59 Tex. 438; *Athol Music Hall Co. v. Carey*, 116 Mass. 471.

1. *Grand Lodge v. Farnham*, 70 Cal. 158; *Hopkins v. Upshur*, 20 Tex. 89; 70 Am. Dec. 375. In the latter case the defendant signed a subscription reading as follows: "We, the undersigned, agree to donate the cash or property set opposite our names for the purpose of erecting a Protestant Episcopal church in the City of Austin. (Among others) H. L. Upshur, cash, \$50." After the church had been contracted for, and during the time the foundation was being laid, he was called on for the amount subscribed by him, but refused to pay it. The ground of his refusal was not in the nature of a retraction, but rather that he had never signed the subscription; and he then agreed, that if his name could be shown on it, in his own handwriting, he would pay it. His name was there, and in his own handwriting. It was held that this was not a retraction, and if it had been, it was not made in time to avail him: and further, that the defendant, having permitted the trustees to incur legal liabilities and expense upon the faith of his subscription, he was liable thereon.

And in *Gulf, etc., R. Co. v. Neely*, 64 Tex. 344, in order to secure the construction of a railroad over a certain line, and the establishment of a depot at a named point, a committee solicited subscriptions to the amount of \$2,500; \$2,350 of this was paid to the railroad company in cash, and the subscription list handed in at the same time. \$150 of the subscriptions remained unpaid, but the company gave a receipt as for \$2,500, and after constructing the road and locating the depot at the desired point, sued for the remaining \$150. The defendant had withdrawn his promise to pay, but not until after the rail-

road company had accepted the subscriptions and performed its part of the agreement. It was held, when this had been done, the defendant became bound, and the subscription became a valid contract between the parties; and further, that the liability of the defendant was in nowise affected by the fact that the other subscribers paid their subscriptions in advance of the time designated.

Sufficiency of Notice of Withdrawal.—A notice to the trustees of a society, after organization, that the subscriber will not pay his subscription unless a certain person is excluded from speaking in the church, while the proffered donation still remains at the head of the subscription list as an unconditional subscription, is not sufficient to exonerate the subscriber from liability to pay it. *Snell v. M. E. Church*, 58 Ill. 290.

2. *Buchel v. Lott* (Tex. 1890), 15 S. W. Rep. 413. In this case a railroad company proposed to extend its road to C. for a bonus of \$25,000. Defendant signed a subscription list, binding himself to pay to the company \$380.25 if its road should be constructed to C. within six months. A subscription list of only \$23,000 was raised, which the company rejected. Defendant then notified the committee in charge of the list that he withdrew his subscription. With knowledge of this withdrawal the company agreed with the committee to construct the road for the \$23,000 subscribed, and the road was built within the six months. It was held that defendant was liable for the amount of his subscription.

3. *Pratt v. Baptist Soc.*, 93 Ill. 475; *Beach v. First M. E. Church*, 96 Ill. 177; *Grand Lodge v. Farnham*, 70 Cal. 158; *Phipps v. Jones*, 20 Pa. St. 260; 59 Am. Dec. 708; *Foust v. Board of Publication*, 8 Lea (Tenn.) 555.

Where there was no consideration for a subscription for the building of a church edifice at the date of the prom-

or insanity¹ of the subscriber before the offer is acted upon, operates a revocation thereof before it becomes a binding contract.

6. Action—*a*. PARTIES.—An action on the subscription may be maintained by the party named in the subscription paper as payee, or by the one afterwards selected in the manner therein indicated, for the purpose of receiving the money.² When a subscriber who

ise, and, before any expenditure was made or work done, the subscriber died, the fact that the church erected the building and incurred the expense in reliance on the subscription, does not raise a consideration to support the promise. *Twenty-third St. Baptist Church v. Cornell*, 117 N. Y. 601.

But if the subscription has been acted on by the incurring of liabilities, or the expenditure of money, it is not revoked by the subsequent death of the subscriber. *Friedline v. Carthage College*, 23 Ill. App. 494.

In *Presbyterian Church v. Cooper*, 45 Hun (N. Y.) 453, the subscription list was invalid by reason of the non-fulfillment of the condition appended. Notwithstanding the decedent, with full knowledge of the circumstances, paid a portion of his subscription before his death, it was held that his administrators were not estopped to deny any legal liability as to the unpaid portion. See also *Helfenstein's Estate*, 77 Pa. St. 328; 18 Am. Rep. 449; *Reimensnyder v. Gans*, 110 Pa. St. 17.

1. *Beach v. First M. E. Church*, 96 Ill. 177.

2. *Robertson v. March*, 4 Ill. 198; *Hall v. Thayer*, 12 Met. (Mass.) 130; *Homes v. Dana*, 12 Mass. 190; 7 Am. Dec. 55; *Farmington Academy v. Allen*, 14 Mass. 172; 7 Am. Dec. 201; *Blodgett v. Morrill*, 20 Vt. 509; *Caul v. Gibson*, 3 Pa. St. 416; *Bort v. Snell*, 39 Hun (N. Y.) 388.

One appointed to receive subscriptions for a society is the trustee of an express trust, and may sue for them without joining the society. *Landwerlen v. Wheeler*, 106 Ind. 523. See also *Stillwell v. Glascock*, 47 Mo. App. 554. Where the subscription is not payable to any particular person, committee or board, the action must be in the name of the remaining subscribers, or of the congregation. *Cross v. Jackson*, 5 Hill (N. Y.) 478; *Ryerss v. Presbyterian Congregation*, 33 Pa. St. 114. If the subscribers to a subscription paper thereby engage with the person named to pay him their respective subscriptions upon the erection of a cer-

tain building by him, he may, upon performance of the agreement on his part, enforce by suit the payment of the subscriptions, and the non-performance of an agreement made by the subscribers among themselves, and not by the persons contracted with, will not constitute a defense to such a suit. *Davis v. Johnson*, 49 Mo. App. 240.

An action may be maintained in his own name by one described as treasurer of an unincorporated association upon a subscription payable to him as such treasurer. The words describing him as treasurer, the association having no corporate existence, should be treated as surplusage. *McDonald v. Gray*, 11 Iowa 508; 79 Am. Dec. 509. But see *Ewing v. Medlock*, 5 Port. (Ala.) 82.

But where the plaintiff is merely treasurer of the fund and is not named as payee in the subscription, and has not done the work in reliance on the subscriptions, he may not maintain the suit, he being only an agent for collections. *Gittings v. Mayhew*, 6 Md. 113.

In *Carr v. Bartlett*, 72 Me. 120, the defendant, with others, signed an agreement to enter into an association for the purpose of erecting and operating a cheese factory, agreeing severally and individually to pay their regularly appointed building committee the sums set against their names. The building committee was chosen from the subscribers; the associates paid in their subscriptions; the committee contracted for the erection of the building; the money was expended, and the common enterprise established without any disclaimer or dissent of the defendant. It was held that an action for defendant's subscription might be maintained in the name of the building committee, the agreement making them payees or promisees by description.

In *Chambers v. Calhoun*, 18 Pa. St. 13; 55 Am. Dec. 583, the congregation of which the plaintiff and defendant were members resolved at a certain meeting to build a new church. The defendant was present and signed an agreement by which he promised to

is authorized to act for the others in furtherance of the common design, incurs expense or advances money on the faith of the subscription, he may sue in his own name a subscriber who refuses to pay.¹ And the party who carries into effect the purposes contemplated in the subscription paper, and to whom such paper is assigned in payment, may sue in his own name.²

b. PLEADING.—If by the terms of subscription the amounts subscribed are due and payable on completion of the object, a complaint for the collection of such amounts need not aver a demand of payment;³ and if the object is of a public nature, an averment of notice of completion is unnecessary.⁴ The failure to perform the contract of subscription may be pleaded in defense to an action for the amount subscribed, or in reply thereto when offered as an offset.⁵

pay to the building committee \$500 for the purpose. This was delivered to the congregation, who appointed a building committee composed of the plaintiff, the defendant, and two others who were deceased at the institution of this action. The building was completed. Before the commencement of this action the congregation met and discharged the building committee from further duty. They appointed another committee to wait on Chambers in reference to his obligation, empowering them to collect the amount. It was held that a promise to pay to the building committee a certain amount of money to build a church, made by one member of such committee, could be enforced by the other members of the committee or their survivors by an action at law against the promisor; and further, that although the church edifice was finished and the committee discharged, and were, therefore, *functi officio*, yet they were still trustees for the recovery of this debt, and it was immaterial that the congregation appointed another committee to wait upon the promisor, for they could not transfer this chose in action to another committee so as to enable them to sue in their own names.

In *State Treasurer v. Cross*, 9 Vt. 289; 31 Am. Dec. 626, it was held that when a subscription is made for the purpose of erecting a state house, payable to the state treasurer, suit may be brought thereon either in the name of the people or of the state treasurer. Followed in *Carpenter v. Mather*, 4 Ill. 376.

But where the associates who have subscribed, legally incorporate, the action on the subscriptions to the com-

mon fund should be in the name of the corporation; but if the names of the trustees have been added as parties' plaintiff, an amendment may be allowed so as to permit the corporation to appear simply by its corporate name. *Edinboro Academy v. Robinson*, 37 Pa. St. 210; 78 Am. Dec. 421. See also *Shober v. Lancaster Park Assoc.*, 68 Pa. St. 431.

1. *McClure v. Wilson*, 43 Ill. 356; *Swain v. Hill*, 30 Mo. App. 436. But one of a number of subscribers to a common object may not sue another of the number for the latter's proportion of moneys alleged to have been expended by the plaintiff, there appearing no agency for the expenditure of the money authorized by the subscribers. *Basford v. Brown*, 22 Me. 9; 38 Am. Dec. 281.

2. *Hopkins v. Upshur*, 20 Tex. 89; 70 Am. Dec. 375.

3. *Allen v. Clinton Co.*, 101 Ind. 553. See also *Princeton v. Gebhart*, 61 Ind. 187; *Excelsior Mut. Aid Assoc. v. Riddle*, 91 Ind. 84.

4. As, for instance, a public highway. *Allen v. Clinton Co.*, 101 Ind. 553.

5. *Brimhall v. Van Campen*, 8 Minn. 13; 82 Am. Dec. 118.

In *Illinois* it is held that an answer to a declaration upon an agreement for a mutual subscription in furtherance of a specified object, which sets up a non-fulfillment of promises and representations as to such object and the benefits to be derived therefrom, is demurrable for failing to show a fraudulent procurement of the subscription. *Richelieu Hotel Co. v. International Military Encampment Co.* (Ill. 1892), 29 N. E. Rep. 1044.

Special Pleas.—Suit was brought on

c. EVIDENCE—MEASURE OF RECOVERY.—If a subscription be complete so far as concerns the conditions on which it was made, a subscriber will not be permitted to go outside of the writing signed by him to establish them by parol evidence;¹ but if the writing does not purport to contain all the stipulations of the contract, parol evidence is admissible to prove other portions thereof not inconsistent with the writing.²

If all the money subscribed is necessarily used in securing the end designed, a recovery in an action upon the subscription will be limited by the amount subscribed; but if the amount expended is less than the whole amount subscribed, the recovery will be

a subscription for stock "for the purpose of forming a company to erect an academy of music." It was held that the defendant was entitled to file special pleas setting up defenses to be substantiated by parol evidence, the contract being on its face incomplete. *Hendrix v. Academy of Music*, 73 Ga. 437.

1. *Hendrix v. Academy of Music*, 73 Ga. 437. *First Free-will Baptist Parish v. Perham* (Me. 1892), 24 Atl. Rep. 958. It is no defense to an action on a "railroad aid" subscription, the condition of which was the completion of the road to "Iowa Falls by Sept. 1st, 1884," that the company had failed to perform a verbal promise, which was part of the consideration, to finish the line from Iowa Falls to Forest City within one year from the date named in the contract for the completion of the road to Iowa Falls, and that the company have abandoned the project of constructing the line between those points. The rights of the parties are controlled by the written contract, and parol evidence is not admissible to show a condition not embodied in the written agreement. *Blair v. Buttolph*, 72 Iowa 31.

And where defendant signed a subscription paper, subscribing a sum to aid the completion of a railroad, writing above his name, "on the completion of the road," as the conditioned time of payment, it was held that parol evidence offered to add the words, "by September 1st, 1886," was not admissible. *Miller v. Preston*, 4 N. Mex. 314.

In a suit by a bridge-builder against the subscribers to a paper stipulating that the sums annexed to their names would be paid to any person who would build a free bridge at a designated place, it was held not competent for the subscribers to vary or contradict the sub-

scription paper by parol evidence that the building of the bridge was to be let out to the lowest bidder, there being no such provision in the paper itself. *Cooper v. McCrimmin*, 33 Tex. 383; 7 Am. Rep. 268.

But evidence outside the written subscription of want of authority from the other subscribers to institute and prosecute a suit at law for the object of the subscription, is competent upon the question of a reasonable dependence upon the subscription. *Norris v. Leavitt*, 61 N. H. 109.

Subscription List Competent Evidence.—In an action to recover on a subscription paper the declaration set out literally the paper, so far as it constituted the contract of the defendant. It was held that the subscription list was competent evidence. *Miller v. Preston*, 4 N. Mex. 314.

2. A subscription in these words: "We, the undersigned, hereby subscribe for the amount of stock opposite our names, and agree to pay the same in four quarterly installments, viz., Feb. 15th, Apr. 15th, June 15th, and Aug. 15th, for the purpose of forming a company to erect an academy of music," is, on its face, an incomplete agreement, being silent as to the location and nature of the structure; whether the company is to be an incorporation or a joint-stock company; what amount is necessary to accomplish the object sought; and also as to the mode and method of raising the funds necessary to complete and equip the building; the specific purposes for which it is to be used, and the manner in which its business is to be conducted; and in order to give it any effect whatever a resort to parol evidence is indispensable. *Hendrix v. Academy of Music*, 73 Ga. 437.

Where, in an action by a church corporation for the recovery of money in

limited to the amount so expended, and will be divided among the subscribers *pro rata*.¹

III. SUBSCRIPTIONS FOR CORPORATE STOCK.—See STOCK, vol. 23, p. 582; STOCKHOLDERS, vol. 23, p. 776.

IV. MUNICIPAL SUBSCRIPTIONS.—See MUNICIPAL SECURITIES, vol. 15, p. 1204.

SUBSEQUENT.—See note 2.

SUBSEQUENTLY.—*Compare* SINCE.—See note 3.

SUBSTANCE.—(See also PURPORT, vol. 19, p. 590).—That which is essential; it is used in opposition to form.⁴ The term has also the meaning of estate, property, etc.⁵

the hands of the treasurer of a society, organized by the church members for the purpose of raising funds to furnish a proposed new church edifice, the defense was, that the money was contributed on the condition that the church should be located at a certain place, and such condition was not complied with, the defendant (treasurer of the society) was properly allowed to testify that her contribution was made with the understanding that the location had been determined on at the time of the organization of the society, and to state what others told her as to their understanding of the matter. A member of the quarterly conference, which had the power to locate the new church, was also properly permitted to testify in such case, that the general understanding of the conference was, that the location had been fixed as claimed by defendant, such evidence tending to show whether the contributions were made on the condition alleged. *First M. E. Church v. Sweny* (Iowa, 1892), 52 N. W. Rep. 546.

1. *Miller v. Ballard*, 46 Ill. 377; *Bryant v. Goodnow*, 5 Pick. (Mass.) 228.

2. **Subsequent Purchaser.**—As used in the recording acts, see RECORDING ACTS, vol. 20, p. 527.

Subsequent Creditor.—In the law of fraudulent sales and conveyances, see FRAUDULENT CONVEYANCES, vol. 8, p. 751; FRAUDULENT SALES, vol. 8, p. 852. As used in the recording acts, see RECORDING ACTS, vol. 20, p. 527.

Condition Subsequent.—See CONDITION, vol. 3, p. 423; ESTATES, vol. 6, p. 900; LIMITATION IN INSTRUMENTS, vol. 13, p. 774; REAL PROPERTY, vol. 19, p. 1043.

3. Upon the construction of the repealed bankruptcy law, the *United*

States district court for *New Jersey*, by Field, J., said: "Webster in his dictionary says: 'The proper signification of since is after, and its appropriate sense includes the whole period between an event and the present time. I have not seen my brother since January.' 'Subsequently,' according to the same authority, means 'at a later time,' or, 'afterwards,' that is, at any time afterwards. Now, the act described in the fourteenth item is that of a merchant or tradesman not keeping proper books of account. If the limitation had been expressed by the words, 'since the passage of this act,' it might have been said, that to bring a merchant or tradesman within its provisions, he must, during the whole period from the passage of the act, have neglected to keep proper books of account. Whereas, by using the word 'subsequently,' it would be sufficient to show that he had, at any time after the passage of the act, neglected to keep proper books of account. And this, no doubt, is what was intended by the provision." *In re Rosenfield*, 7 Am. L. Reg. N. S. 621.

4. *Bouv. L. Dict. followed in Douglas v. Beasley*, 40 Ala. 142.

In *Pennsylvania*, upon *certiorari*, the "substance" of the testimony is required to be recorded and returned with the writ. In *Com. v. Borden*, 61 Pa. St. 276, the court, by Agnew, J., said: "Had the justice merely set forth what he considered was the effect or the result of the evidence, it would have been insufficient according to some of the authorities cited above. But he gives the substance of the testimony itself. 'Substance,' says Webster in his unabridged dictionary, is the 'essential part,' the main or material part."

5. Thus, upon the construction of a will, it was said by Mansfield, C. J., in

SUBSTANTIAL.—Not merely nominal, but considerable or fair in amount, as, substantial damages; opposed to formal or technical, as, a substantial right.¹

SUBSTANTIALLY.—(*Compare* SUBSTANTIAL).—See note 2.

SUBSTANTIVE.—"An accurate definition of the word 'substantive' is 'dependent upon itself.'"³

SUBSTITUTE—SUBSTITUTION.—A substitute is a person or thing put in the place of another person or thing.⁴

SUBSTITUTED SERVICE.—See SERVICE OF PROCESS, vol. 22, p. 107.

SUBSTITUTIONARY REQUESTS AND DEVISES.—See LEGACIES AND DEVISES, vol. 13, p. 54; WILLS.

SUBTERRANEAN WATERS.—See UNDERGROUND WATERS.

Hogan v. Jackson, Cowp. 307: "What is 'substance?' It is every property a man has. So, in the stat. 4 & 5 P. & M., ch. 8, for the punishment for such as shall take away maidens that be inheritors, the word 'substance' is made use of, and means worldly wealth."

1. And. L. Dict., citing *People v. New York Cent. R. Co.*, 29 N. Y. 421; *Rahn v. Gunnison*, 12 Wis. 531.

Substantial Damages.—Damages which are worth having, as opposed to nominal damages. See DAMAGES, vol. 5, p. 5.

In Patent Law.—See INFRINGEMENT, vol. 10, pp. 727, 728, 731.

Substantial and Workmanlike.—A building contract provided that the work was to be done in a substantial and workmanlike manner. The trial court instructed the jury that by plaintiff's undertaking to do for defendant a plain, substantial, and workmanlike job, he did not undertake to do a perfect one. The appellate court, by Wagner, J., said: "This instruction is certainly wrong. What amounted to doing the work in a plain, substantial, and workmanlike manner was a question exclusively for the jury. But the instruction undertakes to withdraw that question from the jury, and, as a matter of law, define what the terms mean, and, as we think, it gives an entirely incorrect definition. To do a thing in a plain, substantial, and workmanlike manner would imply that it should be perfectly done for the character of the job contemplated. Surely an imperfect execution of the work, as the instruction implies, would not be a performance of the contract." *Smith v. Clark*, 58 Mo. 146.

2. Upon the trial of one charged under a *Massachusetts* statute with keeping naphtha and offering it for sale, the trial judge instructed the jury that they were to decide whether the article alleged to have been offered for sale "was substantially naphtha." Held no error. The court, by Morton, J., said: "In the sense in which, as is clear, the presiding judge used the expression 'substantially naphtha,' it is not open to objection. The defendant admitted that he kept for sale an article which was once naphtha, but contended that it had been combined with chemical agents, so as to counteract its explosive qualities as naphtha. In this connection, the instruction excepted to was correct, the word 'substantially' being clearly used as meaning 'really or essentially.'" *Com. v. Wentworth*, 118 Mass. 442. See also *Lineberger v. Tidwell*, 104 N. Car. 506.

3. *State v. Ricker*, 29 Me. 89, following Webster's Dict. That case was upon a *Maine* statute, providing that an accessory before the fact may be indicted and convicted with the principal felon, or after his conviction, "or may be indicted and convicted of a substantive felony." It was held that a substantive felony, as here used, is one which depends upon itself, and is not dependent upon another felony; and that therefore the accessory might be indicted without any reference to the conviction of his principal. See also ACCESSORY, vol. 1, p. 61.

4. *Henderson v. State*, 59 Ala. 91.

For substitutes in military law, see MILITARY LAW, vol. 15, p. 405.

For substitution in the sense of subrogation, see SUBROGATION, vol. 24.

SUBVERT.—See note 1.

SUCCESSFUL.—See note 2.

SUCCESSION.—(See ADOPTION OF CHILDREN, vol. 1, p. 204; ADVANCEMENTS, vol. 1, p. 216; ALIENS, vol. 1, p. 456; CHILD, vol. 3, p. 229; COMMUNITY PROPERTY, vol. 3, p. 350; DEBTS OF DECEDENTS, vol. 5, p. 206; ESCHEAT, vol. 6, p. 854; EXECUTORS AND ADMINISTRATORS, vol. 7, p. 165; HOMESTEAD, vol. 9, p. 423; LEGACIES AND DEVICES, vol. 13, p. 7; NEXT OF KIN, vol. 16, p. 703; PARCENARY (ESTATE IN), vol. 17, p. 313; SLAVES, vol. 22, p. 788; SUCCESSION TAXES; TRUSTS; WILLS.)

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For substitution of parties, see PARTIES TO ACTIONS, vol. 17, pp. 623-628.

1. Where plaintiff alleged that the defendant had "subverted" the water of a spring, it was held that the allegation did not "give the defendant any notice that he would be called upon to answer any charge of corrupting the water of the spring. 'Subvert' has no such natural signification as applied to material objects like a vein or stream of water." *Chesley v. King*, 74 Me. 170; 43 Am. Rep. 569.

2. **Successful Party.**—A Wisconsin statute provided that in case of a new trial on appeal, costs should be allowed the "successful party." In an action

brought in a justice's court plaintiff obtained a judgment of \$31. On appeal by the defendant to the circuit court, plaintiff obtained a verdict of \$4 damages. Defendant contended that as he succeeded in reducing the judgment appealed from, he ought to be regarded as the "successful party." But it was held that the words "successful party" had reference to the party finally recovering judgment, without reference to the question whether it was more or less than that rendered by the justice. *Smithbeck v. Larson*, 18 Wis. 193; *Norwegian, etc., Church v. Thorson*, 21 Wis. 35; *Schoeffel v. Hinze*, 47 Wis. 648. See also PREVAILING PARTY, vol. 19, p. 82.

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I. DEFINITION; DESCENT, DISTRIBUTION, AND INHERITANCE.—Succession, in the civil law, denotes the transmission of the rights and obligations of a deceased person to his heir or heirs.¹ The term is employed in the statutes of some of the states to denote the devolution of title to property under the statutes of descents and distributions. It is proposed in this article to deal with what is frequently called the Law of Descent and Distribution, and to use the term Succession as synonymous with Descent and Distribution. Succession may be defined as the "coming in of another to take the property of one who dies without disposing of it by will."² Descent is hereditary succession to an estate in realty; it is the succession to the ownership of an estate by inheritance, or by an act of law, as distinguished from purchase.³ The term distribution is commonly used to express the division of the personal estate of an intestate, according to the rules prescribed by law.⁴ Thus it will be seen that the term "descent" is usually ap-

1. See Domat Civ. L., pt. 2, pref.; Pothier, *des Successions*; Toullier, 1, 3, tit. 1; Hal. Civ. L. 47.

In Louisiana.—In Louisiana, succession is the transmission of the rights, estate, obligations, and charges of a deceased person to his heir or heirs; legal succession is that which is established in favor of the nearest relations of the deceased; irregular succession is that which is established by law in favor of certain persons or of the state in default of heirs either legal or insti-

tuted by testament; testamentary succession is that which results from the constitution of the heir, contained in a testament executed in the form prescribed by law. Bouv. L. Dict.

2. Deering's Ann. Civ. Code of California, § 1383; Dakota Civ. Code, § 776; Idaho Stats. 1887, § 5700. See *Blake v. McCartney*, 4 Cliff. (U. S.) 103; *Hunt v. Hunt*, 37 Me. 344.

3. And. L. Dict.; Bl. L. Dict.

4. Burr. L. Dict.; 2 Kent's Com. 420.

plied to the devolution of real estate, and "distribution" to that of personalty.¹ The term inheritance is often used as synonymous with descent to denote the fact of receiving an estate as heir. It therefore refers to the devolution of real property. But, while this is its strict legal signification, in its popular acceptation, the word inheritance includes the devolution of both real and personal property, and is coextensive in meaning with succession.²

II. NATURE AND ORIGIN OF THE LAW OF SUCCESSION.—A person may, subject only to certain restrictions imposed by law for the protection of the wife and surviving minor children,³ freely alien any of his property during his lifetime, or dispose of the same by last will. But, upon the death of a person, the law, in the absence of testamentary disposition by him, disposes of his property as it

1. 1 Woern. Am. L. Adm. 132. That the term distribution, when used in its proper and technical meaning, has reference to the devolution of personal property, is pointed out in *Beard v. Lofton*, 102 Ind. 408, where Zollars, J., said: "In the sense of the statute, and in the sense in which the terms are generally used, the distribution of an estate has reference to the personal property and money arising from the sale of real estate by the administrator, among the heirs, after the payment of the debts and legacies. In the absence of a will the land is not distributed, but descends to the heirs. If there be a will, the lands are not distributed, in the statutory and ordinary sense, but go by force of the will. Until something appears to the contrary, it ought to be presumed that the word 'distribution' was used in the statutory and ordinary sense." And see upon this point *Horne v. Webster*, 33 N. J. L. 413.

But distribution has been defined to be the "division of an intestate's estate according to law." 1 Bouv. L. Dict. 438. And when it appears that the word is not used in its technical sense, it should be construed according to its intended employment. Thus, where, by the terms of an agreement between the heirs of a decedent, certain of the heirs were to receive an additional allowance upon "final distribution" of the estate, it was held that such distribution related to real as well as personal estate, and that a claim for such allowance, set up in an action for the partition of the last remaining real estate of the decedent, was not barred by the Statute of Limitations, although more than ten years had elapsed since the making of the agreement. *Rogers v. Gillett*, 56 Iowa 266.

And so, in *Cable v. Martin*, 1 How. (Miss.) 558, the word "descend," as employed with reference to the devolution of personal property in a statute providing that personal estate shall "descend" . . . "in the same way and manner" as real estate, was denied its technical meaning, whereby it signifies the means by which lands are derived from the ancestor to his heir, and it was held that this provision did not alter the rule that personal property shall vest in and be distributed by the administrator. The court admitted that if the word "descend" was to be understood as if employed by the legislature in its strict technical meaning, it would deprive the administrator of the possession of personal property, for the heir is entitled to his inheritance immediately on the death of the ancestor, but apprehended that the statute was framed more particularly with a view to the course of descents than to the kind of title it conveyed.

2. *Horne v. Webster*, 33 N. J. L. 413. Where a private statute of legitimation enabled certain persons to "inherit" in the same manner as if they had been born in lawful wedlock, it was insisted that the effect of the legitimation was to enable the legitimated to take as heirs and not as distributees. But it was held that, while the word "inherit," in its technical sense, related to the succession to real estate, this was not the invariable meaning, and that the statute should be construed as conferring upon the persons legitimated all the rights of inheritance and succession that would attach to them had they been born in lawful wedlock. *Swanson v. Swanson*, 2 Swan. (Tenn.) 460.

3. See DOWER, vol. 5, p. 884; HOME-STEAD, vol. 9, p. 423.

might be presumed that he himself would do if acting rationally and without motives or influences outside of the family relation.¹ It would seem hardly necessary to say that, whatever may be the rules governing the devolution of property in any country, they must of necessity be more or less arbitrary and artificial, "the creatures of the civil polity and *juri positivis* merely."² What these rules shall be, must, therefore, in the nature of things, depend upon the condition and genius of the people among whom they prevail.³

The right of succession to the personal property of one who died without making any disposition thereof by will or otherwise can hardly be said to have been recognized by the early common law. There appears to have been no way, previous to the English Statute of Distributions (22 and 23 Car. II, ch. 10), of enforcing the distribution of the estates of intestates; it seems that the administrator could keep the whole surplus. This statute may, therefore, be said to have first given the right of distribution.⁴ Each of the states of the Union has its own statute of distribution: these, while differing from one another in detail, are but modifications of the English statute.

1. 1 Woern. Am. L. Adm., § 64. Judge Woerner, in his learned treatise on the American Law of Administration, says: "Some text-writers look upon the property left by deceased persons as *res nullius*, which might be seized and appropriated by the first comer or bystander, and hold that the laws of descent and of distribution are simply wise and necessary precautionary measures to prevent strife and violence at the deathbed. That such is the effect of these laws is evident enough, as also their wisdom and validity; but to place the reason of their enactment on this ground is to ignore the true nature of the family as well as the true nature of property." Woern. Am. L. Adm., § 9.

In *Edwards v. Freeman*, 2 P. Wms. 442, Lord Raymond says: "The Statute of Distributions makes such a will for the intestate as a father, free from the partiality of affections, would himself make; and this I call a parliamentary will." So in *Garland v. Harrison*, 8 Leigh (Va.) 368, Parker, J., said, in regard to the *Virginia* Statute of Descents, that "the intention was to make such a will for the intestate as, if he had died testate, he would have been most likely to have made for himself;" and again, that "its obvious policy was to follow the lead of the natural affections, and to consider as most worthy the claims of those who stand nearest to the affections of the last occupant.

It ought, therefore, at all times to be liberally construed in favor of those to whom the intestate himself had made a will, might be supposed to be most favorable, without reference to common-law rules or feudal disabilities." And Tucker, J., said in the same case: "Our law of descents was formed in no small degree upon the human affections, the legislature very justly conceiving that the object of a law of descents was to supply the want of a will, and that it should, therefore, conform in every case, as nearly as might be, to the probable current of those affections which would have given direction to the provisions of such will." See also *Hunt v. Hunt*, 37 Me. 344.

2. 2 Bl. Com. 211.

3. 3 Washb. R. P., § 9; *Jones v. Barnett*, 30 Tex. 637.

4. The theory of the common law was, that the king had the supreme care to provide for all his subjects, and therefore seized the goods of the intestate for the purpose of caring for and disposing of them, for the burial of the decedent, the payment of his debts, and for the benefit of his wife and children, if he had any, and if not, for the benefit of other persons of the blood of the decedent. This prerogative of the king appears to have been exercised some time by his ministers of justice, and perhaps in the county courts. It was also, in some instances, granted as a fran-

The growth of the common law produced a number of rules or canons of inheritance, which have long regulated the transmission of real property from the ancestor to the heir in so clear and decided a manner as to preclude all uncertainty as to the course which the descent is to take. But these rules having grown up under and being founded upon the feudal system of the Middle Ages, were found incompatible with the institutions of the present age. A departure from the common law was first begun in the *United States*. At an early period in the history of the colonies, important departures from these canons were made in the progress of legislation.¹ When the colonies became states, each had its own system of rules for the government of property within its limits, all departing more or less from the common law, and some varying materially from others. At the present time, the common law has been universally rejected in the *United States*, and each state has established a law of descent for itself. In *England* material modifications have been ingrafted upon the ancient canons.²

It should be remembered, as aiding in the construction of American statutes, that when the rules for the descent and distribution of an intestate's property, which have been adopted in the states of the Union, are examined, it will be found that the American law of succession has borrowed much more from the civil

chise to the lords of manors, and others who had a prescriptive right to grant administration to their intestate tenants and suitors in their own courts baron and other courts. Still later the crown invested church authorities with this branch of the prerogative, on the theory that "none could be found more fit to have such care and charge of the transitory goods of the deceased than the ordinary, who all his life had the care and charge of his soul." See note, 12 Am. St. Rep. 81. The ordinary, succeeding to the king's right, after paying the debts of the decedent, so far as his goods extended, in compliance with the statute of 13 Edw. I, ch. 19, himself appropriated the residue, as though for pious uses. Later statutes compelled administration to be granted to the next relatives of the deceased. By the statute 31 Edw. III, § 1, ch. 11, ordinaries were required to appoint the next and most lawful friends of the dead person to administer his goods, and the administrators so appointed were made accountable to ordinaries as "executors be in the case of testament, as well of the time past as the time to come." Wms. Ex. 403, 404. The administrators, however, after the payment of the debts

and funeral expenses of the deceased, remained entitled to enjoy exclusively the residue of his effects; for, as the temporal courts finally decided, the ordinary had no power to compel a distribution, notwithstanding such authority had long been assumed. 2 Bl. Com. 515; *Edwards v. Freeman*, 2 P. Wms. 442; Wms. Exrs. 1483. The immediate result was, therefore, that the person selected for the trust might make the office lucrative for himself, by enjoying the surplus, to the exclusion of other equal kindred to the intestate. The hardships of this privilege upon such kin to the intestate of equal degree with the administrator, was the occasion of making the statute of 22 & 23 Car. II, ch. 10. Wms. Exrs. 1484; Schouler Exrs. and Admsrs., § 495.

1. For instance, it was provided in *Massachusetts* as early as 1641, that estates should be divided equally among children, except that the eldest son should have a double share. *Massachusetts Col. Laws* 205.

2. The statute 3 & 4 Wm. IV, ch. 106, amending the law of inheritance, was applicable to all descents subsequent to January 1st, 1834. It was amended by 22 & 23 Vict. ch. 35.

than from the common law.¹ This is largely due to the fact that the English Statute of Distributions (22 & 23 Car. II), which was to a great extent founded upon the civil law, being borrowed mainly from the 118th Novel of Justinian,² has, with various modifications, been extensively adopted in the different states, and, in general, extended to real property.³ But enough of the common-law system has been preserved to render a general statement of its provisions necessary to the clear comprehension of American law. And it is to be noted in this connection that, while the common law as to descent has been so far supplied or departed from in the *United States* as to be practically of little force, it has been so far recognized as the foundation of American law, that, when the statute did not provide otherwise for a

1. 3 Washb. R. P. 408.

2. 2 Kent's Com. 422; *Carter v. Crawley*, T. Raym. 496.

In the construction of the English Statute of Distributions, the courts have always regarded the fact that it was for the purpose of regulating the matter which was the proper subject of the jurisdiction of the ecclesiastical courts, which proceeded in matters of property according to the rules of the civil law. That statute, as stated by Holt, C. J., in *Pett's Case*, 1 Ld. Raym. 571, and 1 P. Wms. 25, was drawn up by Sir Walter Walker, an eminent civilian. He had applied without success to the common-law courts, to compel the ecclesiastical courts to make distribution. These last mentioned courts originally held that the ordinary, being entitled to the administration, could retain the surplus. But after the Reformation, it was the practice of the ordinary in granting administration, to require of the administrator either a bond that he would distribute the surplus in the manner the ordinary directed, or that he should pay in advance certain portions to such persons. But after the statute of Edward III, directing that the ordinary should grant administration to the best friend of the intestate, he could exact no such conditions, and it was held that neither the ecclesiastical nor civil courts could compel distribution. This was the occasion of the statute. Hence, in construing it, the courts regarded the rules of the civil law and of the ecclesiastical courts as the proper rules for the construction of it. And Chief Justice North, in 1681, in *Carter v. Crawley*, T. Raym. 496, refers to the rules of the civil law as acknowledged in the ecclesiastical courts for the construction of that act.

The rule laid down by Chief Justice North was adhered to in *Maw v. Harding*, 2 Vern. 233; in *Walsh v. Walsh*, Pre. Ch. 54, decided in 1695; in 1700, by the King's Bench on application for *mandamus* in *Pett's Case*, 1 P. Wms. 25; Holt R. 259; 1 Salk. 250; 1 Ld. Raym. 571; and in 1719, by Lord Chancellor Parker, in *Bowers v. Littlewood*, 1 P. Wms. 593. And in *Wallis v. Hodson*, 2 Atk. 117, Lord Hardwicke said: "I now take it to be fully settled that this act is to be construed by the rules of the civil law."

3. *Kelsey v. Hardy*, 20 N. H. 479. This was done by the provincial act of 4 Wm. & M., ch. 2. *Sheffield v. Lovering*, 12 Mass. 489. So, it has been said that the *Maine* statutes were substantially derived (through the provincial statutes of 4 Wm. & M., ch. 2; 9 Anne, ch. 2, and the early statutes of the mother commonwealth) from the English Statutes of Distributions, 22 and 23, Car. II, ch. 10, and 1 Jac. II. *Decoster v. Wing*, 76 Me. 450, and the *New Hampshire* Statute of Descents (act of Feb. 3, 1789; 1 N. H. Laws 207) was in substance copied from that statute. *Parker v. Nims*, 2 N. H. 460; *Prescott v. Carr*, 29 N. H. 453; 61 Am. Dec. 652.

We are told by Carr, J., in *Davis v. Rowe*, 6 Rand. (Va.) 364, that the framers of the *Virginia* act regulating descents "looked at the common-law canons of descent to avoid, not to imitate; to pull down, not to build up. All its principles are violated, its landmarks removed, its fences broken down, its traces obliterated." "Its basis," says Parker, J., in *Garland v. Harrison*, 8 Leigh (Va.) 368, referring to *Stones v. Keeling*, 5 Call (Va.) 143, "was the Statute of Distributions and the civil

given case of descent, he who would have been heir at common law in *England* was declared to take, and the common-law rules for ascertaining kinship to prevail.¹ While the laws of succession adopted in the different states agree in their general outlines, they differ in their details. So the rules regulating the descent of realty and those governing the distribution of personalty show a similarity. But notwithstanding numerous changes made by legislation, the American law of succession retains some features which had their origin in the feudal system. Of these, one of the most conspicuous is the distinction preserved between the descent of realty and the distribution of personalty by the rule under which real property goes, when its owner dies intestate, to the heir, while personal property is, under the same circumstances, distributed among the next of kin of the intestate by an administrator appointed for that purpose by the proper court.² While legislation has not obliterated this and certain other distinctions, such as the difference which sometimes obtains between the estates given in different kinds of property,³ it has shown a steady tendency toward effecting a homogeneity in the devolution of real and personal property. Under the intestate acts, the same persons in general succeed to both realty and personalty, whether as heirs or distributees.⁴ Statutes of descent and distribution are subject, and to be construed with reference, to the law concerning dower, tenancy by the curtesy, partnership, home-

law. It was founded on the great principles of justice. Its object was to make such a will for the intestate as he would himself probably make; and its obvious policy was to follow the lead of the natural affections, and to consider as most worthy the claims of those who stood nearest to the affections of the last occupant."

In *Texas*, it was said that the laws of descent of real property in that state are more in harmony with the civil law of *Spain* than with the common law of *England*. *McKinney v. Abbott*, 49 Tex. 371.

Until the law of *California* regulated the administration, descent, and distribution of estates, the Mexican law was applicable. *McNeil v. First Congressional Soc.*, 66 Cal. 105.

1. *Barnitz v. Casey*, 7 Cranch (U. S.) 456; *Clark v. Clark*, 17 Nev. 124; *Fidler v. Higgins*, 21 N. J. Eq. 138; *Johnson v. Haines*, 4 Dall. (Pa.) 64; *Cresoe v. Laidley*, 2 Binn. (Pa.) 279; *Bevan v. Taylor*, 7 S. & R. (Pa.) 397. So it was held that a naked trust estate descends to the eldest son, according to the law of primogeniture; such estates not being within the provisions of the

New Jersey Statute of Descents. *Den v. Cooper*, 25 N. J. L. 137.

In *New York*, the statute, after laying down the rules of descent, expressly provides that "in all cases not provided for by the preceding rules, the inheritance shall descend according to the course of the common law." 3 *New York Rev. Stats.*, 7th ed., p. 2213, § 16. And there is a similar provision in *Arkansas*.

But it has been said that the common law can only be resorted to for a rule where the statute has manifestly left a case unprovided for. *Peacock v. Smart*, 17 Mo. 402.

2. 1 *Woern. Am. L. Adm.*, § 16. See *infra*, this title, *Difference Between Succession to Personalty and to Realty*.

3. To illustrate: In *Pennsylvania*, the real estate of an intestate without issue goes to the parents for life and then to his brothers and sisters in fee, while his personalty goes to the parents absolutely. And so in most cases where the statutory law of succession gives a life estate in realty, an absolute title is given to personalty.

4. See *Kelsey v. Hardy*, 20 N. H. 479; *Parkman v. McCarthy*, 149 Mass. 502.

steads, and exemption, and particularly to provisions in favor of the widow and minor children for their immediate support.¹

III. INHERITANCE AND DISTRIBUTIVE SHARE—1. **Definition.**—An inheritance is an estate which descends or may descend to an heir upon the death of an ancestor.² Each portion of the intestate's effects of which division is made, and which goes to the persons entitled thereto under the statutes of distributions, may be termed a distributive share.³

2. **Difference Between Succession to Personalty and to Realty.**—It may be said generally that realty descends directly to the heir without the intervention of the administrator, except so far as under statutes he is empowered to deal with it in behalf of creditors; while personalty is transmitted to the distributees through the administrator, in whom, pending such transmission, the legal ownership is vested. The distinction has its origin in the incidents of the feudal system, and, although not of so much importance as formerly, still exists.⁴

3. **What Property Descends and What Is Distributed.**—A general treatment of the questions which frequently arise in consequence of the difference in mode between the devolution of personalty and that of realty, as to whether the property under consideration descends to the heir of the intestate under the statutes of descents, or is to be distributed by the administrator under the statutes of distributions, may be found elsewhere.⁵ Only a few additional cases will be here given.⁶

1. 1 Woern. Am. L. Adm., § 64.

2. 2 Bl. Com. 201; *In re Donahue's Estate*, 36 Cal. 332.

3. See *infra*, this title, *Heirs and Distributees—Definition*.

4. Williams Real Prop. 18; Woerner Adm., § 13; 2 Bl. Com. 55. See also EXECUTORS AND ADMINISTRATORS, vol. 7, p. 270.

It has been argued that the distinction should be abolished, and realty and personalty, in their transmission, be treated as one and governed by the same rules. See article in 15 Am. L. Rev. 512, for a summary of the argument. See also Woerner Adm., §§ 16, 337; also remarks of Hon. John F. Dillon in 22 Am. L. Rev. 30; and remarks of Hon. David Dudley Field in 22 Am. L. Rev. 57.

Necessity of Administration.—In *Re Rapp's Estate*, 12 Pa. Co. Ct. Rep. 609, it was held that in *Pennsylvania* the next of kin, where there were no creditors, might take the estate without administration.

In *Balch v. Smith*, 4 Wash. 497, followed in *Lawrence v. Bellingham Bay*, etc., R. Co., 4 Wash. 664, it was held

that under the *Washington Code of Procedure*, section 12, administration was necessary before the heir to an intestate's realty could maintain an action for possession, unless it was shown that administration was unnecessary.

5. See EXECUTORS AND ADMINISTRATORS, vol. 7, pp. 238–281.

6. PARTITION, vol. 17, p. 805 *et seq.*

The law is that real estate, unless otherwise disposed of, goes to the heirs, and not to the executors, and that a mere power given to the executor to sell real estate does not give him a right to the possession thereof; that to entitle him to such possession, the land, or its usufruct, must be expressly or by necessary implication given to him by the will. *Rubottom v. Morrow*, 24 Ind. 204; 87 Am. Dec. 324.

So a decedent's realty vests in the heir upon the failure of the purpose for which a sale thereof was directed. *In re Adams' Estate*, 9 Pa. Co. Ct. 664.

The following have been held to descend to the heir: Growing grass, *Evans v. Hardy*, 76 Ind. 527; permanent fixtures, *Cannon v. Hare*, 1 Tenn. Ch. 22 (see FIXTURES, vol. 8, p. 47); rent

accruing out of land upon a lease granted by the owner in fee, and which does not become due until after the death of the lessor, *Green v. Massie*, 13 Ill. 363; *Sherman v. Dutch*, 16 Ill. 283; *Foltz v. Prouse*, 17 Ill. 487; *Evans v. Hardy*, 76 Ind. 531; *Foteaux v. Le-page*, 6 Iowa 123; *Laverty v. Woodward*, 16 Iowa 1; *O'Bannon v. Roberts*, 2 Dana (Ky.) 54; *Smith v. Bland*, 7 B. Mon. (Ky.) 21; *Stinson v. Stinson*, 38 Me. 593; *Griffith v. Beecher*, 10 Barb. (N. Y.) 432; *Haslage v. Krugh*, 25 Pa. St. 97. And see *Dixon v. Nicolls*, 39 Ill. 372; 89 Am. Dec. 312; *Creel v. Kirkham*, 47 Ill. 344; *King v. Anderson*, 20 Ind. 385; *Shouse v. Krusor*, 24 Mo. App. 279 (see also *LANDLORD AND TENANT*, vol. 12, p. 734, n. 4); a pew, *McNabb v. Pond*, 4 Bradf. (N. Y.) 7; a license to establish a ferry, *Lewis v. Gainesville*, 7 Ala. 85. And where real estate belongs to the heir he has also a right to the possession of those documents which belong to the estate. *Atkinson v. Baker*, 4 T. R. 229; 2 Rev. Rep. 366.

It seems that at common law charters and deeds, court rolls and other evidences of title to land, as well as the chests in which they are kept, descend to the heir. *Tol. Ex.* 189; 3 Bac. Abr. 65. It was held that a county auditor's certificate of a sale of land for taxes which does not convey a legal title, but is evidence of an equitable title to the land, and enables the purchaser to call in the legal title, savors so strongly of the reality that it descends to the heir, and is not assets in the hands of the executor. *Rice v. White*, 8 Ohio 216.

The interest of one who has contributed to the purchase price of land, and in whose favor a trust has been declared by the grantee, descends to his heirs. *Obermiller v. Wylie*, 36 Fed. Rep. 641.

Where the easement of a decedent appurtenant to his real property is condemned, the proceeds accruing to his estate from such condemnation are treated as realty. *In re City of Rochester*, 110 N. Y. 159.

Lands which an executor is given power to sell, descend to the heirs until the executor effectually exercises such power. *Perkins v. Preswall*, 100 N. Car. 220; *Moss v. Hackensack Sav. Bank*, 47 N. J. Eq. 279.

Real property as to which a testator dies intestate, because of the invalidity of provisions of the will, is not converted into personal property by a

power to the executors to sell which is not pre-emptory, but it descends to the heirs at law rather than to the next of kin. *In re Vedder's Will*, 15 N. Y. Supp. 798; 62 Hun (N. Y.) 275.

The share of a deceased devisee in the proceeds of real estate directed by will to be converted into money is properly distributed to his administrator and not to his heir. *In re Swedes*, 10 Pa. Co. Ct. Rep. 463.

Mining Claims.—An interest in mining claims passes to the intestate's heirs. *Keeler v. Trueman*, 15 Colo. 143.

Emblements.—Though it has been said by a distinguished authority (1 Bouv. Inst., § 1970) that emblements are considered part of the real estate and descend to the heir, it seems to be settled by other authorities that where a tenant in fee or in tail dies after corn has been sown, but before severance, it shall go to his personal representatives and not to the heir. *Com. Dig., Biens* (G 2); *Co. Litt.* 55b, note (2), by Mr. Hargrave; *Broom's Max.* 411. This, when considered in connection with the rule that if a tenant in fee sows land, and then devises the land by will and dies before severance, the devisee shall have the corn, and not the devisor's executor (see *EXECUTORS AND ADMINISTRATORS*, vol. 7, p. 242, n. 1), seems illogical; the authorities have not found it easy to account for this distinction, which gives corn growing to the devisee but denies it to the heir. *Broom's Max.* 411. See *Co. Litt.* 55b, n. (2); *Gilb. Eq.* 250. In *West v. Moore*, 8 East 339, Lord Ellenborough, in explanation of the distinction, says that in the testator himself the standing corn, though part of the realty, subsists for some purposes as a chattel interest, which goes on his death to his executors as against the heirs, though as against the executors it goes to the devisee of the land, upon the presumption that such was the intention of the devisor in favor of his devisee; but that this presumption may be rebutted by other words in the will, which show an intent that the executor shall have it. And in *Dennett v. Hopkinson*, 63 Me. 350, the court, in a passing discussion, by *Walton, J.*, said: "That although the rule which gives to the devisee of the land the unharvested crops, and denies them to the heir at law, may seem to be unphilosophical, it is nevertheless founded in practical wisdom. Not unfrequently the heirs at law are mere children, without discretion of their

An equitable interest in real estate descends to the heir.¹ So, where there is an executory contract for the sale of land, the property which the vendee acquires in the land descends to his

own to enable them to care for the growing crops, and without legal guardians to aid them. They are sometimes scattered and far away. The death of the ancestor may be sudden, and the condition of his family such, that the crops, unharvested as well as harvested, may be needed for their immediate support. Will it not be better, therefore, in the great majority of cases, that all the crops, the unharvested as well as those that are harvested, should be regarded as personal property, and go to the administrator? We cannot resist the conviction that it is better that it should be so." In many of the states this matter is regulated by statute. See *Evans v. Hardy*, 76 Ind. 527; *Green v. Cutright*, *Wright* (Ohio) 738. Compare *Miller v. Wohlford*, 119 Ind. 305.

To the Personal Representative.—Where ground-rent was reserved by a grantor, and in the deed it was stipulated that a gross sum might be paid in discharge of the rent reserved at any time, it was held that such gross sum paid after the grantor's death was personalty. *In re Hirst's Estate*, 147 Pa. St. 319.

An owner's right of action for the taking of his land for a right of way by a railroad company passes on his death to his personal representatives. *Harshbarger v. Midland R. Co.*, 131 Ind. 177.

Estates for Years.—An estate for years is a chattel interest, and, on the death of the tenant for years before the expiration of the term, goes to his executor or administrator and not to his heirs. *Co. Litt.* 46b; *Lenow v. Fones*, 48 Ark. 557. And this is so, though the lease is for ninety-nine years. *Dillingham v. Jenkins*, 7 Smed. & M. (Miss.) 479; *Webster v. Parker*, 42 Miss. 465; or, even if it is for ninety-nine years, renewable forever, *Taylor v. Taylor*, 47 Md. 295; *Murdock v. Ratcliff*, 7 Ohio 119; *Mickey v. Wintrodde*, 7 Ohio 124. So a lease for eighty-nine years. *Thornton v. Mehrling*, 117 Ill. 55.

But the common law has been altered in some states. By statute in *Ohio*, permanent leasehold estates forever renewable, descend like fees. *Ohio Rev. Stats.* 1880, § 4181; and see *Abbott v. Bosworth*, 36 Ohio St. 605. In *Georgia* an estate for years passes as realty. *Georgia Code* 1882, §§ 2273,

2275. In *Massachusetts*, a term for one hundred years or more—so long as fifty years thereof remain unexpired—is regarded as an estate in fee simple as to everything concerning its descent, devise therein, the estate in lieu of dower, and its sale by executors, administrators, guardians, or trustees, the levying of executions thereon, and the redemption thereof when mortgaged or when taken on execution. *Massachusetts Pub. Stats.* 1882, ch. 121, § 1, p. 735.

Proceeds of Sale of Infant's Lands.—It is a general proposition, well sustained by authority, that the proceeds of the sale of an infant's lands are deemed and treated as real estate, and descend to his heirs at law, in case of his death intestate during his minority. *In re Price*, 67 N. Y. 231; *Sweezy v. Thayer*, 1 Duer (N. Y.) 286; *In re Woodworth*, 5 Dem. (N. Y.) 156; *Wells v. Seeley*, 47 Hun (N. Y.) 109; *Vaughan v. Jones*, 23 Gratt. (Va.) 444; *GUARDIAN AND WARD*, vol. 9, p. 133, n. 2. See *Grider v. M'Cloy*, 11 S. & R. (Pa.) 224.

When the land of an infant is sold by a decree of a court of equity for a particular purpose, any surplus of money that remains after that purpose is accomplished will be regarded as real estate; and, upon the death of the infant, intestate, will go to his heirs at law, and not to his next of kin. *March v. Berrier*, 6 Ired. Eq. (N. Car.) 524; *Jones v. Edwards*, 8 Jones (N. Car.) 336.

Royalties.—Coal royalties accruing after the death of the grantor are personalty. *In re Hancock's Estate*, 7 Kulp. (Pa.) 36; and see *In re Claver's Estate* (Pa.), 23 Pitts. Leg. J. N. S. 358.

1. Equitable estates vest and descend as legal estates. *Bolton v. Ohio Nat. Bank* (Ohio, 1893), 33 N. E. Rep. 1115. In *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 316, the chancellor says "an equitable interest, founded upon articles for a purchase, and which a court of equity will specifically enforce, is real estate, which will pass by a devise subsequently made, and if there be no devise, will descend to the heir, and the executor must pay the purchase money for the benefit of the heir." If such an equitable interest be real estate, certainly an equity like that of A's in the present case, must be real estate. Be-

heirs upon his death, while the agreement remains executory.¹ And, if all the purchase money is not paid, the heir has a right to have the same paid out of the personal estate of the decedent.² But the vendor's property is no longer real estate in the land, but personal estate in the price, and, if he dies before payment, it goes to his administrator, and not to his heirs.³ As the vendor

fore his death, the entire purchase money had been paid to the government, and nothing remained but that the patent should issue. See also *PUBLIC LANDS*, vol. 19, p. 332 *et seq.*

Under a *Michigan* statute which declared that an interest to pass by inheritance must be one of which the ancestor had seisin, it was held that an equitable title, obtained by an order of probate on the death of the trustee, to divide the land among the beneficiaries, they having consented, will pass by descent; it was said that this statute contemplated seisin in law as well as seisin in fact. *Obermiller v. Wylie*, 36 Fed. Rep. 641.

Interests in Land Under Public Land Laws.—Among those claims to or interests in lands concerning which there is some difficulty in determining whether they are or are not inheritable, are claims to lands which have been "located" under the laws respecting public lands, and surveyed, but not actually patented, by the ancestor during life. It has been held that the interest which holders of land warrants acquire in land by the entry and survey thereof, though not perfected by grant, is a descendible interest. *Jackson v. Howe*, 14 Johns. (N. Y.) 405; *Thomas v. Marshall*, Hard. (Ky.) 22; *Hansford v. Minor*, 4 Bibb (Ky.) 385; *Morrison v. Campbell*, 2 Rand. (Va.) 206. And, though the patent is issued to the heirs, they take the land by descent and not by purchase. *Frizzle v. Veach*, 1 Dana (Ky.) 211; *Bond v. Swearingen*, 1 Ohio 395; *Avery v. Dufrees*, 9 Ohio 145.

It has been held that the interest of a deceased person in land warrants descends to the heirs. *Armstrong v. Campbell*, 3 Yerg. (Tenn.) 201; 24 Am. Dec. 556.

And it was held that a land certificate to which a person was entitled under the act of Congress of May 23, 1828, issued to his heirs. *Shanks v. Lucas*, 4 Blackf. (Ind.) 476.

Settlement claims are subject to the same laws of descent as other lands. *Workman v. Gillespie*, 3 Yeates (Pa.) 571.

The interest acquired by preëmption

descends to the heir upon the death of the owner, and will not go to the executor or administrator. *Lester v. White*, 44 Ill. 464. See further, *Forsythe v. Ballance*, 6 McLean (U. S.) 562.

1. *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 398; 10 Am. Dec. 343; *Griffith v. Beecher*, 10 Barb. (N. Y.) 432; *Knolls v. Barnhart*, 9 Hun (N. Y.) 443; *Roup v. Bradner*, 19 Hun (N. Y.) 513; *Moore v. Burrows*, 34 Barb. (N. Y.) 173; *Roberts v. Smith*, 21 S. Car. 461; *Sweatman v. Edmunds*, 28 S. Car. 58; *Perkins v. Cheairs*, 58 Tenn. 194.

A bond for title descends to the heir, and the administrator has nothing to do with it; except that he is bound to pay out of the assets the amount which may remain due of the purchase money. *Myrick v. Boyd*, 3 Hayw. (Tenn.) 179; *Stephenson v. Yandle*, 3 Hayw. (Tenn.) 109.

So, it has been held that the interest acquired by the purchaser of lands under a contract with the assignee in bankruptcy for the execution of a deed, is realty, and passes to the purchaser's heirs and not to his administrator. *Palmer v. Morrison*, 104 N. Y. 132.

The interest which a purchaser of land at a tax sale acquired in the property under the county auditor's certificate of purchase was, on the death of the purchaser before obtaining a deed, held to pass to his heirs. *Rice v. White*, 8 Ohio 216.

An equitable interest in real estate under a contract of purchase, descends to the heirs. *Braxton v. Braxton* (D. C.), 20 Wash. L. Rep. 525.

2. *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 316. See *Broome v. Mouck*, 10 Ves. 597; *Sutherland v. Harrison*, 86 Ill. 368; *Cogswell v. Cogswell*, 2 Edw. Ch. (N. Y.) 231; *Duke of Cumberland v. Codrington*, 3 Johns. Ch. (N. Y.) 229; *Johnson v. Corbett*, 11 Paige (N. Y.) 265; *Wright v. Holbrook*, 32 N. Y. 587; *DEBTS OF DECEDENTS*, vol. 5, p. 256, n. 2.

3. *Davie v. Davie* (Ark. 1892), 18 S. W. Rep. 935; *Miller v. Miller*, 25 N. J. Eq. 365; *Howley v. James*, 5 Paige (N. Y.) 318; *Moore v. Burrows*, 34 Barb.

still holds the legal title, but only as trustee, so the heirs take the legal title by descent as a mere security in equity for the payment of the debt, precisely as they would have taken it by deed to hold in trust as security for a debt due to a third person, and are, in equity, compellable to execute the trust by a conveyance of the title.¹

A mortgagor's interest in the mortgaged land prior to foreclosure, is, in equity, regarded as an equitable estate in the land which has all the incidents of absolute ownership and will descend to the heir.² And if there is no foreclosure in the mortgagor's lifetime, the equity of redemption (supposing the mortgage to be in fee) descends upon his heir.³ On the other hand, while a mortgagee at common law holds the freehold of the mortgaged land, so that his interest will descend to his heirs, the land is, in equity, a pledge held in security for the debt, and, like the debt, is an interest of a personal nature, which, if the mortgagee dies, goes to his executor, who may receive the same and oblige the heir to release the mortgage.⁴

IV. ANCESTOR—1. Definition.—The term ancestor, in its technical meaning, and as used in the statutes of descents, means any one from whom an estate is inherited; its meaning is not confined to

(N. Y.) 173; *Adams v. Green*, 34 Barb. (N. Y.) 176; *Thomson v. Smith*, 63 N. Y. 301; *Leiper's Appeal*, 35 Pa. St. 420; 78 Am. Dec. 347. See *Mulford v. Hiers*, 13 N. J. Eq. 1; *King v. Ruckman*, 21 N. J. Eq. 599.

Of course, if the contract for the sale of land is void and cannot be enforced by reason of laches in the purchaser, the land will, on the death of the vendor, descend to his heirs. *McKay v. Carrington*, 1 McLean (U. S.) 53; and see *Flandera v. Davis*, 19 N. H. 139.

It was held that where one enters into a parol agreement to sell land, and delivers possession without having received any part of the purchase money, the legal estate remains in him, and, at his death, descends to his heir; if the heir convey to another, by general words, all the real estate of which his ancestor died seised, the land in reference to which the agreement was made passes to the alienee, subject to the agreement. *Vincent v. Huff*, 8 S. & R. (Pa.) 381.

1. *Moore v. Burrows*, 34 Barb. (N. Y.) 173; 1 *Perry on Trusts*, § 342, *citing Wall v. Bright*, 1 J. & W. 494; *Read v. Read*, 8 T. R. 118. See *Thomson v. Smith*, 63 N. Y. 301; *SPECIFIC PERFORMANCE*, vol. 22, p. 908.

In *Massachusetts*, the executor or administrator was authorized by statute (Pub. Stat. (1882), ch. 142, § 1) to con-

vey such estate under the direction of the court of probate. *Reed v. Whitney*, 7 Gray (Mass.) 533.

2. 3 Pom. Eq., § 1181.

3. 1 Pom. Eq., § 162; *Assay v. Hoover*, 5 Pa. St. 21; 45 Am. Dec. 713; and see *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 71; *REDEMPTION*, vol. 20, p. 618, n. 3.

The interest of a deceased mortgagor descends as realty where his death occurred after the entry of a foreclosure decree but before sale. *Holden v. Dunn* (Ill.), 33 N. E. Rep. 413.

Surplus Money.—But, with regard to the surplus resulting from a foreclosure made during the lifetime of the mortgagor, see *SURPLUS MONEY*.

4. *Wms. R. P.* 353, 354; 1 *Washb. R. P.* 534; 3 Pom. Eq., § 1181; *MORTGAGES*, vol. 15, p. 739.

Mortgage Assigned to Holder of Fee.—Certain land was purchased, subject to the lien of a mortgage thereon which the purchaser subsequently paid to the mortgagee and took an assignment thereof in the following terms: "To have and to hold the same unto the said party of the second part, his executors, administrators and assigns, forever, as a muniment of title, and not to merge in the fee of the land covered thereby which is now owned by the said party of the second part;" the printed word "heirs" in the assignment, before the

the lineal progenitors, as has sometimes been insisted.¹ It thus appears that the term is often employed in the statutes as the correlative of heir,² but it does not always have that meaning. As sometimes employed it is synonymous with kindred, and embraces all from whom a title could be derived by descent.³

2. Who Is Ancestor; Seisina Facit Stipitem.—It was a rule of the common law that descent must be traced from the first purchaser.⁴ By first purchaser is meant the person who acquired an estate to his family, or brought it into the family which at present owns it, whether the same was transferred to him by sale, or by gift, or by any other method, except only that of descent.⁵ Therefore, such person might, with reference to his relation to the land, also be denoted by the term "last purchaser," meaning the last person who acquired the land otherwise than by descent.⁶

word executors, was stricken out. The purchaser subsequently died intestate. It was held that, under the circumstances, the interest represented by the mortgage passed with the real estate to the heirs at law, and that the mortgage would not be considered as a charge upon the land, except so far as it might be necessary to enforce the same in order to protect the title thereto. *Browne v. Perris*, 56 Hun (N. Y.) 601.

1. *Bailey v. Bailey*, 25 Mich. 185; *Den v. De Hart*, 3 N. J. L. 73; *Wheeler v. Clutterbuck*, 52 N. Y. 67; *Conkling v. Brown*, 57 Barb. (N. Y.) 269a, opinion by Hon. William Inglis and Charles O'Connor, Esq.; *Emanuel v. Ennis*, 48 N. Y. Super. Ct. 430; *Brewster v. Benedict*, 14 Ohio 368. But see *Pratt v. Atwood*, 108 Mass. 41.

In accordance with this view, it was held that an uncle of the intestate from whom the latter inherited was his ancestor within the meaning of that word as used in the statute. *Brewster v. Benedict*, 14 Ohio 385. And likewise a brother has been held to be an ancestor, *Prickett v. Parker*, 3 Ohio St. 394. So, it was said by Field, J., in *Lavery v. Egan*, 143 Mass. 389, "After the rule was adopted that inheritances might ascend, the ancestor was the person from whom the inheritance devolved upon the heir, and a child might be the ancestor of his parent."

So, where a statute, designed to remove the common-law impediment of alienism in the transmission of an inheritance, provided that no person capable of inheriting under the provisions of the Statute of Descents should be precluded from such inheritance by reason of the alienism of any ancestor of such

person, it was held that one who claimed as heir of the intestate by reason of being the great-grandson of the brother of the grandfather of the deceased, was capable of inheriting, though the father and grandfather of the intestate were both aliens. *McCarthy v. Marsh*, 5 N. Y. 263, *overruling Banks v. Walker*, 2 Sandf. Ch. (N. Y.) 344; 3 Barb. Ch. (N. Y.) 438.

2. See *infra*, this title, *Heirs and Distributees—Definition*.

3. *Greenlae v. Davis*, 19 Ind. 62. See also *Burgwyn v. Devereux*, 1 Ired. (N. Car.) 583; *Osborne v. Widenhouse*, 3 Jones Eq. (N. Car.) 238.

4. See *infra*, this title, *Rule that Descent Must be Traced from First Purchaser*.

5. *Bouv. L. Dict.*

6. See *West v. Williams*, 15 Ark. 682. In *Goodman v. Collins*, 2 Pet. (U. S.) 58, it appeared that the father J. had devised land to his daughter M., and that the land had descended to her three children, and, on the death of two of them, mediately through the mother, to the other surviving child, the intestate, from whom the plaintiff, who was brother to the intestate, claimed as "kin next to the intestate," under a statute providing that "when the title to any estate of inheritance, as to which the person having such title shall die intestate, came by descent, gift, or devise from the parent or other kindred of the intestate, and such intestate die without children, such estate shall go to the kin next to the intestate of the blood of the person from whom such estate came or descended if any there be." The defendants were the children of J., the devisor, and, therefore, the brother and sis-

In connection with the rule that descent must be traced from the first purchaser, a doctrine which is its auxiliary in an evidentiary sense, in that it supplies a simpler mode of proving heirship to the first purchaser than by tracing pedigree in a direct line from such root of descent, demands consideration. The doctrine referred to is that expressed in the maxim *seisina facit stipitem*. As supplementary of the doctrine of the feudal law, which required that whoever claimed by descent should make himself to be the heir of the first purchaser, it was considered that the seisin of the last possessor from whom he claimed as his heir of the whole blood should be presumptive evidence of his being of the blood of the first purchaser.¹ This supplies the difficulty of investigating a descent from a distant stock through a line of succession become dim by the lapse of ages.²

The effect of the common-law rule that descent must be traced from the first purchaser, together with its auxiliary doctrine expressed in the maxim *seisina facit stipitem*, is, then, that the claimant must show kinship to the person who last died seised in deed. Though the law passes an inheritance upon the heir immediately upon the ancestor's death, he thereby only acquires a seisin in law, and this alone would not enable him to transmit the inheritance to his heirs; for, at common law, no one could be a

ter of the daughter M., the devisee, and therefore the uncle and aunt of the intestate. Story, J., said: "The counsel for the plaintiff contends that the clause looks only to the proximate and immediate descent; the counsel for the defendants, that it looks to the origin of the title in the first purchaser, and requires that the party claiming as heir should be of the blood of the first purchaser, through whatever intermediate devolutions by descent, gift or devise it may have passed, and however remote may be the first ancestor. If the latter be the true construction of the clause, it goes far beyond the common law, for that stopped at the last purchaser in the ancestral line (and persons taking by devise or gift are deemed purchasers), and ascended no higher than it could trace an uninterrupted course of descents. The common law, therefore, would have considered M. as the first purchaser for all its own purposes of descent. . . . In the case at bar, the mother of the intestate took the estate by devise from her father. She was in by purchase; and in the sense of the common law, as first purchaser, and, of course, the true stock of descent, holding the estate *ut feudum antiquum*." And is not the rule laid down in 3 & 4 Wm. IV, ch. 106, that inheritance shall

be traced from the last purchaser of the property, declaratory of the common law? See Wms. R. P. 218.

But, under some modern statutes, the policy of which is to keep real property in the line of the ancestor by whom it was brought into the family, a person who takes an estate from his father or other ancestor by gift or gratuitous devise, will not become the purchaser from whom descent is to be traced. This is considered not to be strictly within the policy of these statutes. See *infra*, this title, *Rule that Descent Must be Traced from First Purchaser—Partial Recognition of, in United States*.

1. 4 Kent's Com. 386.

2. 2 Reeves's Hist. Eng. L. 318. As Blackstone says: "When by length of time and a long course of descents, it came (in those rude and unlettered ages) to be forgotten who was really the first feudatory or purchaser, and thereby the proof of an actual descent from him became impossible, then the law substituted what Sir Martin Wright (Wright Ten. 186) calls a reasonable, in the stead of an impossible proof; for it remits the proof of an actual descent from the first purchaser; and only requires in lieu of it, that the claimant be next of the whole blood to the person

stirps from whom a descent could be derived, unless he had been actually seised. The maxim of the common law was *non jus sed seisinam facit stipitem*.¹ He could not be accounted an ancestor who had only a bare right or title to enter or be otherwise seised; for the law required this notoriety of possession as evidence that the ancestor had that property in himself which was to be transmitted to his heir. It may, then, be stated as the clear result of all the authorities that, wherever a person succeeded to an inheritance by descent, he must have obtained an actual seisin or possession, or seisin in deed, as contradistinguished from seisin in law, in order to make himself the root or stock from which the future inheritance by right of blood must have been derived; that is, in other words, in order to make the estate transmissible to his heirs. If, therefore, the heir on whom the inheritance has been cast by descent, dies before he has acquired the requisite seisin, his ancestor, and not himself, becomes the person last seised of the inheritance and to whom the claimants must make themselves heirs.²

A notable application of this doctrine is found in the descent of estates in reversion and remainder. If the person owning the remainder or reversion expectant upon the determination of a freehold estate, dies during the continuance of the particular estate, the remainder or reversion does not descend to his heir, because he has never had seisin, but will, in general, descend to the person who is heir to him who created the freehold estate.³ But this

last in possession (or derived from the same couple of ancestors), which will probably answer the same end as if he could trace his pedigree in a direct line from the first purchaser." 2 Bl. Com. 229.

1. *Origin of the Rule.*—This rule had its origin in that early period of the law when, by reason of the nature of the feudal tenure of land, an estate did not, on the death of the tenant, descend to his heirs, but was customarily granted by favor of the lord to such heir, if capable of performing the feudal services. See *supra*, this title, *Difference Between Succession to Personality and to Realty*. By the feudal investiture, the vassal on the descent of lands, was admitted in the lord's court, and there received his seisin, in the nature of a renewal of his ancestor's grant, in the presence of the feudal peers. This practice was pursued until, at length, when the right of succession became indefeasible, an entry on any part of the lands within the county (which, if disputed, was afterwards to be tried by those peers) or other notorious possession, was admitted as equivalent to the formal grant of seisin, and made the tenant capable of

transmitting his estate by descent. 2 Bl. Com. 209.

2. Burt. R. P., § 303; 4 Kent's Com. 386; Broom's Max. 525; Goodtitle v. Newman, 3 Wils. 516; 1 Sim. & St. 260.

Exceptions to the Rule.—There are, however, some reasonable qualifications to the universality of the rule. If the ancestor acquired the land by purchase, he might, in some cases, transmit it to his heirs though he never had actual seisin of it himself. *Shelly's Case*, 1 Coke 98 a; Burt. R. P., § 304; 2 Greenl. Cruise 149. So if, upon the exchange of lands, one party had entered and the other died before entry, his heir would still take by descent, for he could not take in any other capacity. *Shelly's Case*, 1 Coke 98 a; 4 Kent's Com. 386. It is likewise the rule in equity, that if a person is entitled to real estate by contract, and dies before it is conveyed, his equitable title descends to his heir. *Potter v. Potter*, 1 Ves. 437. And see *Roup v. Bradner*, 19 Hun (N. Y.) 513.

3. *Descent of Remainders and Reversions at Common Law.*—It is a well-settled rule of the common law that if the person owning the reversion or re-

common-law doctrine is now changed by statute in *England*,¹ and is generally rejected throughout the *United States*,² where ownership or title to property is substituted for seisin, and the heir takes all the real estate owned by the ancestor at the time of his death.³ So, the heirs of a reversioner or remainder-man take as absolutely as if their ancestor were actually seised as of a freehold in possession; the word "seised," when applied to such an interest,

remainder expectant upon the determination of a freehold estate, dies during the continuance of the particular estate, the remainder or reversion does not descend to his heir, because he has never had the seisin necessary to constitute him the stock of descent. Of such estates there can be no actual seisin during the existence of the particular estate of freehold; and, consequently, there cannot be any mesne actual seisin, which, of itself, shall turn the descent, so as to make any mesne reversioner or remainder-man a new stock of descent, whereby his heir, who is not the heir of the person last actually seised of the estate, may inherit. Upon the death of the reversioner or remainder-man before the termination of the particular estate, the reversion or remainder will go to the heir of the donor of the particular estate, since he is the person who was last seised in fee of the land. *Jackson v. Hendricks*, 3 Johns. Cas. (N. Y.) 214; *Bates v. Shraeder*, 13 Johns. (N. Y.) 260; *Jackson v. Hilton*, 16 Johns. (N. Y.) 96; *Seabrook v. Seabrook*, 1 McMull. Eq. (S. Car.) 201. But it would be competent for any one to whom the remainder or reversion has descended to sell or devise it, whereby the grantee or devisee will, as purchaser of the future estate, constitute the new *stirps* from whom all subsequent descent of such estate must be traced, and from whom he who would take the estate when it rests in possession must trace the descent. *Vanderheyden v. Crandall*, 2 Den. (N. Y.) 9; *Wendell v. Crandall*, 1 N. Y. 491. So also the mesne heir, in whom the remainder or reversion vests, may, while the estate is thus in expectancy, exercise some act of ownership over the estate, which the law deems equivalent to an actual seisin of a present estate of inheritance, and thereby make himself a new stock of inheritance. Thus, he may, by grant or devise of it, or charge upon it, appropriate it to himself, and change the course of descent. By conveying it for his own life there would be an alteration of the estate sufficient to create in

him a new stock or root of inheritance. It would be deemed equal to an entry upon a descent. Co. Litt. 15a, 191b; *Stringer v. New*, 9 Mod. 363. In like manner it may be taken in execution for the debts of such mesne remainder-man or reversioner during his life, and this in the same manner intercepts the descent. See *Cook v. Hammond*, 4 Mason (U. S.) 467. But if no such act be done, and the reversion or remainder continues in a course of devolution by descent, the heir of the first donor or purchaser will be entitled to the whole as his inheritance, although he may be a stranger to all the mesne reversioners and remainder-men, through whom it has devolved. Co. Litt. 15a; *Doe v. Hutton*, 3 B. & P. 643; *Ratcliff's Case*, 3 Co. 41b, 42a; *Kellow v. Rowdon*, 3 Mod. 253. The rule, therefore, as to reversions and remainders, expectant upon estates in freehold, is, that unless something is done to intercept the descent, they pass, when the particular estate falls in, to the person who can then make himself heir of the original donor, who was seised in fee and created the particular estate, or if it be an estate by purchase, the heir of him who was the first purchaser of such reversion or remainder. These doctrines are fully and learnedly explained by Mr. Watkins in his *Essay on Descents*. Watk. Desc. 137 (110), 148 (116), 153 (120).

1. In *England*, the statute of 3 and 4 Wm. IV, ch. 106, in effect provides that the inheritance shall pass to the heir of the last person entitled who did not inherit.

2. See 3 Washb. R. P. 410; 4 Kent's Com. 388. But see *infra*, this title, *Kinsmen of the Half Blood — Possessio Fratris*.

3. *Hillhouse v. Chester*, 3 Day (Conn.) 166; 3 Am. Dec. 265; *Kean v. Hoffecker*, 2 Harr. (Del.) 103; 29 Am. Dec. 336; *Hicks v. Pegues*, 4 Rich. Eq. (S. Car.) 413; *Guion v. Burton*, Meigs (Tenn.) 565. And see *Guion v. Anderson*, 8 Humph. (Tenn.) 298.

It was so held in *Arkansas*, where the statute prescribed certain rules of

being equivalent to owning, and "seisin" to ownership. A remainder-man or reversioner, therefore, becomes a proper stock of descent, and the remainder or reversion of one dying intestate will go among his heirs in the same manner as estates in possession.¹

descent "when any person shall die having title to any real estate of inheritance." *Kelly v. McGuire*, 15 Ark. 555.

The common-law rule *seisina facit stipitem* is not in force in *Georgia*, where the rule is *titulus facit stipitem*. *Thompson v. Sanford*, 13 Ga. 238.

Under the rule of the *North Carolina Revised Code*, ch. 38, that "every inheritance shall lineally descend forever to the issue of the person who died last seised, entitled or having any interest therein," it was held that neither actual nor legal seisin was necessary to make the stock in the devolution of estates. *Sears v. McBride*, 70 N. Car. 152.

But as to the law in *Maryland*, see *Chirac v. Reinecker*, 2 Pet. (U. S.) 625. It was held in this case that by the law of descent a person claiming as heir must prove himself heir of the person last seised of the estate; and if an intestate leaves a brother of the whole blood, who dies without issue, and without being actually seised of the estate, the estate will descend to the half blood of the person so seised.

1. 3 Washb. R. P. 410; *Miller v. Miller*, 10 Met. (Mass.) 393; *Whitney v. Whitney*, 14 Mass. 88. But see *Lawrence v. Pitt*, 1 Jones (N. Car.) 344, in which case it was held that where, by the death of her grandfather (the person last seised), a child is entitled to a reversion in land, expectant on the termination of a life estate, and such child dies before the expiration of the life estate, the inheritance does not vest for life in the parent of the deceased child, under the sixth canon of descent, on the expiration of the life estate. The person entitled to take must make himself heir to the person last seised. *Lawrence v. Pitt*, 1 Jones (N. Car.) 344.

Where the *New Jersey Statute of Descents* provided for descent to certain heirs "when any person shall die seised of any lands, etc., in his or her own right in fee simple without devising the same," it was said that the phrase "die seised" in this statute should be interpreted to mean dying lawfully seised, and that the statute did not require actual seisin in the intestate. It was held that a remainder in fee limited upon an estate tail was a vested re-

mainder, and upon the death of the remainder-man pending the estate tail, the descent should be traced from such remainder-man and not according to the rule of the common law. *Moore v. Rake*, 26 N. J. L. 574. The same result was arrived at in the earlier case of *Cook v. Hammond*, 4 Mason (U. S.) 467, decided in 1827, in the construction of the *Massachusetts Act of Descents* of 1805, ch. 90. This act provided that "when any person shall die seised of any lands, tenements, or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the same, the same shall descend in equal shares to his children, etc." The Provincial Act of 1692 (4 W. & M. ch. [8]) was somewhat similar to this, as was also the State Act of 1783, ch. 36. Story, J., in the decision of this case said: "The present case is obviously within the words of the act. No reasonable doubt can be entertained, that a reversion is a 'right' or 'interest' in lands. In truth, it is included under the denomination even of 'land,' and a grant of land will convey a reversion. *A fortiori*, it is included under the description of 'tenement' and 'hereditament,' for these are words of more extensive import, *nomina generalissima*. The language of the act is, 'when any person shall die seised.' But it is not a just construction of the act to interpret this as intending an actual seisin. Lord Coke says (1 Inst. 153 a): 'Seisin is common, as well to the English as French, and signifies, in the common law, possession.' It may be either a seisin in law, or a seisin in fact. Now, without adverting to what constituted in the ancient law a seisin in law, as contradistinguished from a seisin in deed, it is sufficient to say, that for centuries the language of the law has been, that a reversioner is 'seised' of the reversion, although dependent upon an estate for life. Thus, in Plowden 191, it was held by the court, that where a reversion is dependent upon an estate for life, the reversioner in pleading may state that he is seised of the reversion. By this no more is meant than that he has a fixed vested right of

V. HEIRS AND DISTRIBUTEES—1. Definition.—An heir is one upon whom the law casts an estate of inheritance immediately upon the death of the owner.¹ At common law, the heir succeeds to and acquires by operation of law the estate of his ancestor in lands and tenements only; the term, therefore, is not applicable to one to whom the personal estate of the decedent goes.² The heir is called into existence by his ancestor's decease, for no man during his lifetime can have an heir; *nemo est haeres viventis*.³ Before the ancestor's death the person who is next in the line of succession is called an heir apparent or heir presumptive. An heir ap-

future enjoyment in it. If a sense at least as large as this were not given to the term 'seised,' it would follow that the descent of reversions and remainders vested by purchase in the ancestor, and even of reversions vested in the original donor of the particular estate, would be wholly unprovided for, both by the Provincial Act of Descents of 1692 and the State Act of 1783. Cases of this sort must have been innumerable, and yet no doubt ever was entertained that the descent of such remainders and reversions was provided for by these acts. My opinion is, however, that the word 'seised,' used in all these acts, has a broader signification, and such as belongs to it in common parlance. It is equivalent to 'owning'; and 'seisin' is equivalent to 'ownership.'"

A testator, in 1807, devised to his wife the improvement of his real estate and the income of one-third of his personal property during her widowhood; and, in case of her marrying again, he gave her one-sixth of his personal estate absolutely. He bequeathed two-thirds of his personal property to his children and made no further disposition of his real personal estate. It was held that under the statute of 1805, ch. 90, the reversion in the real estate descended, immediately upon the death of the testator, to his surviving children, and that one-third of the personal property vested in them, subject to the bequest to the widow. *Russell v. Hoar*, 3 Met. (Mass.) 187.

1. 2 Bl. Com. 201; Co. Litt. 191 a; 1 Reeves Hist. Eng. Law; Richards v. Miller, 62 Ill. 417; Gauch v. St. Louis Mut. L. Ins. Co., 88 Ill. 251; 30 Am. Rep. 554; O'Brien v. Bugbee, 46 Kan. 1; Lavery v. Egan, 143 Mass. 391; Proctor v. Clark, 154 Mass. 45; Richardson v. Martin, 55 N. H. 45; State v. Engle, 21 N. J. L. 347; Leach v. Cooper, Cooke (Tenn.) 249.

The notion of heir always having

been that of one on whom the law casts an estate of inheritance immediately on the death of the owner, the takers of the life estate created by the common law or by statute on the owner's death, such as dower, curtesy, or homestead, are not heirs. *Proctor v. Clark*, 154 Mass. 45. See *Gauch v. St. Louis Mut. L. Ins. Co.*, 88 Ill. 237; 30 Am. Rep. 554.

In *Pennsylvania*, while the Intestate Act has made some changes in the common law as to the interest to which a widow is entitled in the estate of her deceased husband, she is not in any proper sense of the word recognized as his heir, except, perhaps, in the case of his dying without "known heirs or kindred competent to take," in which event alone an estate of inheritance is vested in the widow under the tenth section of the act. In all other contingencies, her interest in her husband's estate is unlike that of an heir. While she acquires an interest or estate in the land and not a mere lien thereon, that interest is of a special and peculiar nature, essentially different from the estate of inheritance which the law casts upon the heir. *Dodge's Appeal*, 106 Pa. St. 216; 51 Am. Rep. 519.

A purchaser from a tenant in fee simple in his lifetime, and a devisee under his will, are alike assigns in law, claiming in opposition to and in exclusion of the heir who would otherwise have become entitled. *Wms. R. P. 64*; citing *Hogan v. Jackson*, Cowp. 306; Co. Litt. 191a, n. (1), VI, 10.

2. *Wms. Pers. Prop.* 265; *Tillman v. Davis*, 95 N. Y. 17; 47 Am. Rep. 1.

3. *Wms. R. P. 96*. By a peculiar statutory act of the *Ohio* territorial government it was provided that all conveyances, etc., made for a gambling consideration, should inure to the use of the heir of the bargainer, and vest the estate in such heir the same as if the bargainer had died intestate. See *Bond v. Swearingen*, 1 Ohio 395.

parent is the person who, if he survives his ancestor, must certainly be his heir.¹ The heir presumptive is the person who, though not certain to be heir at all events, should he survive, would yet be the heir in case of the ancestor's immediate decease.²

The persons who are entitled under the statutes of distribution to the personal estate of one who is dead intestate, may be denoted by the term distributees.³ The phrase next of kin is sometimes also employed to denote such relations of a person who has died intestate as take his estate under the statute of distributions.⁴

2. Who May be Heirs and Distributees—*a. IN GENERAL.*—At common law, monsters are incapable of inheriting; but, although deformed, if they have human shape, they may be heirs.⁵ It has been held that a person cannot, by inheritance, take the estate of a person whom he murders for the purpose of removing the life that stands between him and the inheritance.⁶ In the absence of

Civil Death.—At common law the estate of a person civilly dead would, in certain cases, vest in his heirs as if he were actually dead. "The civil death commenced if any man was banished or abjured the realm by the process of the common law, or entered into religion—that is, went into a monastery and became there a monk professed—in which case he was absolutely dead in law, and his next heir should have his estate." 1 Bl. Com. 132. But there seems to be no doubt that, in the *United States*, even in those states where there is a statutory provision that one imprisoned for life shall be deemed civilly dead, the property of such felon does not thereby devolve upon his successors or heirs because of the disability of imprisonment. See *Avery v. Everett*, 110 N. Y. 317; 6 Am. St. Rep. 369 and note; and in *Texas*, where there was no such provision, it was expressly decided that the estate of one sentenced to imprisonment for life did not descend to his heirs as in the case of death. *Davis v. Laning* (Tex. 1892), 19 S. W. Rep. 846.

1. Thus, at common law the eldest son is the heir apparent during the lifetime of his father, as he must be heir to the father whenever he happens to die. 2 Bl. Com. 208.

2. Thus, to take a common-law example: an only daughter is the heiress presumptive of her father; if he were now to die she would at once be his heir; but she is not certain of being heir, for her father may have a son who would supplant her and become heir apparent during the father's lifetime and his heir after his decease. *Wms. R. P.* 96.

3. *Henry v. Henry*, 9 Ired. (N. Car.) 278.

4. See also *NEXT OF KIN*, vol. 16, p. 703; 1 Bouv. Inst., § 1959; *Steel v. Kurtz*, 28 Ohio St. 191.

This was held to be the meaning of the term "next of kin," as used in the statute authorizing actions to be brought against the next of kin of any deceased person to recover the value of any assets that may have been paid to them by an executor or administrator. *Merchants' Ins. Co. v. Hinman*, 4 Abb. Pr. (N. Y.) 312; 15 How. Pr. (N. Y.) 182; *Merchants' Ins. Co. v. Hinman*, 13 Abb. Pr. (N. Y.) 110; 34 Barb. (N. Y.) 410. And the same construction was given to the term as employed in a statute which authorized an action to be brought "by any legatee, or any of the next of kin entitled to share in the distribution of the estate," against the executor or administrator thereof to recover his legacy or distributive share; the intestate's widow was held to be included in the term as here used. *Betsinger v. Chapman*, 24 Hun (N. Y.) 15.

5. *Co. Litt.* 7, 8; 2 Bl. Com. 246; 2 Min. Inst. 549.

6. This holding was considered not to be in violation of the provisions of the Constitution of the *United States*, or of the state against bills of attainder, and that no person shall be deprived of property without due process of law. Were the principle here enunciated enacted into a statute, it would take no one's property from him, nor work corruption of any one's blood, but would only stand in the way of taking an estate as a reward for the commission

these disabilities, the intestate's real estate will descend and his personalty be distributed to the persons pointed out by the statutes. All persons, even minors and lunatics, may transmit their estate as intestates, and inherit from others.¹

b. RELATIVES SPECIALLY DESIGNATED.—In directing the course of succession, the statutes of descents and distributions adopted in the states of the Union commonly refer to the nearer relatives by their designation of relationship. The statutes are in this respect explicit.²

c. KINDRED.—The statutes, after providing specifically for the succession to decedents' estates in case of the survival of the near

of crime. *Shellenberger v. Ransom*, 31 Neb. 61. The court based its decision upon a number of analogous cases which seem to support the principle that it would be contrary to public policy to permit a person who commits murder, or any person claiming under him or her to benefit by his or her criminal act. In *Riggs v. Palmer*, 115 N. Y. 506; 12 Am. St. Rep. 819, the devisee murdered his testator that he might prevent him from revoking a will, which he had manifested some intention of doing, and to obtain the speedy enjoyment and immediate possession of the property. An action being brought to enjoin an administrator from disposing of the personal property of the testator to the defendant, and to declare him not entitled to the real estate under the will, on the ground that he had murdered the testator, it was held that, by reason of the crime of murder committed upon the testator, the defendant was deprived of any interest in the estate left by him, and a judgment was entered enjoining the defendant and the administrator from using any of the personal or real estate left by the testator for the defendant's benefit. In *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 599, it was held that one who murdered the person upon whose life he held a policy of insurance, forfeited all rights under such policy, when, to secure its immediate payment, he murdered the assured.

In *Cleaver v. Mutual Reserve Fund Life Assoc.* (1892), 1 Q. B. 147, it was held that the executors of a person who has effected an insurance on his life for the benefit of his wife can maintain an action on the policy notwithstanding the fact that the death of the insured was caused by the felonious act of the wife. The trust created by the policy in favor of the wife under the Married Women's Property Act 1882, § 11, hav-

ing become incapable of being performed by reason of her crime, the insurance money forms part of the estate of the insured; and as between his legal representatives and the insurers no question of public policy arises to afford a defense to the action. And in that case *Esher, M. R.*, said: "That the person who commits murder, or any person claiming under him or her, should be allowed to benefit by his or her criminal act, would no doubt be contrary to public policy."

But in *Riggs v. Palmer*, 115 N. Y. 513 (set out *supra*, this note), *Gray, J.*, dissented in a strong opinion; and *Danforth, J.*, concurred in the dissent.

And in a *North Carolina* case, where a widow, who was convicted upon a charge of being accessory before the fact to the murder of her husband, afterwards brought suit to have her dower assigned in the real property left by him, the supreme court, reversing the judgment below, held that notwithstanding her criminal participation in her husband's death, she was entitled to be endowed of a share of his estate. The reason given by the court in the opinion is that, the statute having provided but one cause for which a widow should be barred of her dower, which was when she should commit adultery, and not be living with her husband at his death, her right to dower is not affected by the fact that the intestate died at her hands or through her procurement. *Owens v. Owens*, 100 N. Car. 240. In commenting upon this case, the court, in *Shellenberger v. Ransom*, 31 Neb. 61, by *Cobb, C. J.*, said: "I agree with the *New York* Court of Appeals, which also reviewed this case in the opinion in *Riggs v. Palmer*, 115 N. Y. 506; 12 Am. St. Rep. 819, in an unwillingness to assent to the doctrine of this case."

1. 1 Bouv. Inst., § 1957.

2. See *infra*, this title, *Course of Suc-*

relatives just referred to, very largely indicate the further order of succession by a general reference to the kindred of the intestate.¹

(1) *Who Are Kindred; Consanguinity.*—It is considered that, in speaking of kin or kindred, the statute thereby, unless its language clearly shows that relations by affinity are included,² means relationship by consanguinity only.³ Thus, kin may be defined as a relation or relationship by blood or consanguinity.⁴ As intestate succession, then, depends not a little on the nature of kindred and the several degrees of consanguinity, it will be necessary to state the true notion of this kindred or alliance in blood.

Consanguinity is the connection or relation existing among all the different persons descended from the same stock or common ancestor.⁵ It is either lineal or collateral. Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other, as between the intestate and his son, grandson, great-grandson, and so downward in the direct descending line, or, between the intestate and his father, grandfather, great-grandfather, and so upward in the ascending line.⁶ Collateral consanguinity is that which exists between persons who are descended from the same common ancestor, but not from each other; as between two brothers descended from the same father, or between two cousins descended from the same grandfather.⁷

(2) *Classes of Kindred; Descendants, Ascendants, and Collaterals.*—Kindred are naturally classified into, first, one's children and

cession—To the Specially Designated Relatives.

1. See *infra*, this title, *Course of Succession—Generally to the Next of Kin.*

2. In *Ohio*, the wife is, for certain purposes, designated as her husband's next of kin. *Gardner v. Gardner*, 13 Ohio St. 426.

3. *Green v. Hudson River R. Co.*, 32 Barb. (N. Y.) 25; 30 How. Pr. (N. Y.) 593, n. See also *Kearney v. Turner*, 28 Md. 425; *Jones v. Barnett*, 30 Tex. 638.

A husband is not the next of kin of his wife, within the meaning of the statute of distributions. The words "next of kin" embrace blood relatives only. *Peterson v. Webb*, 4 Ired. Eq. (N. Car.) 56. And see *Townsend v. Radcliffe*, 44 Ill. 446. So, the surviving husband or wife cannot ordinarily inherit as the next of kin nor as the descendant of the decedent. *Prather v. Prather*, 58 Ind. 141. See *Garrick v. Camden*, 14 Ves. 372; *Haraden v. Larabee*, 113 Mass. 431.

And it was held that first cousins inherited in preference to second cousins by consanguinity, though such second cousins were also uncles and aunts by affinity. *Speer v. Miller*, 37 N. J. Eq. 492.

4. Burr. L. Dict. Kindred are descendants from the same stock or ancestor. *Birney v. Wilson*, 11 Ohio St. 426.

It has been held that where lands descend from father to daughter, and she dies without leaving nearer heirs than uncles and aunts on the maternal side and first cousins on the paternal side, the cousins take to the exclusion of the uncles and aunts, though the uncles and aunts are of the blood of her father, their relationship to her being, by consanguinity, that of second cousin, and by affinity, that of uncle and aunt. *Speer v. Miller*, 37 N. J. Eq. 492.

Kindred and kin are, in several states, declared to mean kindred by blood. *Delaware Rev. Code* 1874, ch. 5, § 1; *New Mexico Comp. L.* 1884, §§ 973; *Ohio Rev. Stat.* 1880, §§ 4158-9; *Stim. Am. Stat. L.*, § 3139.

5. 2 Bl. Com. 202; Toll. Ex. 87; *Sweezy v. Willis*, 1 Bradf. (N. Y.) 495; *Blodget v. Brimsmaid*, 9 Vt. 27.

6. 2 Bl. Com. 202; Bouv. L. Dict., tit. *Consanguinity*. See *Stim. Am. Stat. L.*, § 3139.

7. 2 Bl. Com. 204; Bouv. L. Dict., tit. *Consanguinity*; Burr. L. Dict., tit. *Collateral Consanguinity*. See *Stim. Am. Stat. L.*, § 3139.

their descendants; second, his father, mother, and other ascendants; third, his collateral relations, which include, in the first place, his brothers and sisters and their descendants, and, secondly, his uncles, cousins, and other relations of either sex who have not descended from a brother or sister of the deceased. All kindred, then, are descendants, ascendants, or collaterals. Ascendants and descendants are lineal kindred; other kindred are collateral.¹

(3) *Degrees of Kinship; How Reckoned.*—In speaking of degrees of relationship, the word degree is a metaphorical expression borrowed from the steps of a ladder or of stairs; the kindred descending from their common ancestor from generation to generation are as so many steps in a stair or so many rounds in a ladder. The degree of kindred is established by the number of generations.²

In the direct line—line being understood to be the series of persons who have descended from a common ancestor, placed one under the other in the order of their birth—any one of the persons there represented may be taken as a *propositus*, in order to class the other persons in the line both above and below. This line is then severed into two—namely, the ascending line and the descending line.³ In computing the degree of kinship of descendants or ascendants to the *propositus*, every generation, either upward or downward, constitutes a different degree.⁴ This is the only natural way of reckoning the degrees in the direct line, and is common to the civil, canon, and common law.⁵

The collateral line, considered of itself and relatively to the common ancestor, is a direct line; it takes the name of collateral when it is placed alongside of another line below the common ancestor, in whom both lines unite. These two lines are independent of each other; they have no connection, except by uniting in the person of the common ancestor, and it is this union which forms the kindred between the persons in these two lines.⁶ There are two modes of computing the degrees of collateral kindred; the one is that of the canon law, which has been adopted by the common law;⁷ the other is that of the civil law.

1. 1 Bouv. Inst., § 1961; Bouv. L. Dict. See Wood Inst. 50; Ayliffe, Parerg. 325; Dane Abr.; Toulier Ex. 382; 2 Sharsw. Bl. Com. 516, n.; Pothier, Des Successions, ch. 1, art. 3.

2. 1 Bouv. Inst., § 1962. See Stim. Am. Stat. L., § 3139.

3. See Stim. Am. Stat. L., § 3139.

4. See Stim. Am. Stat. L., § 3139.

5. 2 Bl. Com. 203 and authorities there cited.

6. 1 Bouv. Inst., § 1965.

7. A statement is made by Blackstone that the canon law method of computing the degrees of consanguinity has been adopted by the common law. 2

Bl. Com. 206, citing Co. Litt. 23. But this assertion has been doubted. In a *New Jersey* case, that of *Schenck v. Vail*, 24 N. J. Eq. 538, it was urged by counsel that the canon-law rule is the rule of the common law, and as such could not be discarded in that state except by the aid of the legislature. Although the court thought that when the statutes of that state were enacted, remodeling the entire plan of descents, and leaving scarcely a vestige of that of the common law remaining, it did not follow that the rule of the canon law, even if such rule had been transplanted into the ancient English system, was to

The mode of computation by the canon and common law is to begin with the common ancestor and reckon downward, and the degree in which the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred subsisting between them; in whatever degree the claimant is distant from the ancestor common to him and the intestate, that is the degree in which they are related; but if there are more degrees between the ancestor and the intestate than between the ancestor and the claimant, then the degrees are reckoned between the ancestor and the intestate.¹

The civil-law rule is to begin with the intestate, and ascend from him to a common ancestor, and descend from that ancestor to the heir, reckoning a degree each generation, as well in the ascending as descending lines.²

be necessarily applied by the courts of that state to this new condition of things, yet it also questioned whether the assumption upon which the argument was based was well founded. Beasley, C. J., said: "The rule of the canon law has, indeed, the sanction of Sir William Blackstone, but the authority he vouches for his opinion does not entirely sustain it, and other writers of equal learning have expressed a view opposite to this of the great commentator. It is certain that the adoption of either rule was a matter of indifference under the English system, in which prevailed the doctrine of the representation of the ancestor by his lineal descendants. This was so completely the case, that Mr. Christian is enabled to say that 'the introduction of the computation of kindred, either by the canon or the civil law, into a treatise upon descents may perplex, but can never assist.' And on another occasion the same writer remarks: 'It is said that the canon law computation has been adopted by the law of *England*; yet I do not know a single instance in which we have occasion to refer to it.' 2 Bl. Com. 208, n. 10 (Am. ed. of 1830); 2 Bl. Com. 224. It can hardly be said that a dogma, which has no practical efficiency, exists as a part of any system of laws. It has certainly never been impressed with the stamp of judicial approval."

In this connection it may be noticed that the canon law reckons degrees of consanguinity with a view to determining the validity of marriages between those who have a large portion of the same blood running in their respective veins, and, therefore, looks up to the author of that blood or the common ancestor, reckoning the degrees from

him. The civil law adopts its computation with a view to the distribution of estates, and therefore looks to the proximity or remoteness of the parties in respect to one another, counting the degrees of kindred according to the number of persons through whom the claim must be derived from the deceased. Seeing that the common and civil law have the same object, it might have been expected that the common law would have adopted the computation of the civilians rather than that of the canonists. It should be remembered, however, that the common law, in the disposition of inheritances, has a chief regard to the blood of the first purchaser, who, for the most part, is a common ancestor, so that proximity to him is of more importance than proximity of the parties to one another. 2 Bl. Com. 224; 2 Min. Inst. 518. From the above consideration it would seem that in the modern law of descents, where the requirement that the heir be of the blood of the first purchaser is so extensively abrogated, the civil-law rule would be more in harmony with the general scheme.

1. 2 Bl. Com. 206; 1 Bouv. Inst., § 1966; 1 Woern. Am. L. Adm. 151, 152. For instance: two brothers are related to each other in the first degree, because from the father to each of them is one degree. An uncle and nephew are related to each other in the second degree, because the nephew is two degrees distant from the common ancestor. And this mode of computation is extended to the remotest degree of collateral relationship.

2. 4 Kent's Com. 412; 3 Cruise Dig. 339. According to this rule of computation, the father of the intestate stands

At common law it is immaterial which method of computation is adopted; for, under the efficacy of the principle of indefinite representation, both rules lead to the same result—both will establish the same person to be the heir.¹ But under the American statutes of descents, where the right of representation is given only a limited effect, very different results are, by the employment of the one or the other of these several methods of computation, often arrived at.²

Although it has been said in *England* that their statute of distributions must be construed according to the rules of the common law,³ the rule which has finally prevailed for reckoning the degrees of kindred under that statute is that of civil law.⁴ In the *United States*, the rule of the common or canon law has met with little favor.⁵ The rule generally adopted is that of the civil law, either by statutory enactment or by judicial construction.⁶ To avoid the division of an inheritance into unduly small fractions, and to simplify the rules of descent, statutes frequently provide that, where two or more of the same degree of consan-

in the first degree, his brother in the second, and his brother's children in the third. Or, the grandfather stands in the second degree, the uncle in the third, the cousins in the fourth, and so on in a series of genealogical order. The intestate is taken as the *terminus a quo*, and the propinquity to him of any collateral relative is determined by the sum of the degrees in both lines to the common ancestor.

In the collateral line, the degrees are counted by generations, from one of the relations up to the common ancestor and down to the other relation, the ancestor being counted but once, the decedent excluded, and the relation included; thus, uncle and niece are related in the third degree. *Stim. Am. Stat. L.*, § 3139; citing statutes of *California, Dakota, Louisiana, Montana, New Mexico, and Utah*.

1. 1 Bouv. Inst., § 1966; *Schenck v. Vail*, 24 N. J. Eq. 538.

2. See 1 Woern. Am. L. Adm. 152.

3. *Blackborough v. Davis*, 1 P. Wms. 41, where it was said by Holt, C. J., that a prohibition would issue to prevent the ecclesiastical courts from proceeding under the statute of Car. II contrary to the rules of the common law.

4. This was so held by Sir Joseph Jekyll, M. R., in 1722, in *Mentney v. Petty*, Prec. Ch. 593; by Lord Hardwicke in 1749, in *Thomas v. Ketteriche*, 1 Ves. 334; and by Sir John Strange in 1750, in *Lloyd v. Tench*, 2 Ves. 215; and has been ever since acquiesced in. See

Wallis v. Hodson, 2 Atk. 116; 1 Wms. Exrs. 365.

5. In *Georgia*, the statute, after fixing the order in which certain relatives of the intestate are entitled to the inheritance *nominatim*, then provides "that the more remote degrees of kindred shall be determined by the rules of the canon law, as adopted and enforced in the English courts prior to the 4th of July, 1776." *Georgia Code* 1832, § 2484; *Wetter v. Habersham*, 60 Ga. 193. The canon law is adhered to in both *Maryland* and *North Carolina*. *Maryland Code*, 1878, art. 48, § 17; *North Carolina Code* 1883, § 1281 (6); *Gillespie v. Foy*, 5 Ired. Eq. (N. Car.) 280.

6. See the statutes of the various states. See also *Martindale v. Kendrick*, 4 Greene (Iowa) 307; *Mayo v. Boyd*, 3 Mass. 13; *McCracken v. Rogers*, 6 Wis. 278; *People v. De La Guerra*, 24 Cal. 73.

It has been held that, in the absence of statute, the civil-law rule for the computation of degrees of kindred prevails as to personality. *Sweezy v. Willis*, 1 Bradf. (N. Y.) 495; *Hurtin v. Proal*, 3 Bradf. (N. Y.) 414. And it may be said that the civil-law method of computation has been recognized in construing statutes which do not in terms expressly recognize it. *Hillhouse v. Chester*, 3 Day (Conn.) 166; 3 Am. Dec. 265; *Hays v. Thomas*, 1 Ill. 180; *Clark v. Sprague*, 5 Blackf. (Ind.) 412; *Cloud v. Bruce*, 61 Ind. 171; *Schenck v.*

guinity claim as next of kin, those who trace their blood through the nearest lineal ancestor shall be preferred to those whose ancestor is more remote from the intestate.¹ It will be noticed that, where representation is allowed, the same general result is reached by that means.²

d. POSTHUMOUS CHILDREN.—Posthumous children inherit and take under statutes of distributions in the same manner as if they had been born in the lifetime of the father, and were surviving heirs;³ the child in its mother's womb is considered as born for all purposes of its own interest; it takes by descent since its conception, provided it be capable of inheriting at the moment of its birth. But it is necessary that the child should be born after such a period of foetal existence that its continuance in life might be reasonably expected,⁴ and also that it be born alive, for it is presumed when it is still-born that it never had life.⁵ And, in

Vail, 24 N. J. Eq. 538; Taylor v. Bray, 32 N. J. L. 182; Smith v. Gaines, 36 N. J. Eq. 297; Clayton v. Drake, 17 Ohio St. 368; McDowell v. Addams, 45 Pa. St. 430; Shaffer v. Nail, 2 Brev. (S. Car.) 160.

Under the law of the *District of Columbia* a paternal grandfather is nearer of kin than a maternal uncle. *In re Afflick*, 3 MacArthur (D. C.) 95.

1. See various state statutes.

2. See 1 Woern. Am. L. Adm. 153.

3. 3 Wash. R. P. 412; 4 Kent's Com. 412; Challis R. P. 111, 126; Bishop v. Hampton, 11 Ala. 254; Morrow v. Scott, 7 Ga. 535; Botsford v. O'Conner, 57 Ill. 72; Catholic Mut. Ben. Assoc. v. Firnane, 50 Mich. 82; Harper v. Archer, 7 Smed. & M. (Miss.) 99; 43 Am. Dec. 473; Hill v. Moore, 1 Murph. (N. Car.) 233; Watkins v. Flora, 8 Ired. (N. Car.) 374; Laird's Appeal, 85 Pa. St. 339; Pearson v. Carlton, 18 S. Car. 47. See INFANTS, vol. 10, p. 624 *et seq.* It is in a number of states expressly provided by statute that persons not *in esse*, but conceived at the time of the testator's death, inherit as if born at the time. Stim. Am. Stat. L., § 3135. Posthumous children of the intestate inherit as if living at his death in all states. Stim. Am. Stat. L., § 3136; Detrick v. Migatt, 19 Ill. 146; 68 Am. Dec. 584. And so in many states of all posthumous descendants of the intestate. See Stim. Am. Stat. L., § 3136.

The provision of the *New York* statute is in terms more liberal; it is that descendants and relatives of the intestate, begotten before his death, but born thereafter, shall in all cases inherit in

the same manner as if they had been born in the lifetime of the intestate and had survived him. 3 *New York Rev. Stats.* (7th ed.) 2213, § 18.

For the statutory provision in *Virginia* see 2 Min. Inst. 455. And in many states there is a general rule that, in all cases of succession, direct or collateral, posthumous children take both realty and personality as if living at the death of the parent whom they represent. See designation of these states in Stim. Am. Stat. L., § 3136.

Posthumous Children of Half Blood.—There would seem to be no question that a half brother or sister *en ventre sa mere* at the time of the death of an intestate, can inherit where the half blood who are born before the intestate dies are permitted by law to take. See Burnet v. Mann, 1 Ves. 156, more fully and correctly reported in 1 Myl. & K. 672, note.

4. See Harper v. Archer, 4 Smed. & M. (Miss.) 99; 43 Am. Dec. 472; Marsellis v. Thalhimier, 2 Paige (N. Y.) 35; 21 Am. Dec. 66.

Children born within the first six months after conception are considered by the civil law as incapable of living; and, therefore, although they are apparently born alive, if they do not in fact survive so long as to rebut the presumption of law, they cannot inherit so as to transmit the property to others. Code Napoleon, art. 312, 725, 906; Code Louisiana, art. 205; Dig. lib. 1, tit. 5, § 1, 12; Domat Prel. B., tit. 2, § 1, art. 5. And see INFANTS, vol. 10, p. 625.

5. 1 Bouv. Inst., § 1957; Marsellis v. Thalhimier, 2 Paige (N. Y.) 35; 21 Am. Dec. 66. See Domat Liv. L., pt. 2, b. 2,

some states, the time within which the posthumous child must be born is by statute fixed at ten months.¹

c. KINSMEN OF THE HALF BLOOD; POSSESSIO FRATRIS—(1) *At Common Law*.—It is substantially stated above that the heir is, by the common law always, and under the modern scheme of descents, with rare exceptions, selected from the intestate's relations by blood.² But blood is, at common law, recognized to be of two kinds: the whole or full blood and the half blood. A person is of the whole blood to another when they are both descended, not only from the same ancestor, but from the same couple of ancestors.³ Two persons are said to be of the half blood to one another when they are descended from one common ancestor only.⁴

At common law the intestate's next collateral kinsman⁵ must, in order to be his heir, be his kinsman of the whole blood; a kinsman of the half blood could not inherit. Though there is a near kinsman of the half blood, not only will a more distant kinsman of the whole blood be admitted and the other wholly excluded, but, there being no kindred of the full blood, rather than go to the half blood, the estate escheats to the lord.⁶

This total exclusion of the half blood from the inheritance is

tit. 1, § 1, art. 7. A person cannot claim an inheritance, therefore, through a child who was conceived but was still-born. 1 Bouv. Inst., § 1957.

1. The *Virginia* statute provides that "any person *en ventre sa mere*, who may be born in ten months after the death of the intestate, shall be capable of taking by inheritance in the same manner as if he were in being at the time of such death." *Virginia* Code 1887, § 2555. See statutes of *North Carolina* (Code, § 1281); *Rutherford v. Green*, 2 Ired. Eq. (N. Car.) 121; *Tennessee*, *Melton v. Davidson*, 86 Tenn. 129; and *West Virginia*, 3 L. C. Am. L. R. P. 431.

In *Kentucky*, "any person born of his widow within ten months after the death of the intestate, shall inherit from him in the same manner as if he were in being at the time of such death." *Kentucky* Gen. Stats., ch. 31, § 7; *Massie v. Hiatt*, 82 Ky. 314.

Pretermitted Children.—See WILLS.

2. See *supra*, this title, *Who Are Kindred; Consanguinity*.

3. As two brothers who have the same father and mother. 2 Bl. Com. 227; *Rap. & L. L. Dict.*, tit. *Blood*; *citing* Co. Litt. 14a.

4. Two brothers who have the same father but different mothers are kindred of the half blood. 2 Bl. Com. 227.

5. It is evident that questions of the

whole blood and half blood can only arise in respect to collateral heirs. A man cannot be of the half blood to his ancestor. This is the reason why there was no *possessio fratris* of an estate tail; the descent of the estate being always under the statute *de donis* traced from the donee, the issue in tail taking as heir to him *per formam doni*, and not as heir to the last actual tenant in tail. *Challis R. P.* 190; *citing* *Doe v. Whichelo*, 8 T. R. 211.

6. 2 Bl. Com. 224, 227.

Doctrine of Possessio Fratris.—One consequence of this doctrine, together with the rule *seisina facit stipitem*, is the doctrine of *possessio fratris*, which was this: If a man, being seised of land, had issue a son and a daughter by one woman, and a younger son by another woman, and the father died, and then the elder son entered and died, the daughter would have inherited the land as heir to her brother, who was the person last actually seised. The maxim in such cases is that the *seisin or possessio fratris facit sororem esse haeredum*. 2 Bl. Com. 227; *Broom's Max.* 532. But had the elder son died without entry, then the younger son might have inherited, not as heir to his half-brother, but as heir to their common father, who was the person last actually seised. 2 Bl. Com. 227; *citing* 2 Hale Hist. C. L. 238.

not so much to be considered in the light of a rule of descent as of a rule of evidence—an auxiliary rule to carry into execution the common-law requirement that the inheritance shall continue in the blood of the first purchaser.¹

(2) *The Rule Generally Abrogated.*—This doctrine, then, being dependent upon and only useful in connection with the common-law rule or canon of descent that its course must be traced from the first purchaser, would seem to have no general application under a scheme of descents such as is established in the *United States*, in which this rule has been, in some states wholly, and in all states largely, abrogated.²

It would seem to follow accordingly as a general doctrine, that, independent of express statutory enactment, no distinction is admitted in the *United States* between the whole and the half blood.³ And, looking to the express legislation on the subject, we find that in no state is the half blood wholly excluded; we even find that in some states no distinction whatever is made between the half blood and the whole blood.

1. 2 Bl. Com. 228. And see 2 Min. Inst. 464, referring to 2 Bl. Com. 224, 227, 228, and commenting on the rule.

2. See *Cliver v. Sanders*, 8 Ohio St. 506.

3. See *Gardner v. Collins*, 2 Pet. (U. S.) 58; *Clark v. Russell*, 2 Day (Conn.) 112; *Neeley v. Wise*, 44 Iowa 544; *Pearson v. Grice*, 6 La. Ann. 233; *Brown v. Brown*, 1 D. Chip. (Vt.) 360. The general doctrine that, independent of express statutory enactment, no distinction is admitted between the whole and the half blood was asserted in *Prescott v. Carr*, 29 N. H. 453; 61 Am. Dec. 652, and distinctly recognized in *Crowell v. Clough*, 23 N. H. 207. So, where a statute directed that the estate should, in certain cases, descend to the brothers and sisters of the deceased person, dying intestate, it was held that the term "brothers and sisters" included those of the half blood. *Clark v. Sprague*, 5 Blackf. (Ind.) 412; *Doe v. Abernathy*, 7 Blackf. (Ind.) 442; *Aldridge v. Montgomery*, 9 Ind. 302; *Clay v. Cousins*, 1 T. B. Mon. (Ky.) 75; *Sheffield v. Lovering*, 12 Mass. 490. But see *Wren v. Carnes*, 4 Desaus. (S. Car.) 405; *Lawson v. Perdriaux*, 1 McCord (S. Car.) 456. And the term "next of kin" in other statutes has been construed to include the half blood. *Hillhouse v. Chester*, 3 Day (Conn.) 166; 3 Am. Dec. 265; *McKinney v. Mellon*, 3 Houst. (Del.) 277. So, under the *South Carolina* statute of 1791, which provided that "if the intestate shall leave no lin-

cal descendant—father, mother, brother or sister of the whole blood, or their children, or brother or sister of the half blood, or lineal ancestor,—then the widow shall take two-thirds of the estate, and the remainder shall descend to the next of kin," it was held where the nearest relations of the intestate were an uncle or aunt of the half blood and first cousins of the whole blood, that the former were entitled to take the whole personal and real estate in exclusion of the latter, since they were the next of kin. *Karwon v. Lowndes*, 2 Desaus. (S. Car.) 210; *Perry v. Logan*, 5 Rich. Eq. (S. Car.) 202. First cousins of the whole and the half blood take equally as next of kin. *Edwards v. Barksdale*, 2 Hill Eq. (S. Car.) 416; *Riley Eq. (S. Car.)* 16. And an uncle of the half blood shares equally with an uncle of the whole blood. *Guerard v. Guerard*, 4 Desaus. (S. Car.) 405, note. In an elaborate discussion, in *Edwards v. Barksdale*, 2 Hill Eq. (S. Car.) 416; *Riley Eq. (S. Car.)* 16, of the true construction of the statute under consideration, Chancellor Harper, in effect, said that the conclusion there reached was not at all inconsistent with the determination in the above-cited cases of *Wren v. Carnes*, 4 Desaus. (S. Car.) 405, and *Lawson v. Perdriaux*, 1 McCord (S. Car.) 456, that by the act of 1797, amending that of 1791, and providing that where there is a father or mother and brother and sister, they shall take equally, brother and sister of

In certain states the statutes declare collaterals of the half blood to be entitled equally with those of the full blood in equal degree.¹ There can be no doubt that, under these statutes, no preference will be shown, in the case of inheritance by half-brothers and sisters, to those brothers and sisters who are related to the intestate on the side of the one parent over those who are of his blood on the side of the other.²

(3) *Statutory Provisions*.—But in some states it is provided that the estate which a minor, who died unmarried and without issue, derived from one of his parents, passes to the other children of the same parent.³ Here the estate of the deceased will not always go to his half-brothers and sisters. If, for instance, he derived the estate from his father, the surviving children of the deceased father will take the deceased child's share in their father's estate to the exclusion of brothers and sisters of the half blood by the same mother but by a different father.⁴

This provision, however, is rather a restriction of the descent to the line of the parent from whom the estate came than an exclusion of the half blood; if the estate came from the father, the

the whole blood only were meant. The chancellor said that upon the particular provisions of both acts construed together, he would certainly have arrived at the same conclusion.

The words "lawful heirs" in a will have been held to refer to heirs of the half as well as the whole blood. *Sharp v. Klienpeter*, 7 La. Ann. 264.

1. See the statutes of *Illinois, Maine, Massachusetts, North Carolina, Oregon and Vermont*. And see *Larabee v. Tucker*, 116 Mass. 562; *Hatch v. Hatch*, 21 Vt. 450.

2. See *Edwards v. Barksdale*, 2 Hill Eq. (S. Car.) 416.

Under the provision of the *Illinois* Statute of Wills that "in no case shall there be a distinction between the kindred of the whole and of the half blood," it was held, where one P. F. was seised in fee of certain property and died intestate, leaving as his sole heir at law T. F., who subsequently died intestate while seised in fee of the property, leaving surviving him his mother and certain half-brothers and sisters on her side, that such brothers and sisters of the half blood would take. The court considered that the above-quoted provision was not confined in its application to cases where the ancestor from whom the estate was derived leaves children by different mothers; the children of the same mother, but who have different fathers, are no less brothers and sisters of the half blood

than are the children of a common father, but who have different mothers, and all are equally within the operation of the statute. *Oglesby Coal Co. v. Pasco*, 79 Ill. 164.

Under an act declaring that if a married woman "die possessed of slaves or other personal chattels as her separate property, leaving issue of her body, either by a former husband or by her surviving husband, such slaves and other personal chattels shall descend to her children in equal shares," the children of the first marriage are entitled to an equal share of all their deceased mother's personal chattels with the children of the second marriage. *Marshall v. King*, 24 Miss. 85; *Bates v. Cotton*, 32 Miss. 266.

But in *Georgia* a preference is shown, in the case of inheritance by brothers and sisters, to the half blood on the paternal side. "Brothers and sisters of the intestate stand in the second degree, and inherit; if there is no widow or child or representative of the child, the half blood on the paternal side inherit equally with the whole blood. If there be no brother or sister of the whole or half blood on the paternal side, then those of the half blood on the maternal side shall inherit." *Georgia* Code, 1882, § 2484.

3. See *infra*, this title, *In Succession to Estate of Unmarried Infant*.

4. *Clark v. Pickering*, 16 N. H. 284; *Crowell v. Clough*, 23 N. H. 207.

half-brothers and sisters on the paternal side will probably inherit from the deceased infant.¹ A provision somewhat analogous to this is found in a number of states, in the proviso or exception contained in an enactment which may be stated substantially as follows: that kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift from some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance.² Here again the course of descent is restricted to the line through which the estate came, and the intestate's kindred of the half blood, who have none of the blood of the ancestor from whom it came in the manner indicated, are excluded from the inheritance.³

But the effect of these provisions is not necessarily a preference of the whole to the half blood;⁴ for here also the kindred of the half blood will inherit if they are in the line of succession—that is, if they are of the blood of the ancestor from whom the intestate's property came as an ancestral estate.⁵ If a person has any of the blood of the ancestor, however small the fractional

1. See *Talbott v. Talbott*, 17 B. Mon. (Ky.) 1.

2. See *infra*, this title, *Rule that Succession Must be Traced from First Purchaser—In Collateral Successions*.

3. Brothers and sisters of the half blood cannot inherit to each other, unless the estate is derived from their common ancestor, or has been acquired by the intestate by purchase. *Cutter v. Waddingham*, 22 Mo. 206; *Den v. Urison*, 2 N. J. L. 212; *Den v. De Hart*, 3 N. J. L. 73; *Den v. Searing*, 8 N. J. L. 340.

But if there are no kindred of the blood of the ancestor from whom the estate came, it will, as a general rule, go to the kindred of the intestate without common blood with such ancestor. So it was held under the *Tennessee* act of 1784, that if one die without issue and without brothers or sisters of the blood of the ancestor from whom his estate descended, his brothers and sisters of the half blood of the line of the other ancestor will be let into the succession and inheritance of the estate. *Nesbit v. Bryan*, 1 Swan (Tenn.) 468.

4. *Bing. Desc.* 324.

5. *Kelly v. McGuire*, 15 Ark. 555; *Doe v. Sheppard*, 3 Murph. (N. Car.) 333; *Prichard v. Turner*, 2 Hawks (N. Car.) 435; *Ross v. Toms*, 2 Hawks (N. Car.) 9; *Osborne v. Widenhouse*, 3 Jones Eq. (N. Car.) 238; *Lynch v. Lynch*, 132 Pa. St. 422; *Nichol v. Dupree*, 7 Yerg. (Tenn.) 415. It is held

that an ancestral estate which was derived from one of the decedent's parent's will go to the decedent's brothers and sisters on the side of that parent, although they are not the issue of the decedent's other parent. *Gardner v. Collins*, 3 Mason (U. S.) 398; 2 Pet. (U. S.) 58; *Clark v. Russell*, 2 Day (Conn.) 112; *Aldridge v. Montgomery*, 9 Ind. 302; *Lowe v. Maccubbin*, 1 Har. & J. (Md.) 550; *Beebe v. Griffing*, 14 N. Y. 235; *Freeman v. Allen*, 17 Ohio St. 527; *Baker v. Chalfant*, 5 Whart. (Pa.) 477. So where a statute, in directing the descent of ancestral estates, provided that, in certain cases, the estate should pass to the brothers and sisters of the ancestor from whom the estate came, it was held that the words "brothers and sisters," as there used, included half-brothers and sisters. *Cliver v. Sanders*, 8 Ohio St. 501.

Where there were three children, A, B, and C, all by the same mother, but A and B were the issue of the first, and C of the second marriage of the mother, and A died, the estate which she had inherited from her father descending to her brother B, who afterwards died, it was held that, A being the ancestor, within the meaning of the statute, from whom the estate came by descent to B, C, who was the son of the same mother as A, though not of the same father, inherited the estate; it was not necessary to his capacity to take under the statute that he should be of the full

part, he may, under these provisions, inherit as the intestate's next of kin equally with the whole blood.¹ It is clear that, both under the statutes last referred to and those relating to the descent of the estate of a deceased minor, if the estate did not come to the deceased in the manner indicated—*i. e.*, is not an ancestral estate, but is a new acquisition, that is, if it cannot be traced to

blood. *Wheeler v. Clutterbuck*, 52 N. Y. 68.

In *Maryland* no distinction is made between brothers and sisters of the whole and the half blood, all being descendants of the same father, where the estate descended on the part of the father; nor where all are descendants of the same mother, the estate descending on her part. *Maryland* Pub. Gen. Laws, art. 46, § 26.

Preference of Whole Blood in Succession by Brothers and Sisters.—In *Pennsylvania* there is an express postponement of brothers and sisters of the half blood to brothers and sisters of the whole blood and to parents, even when the half blood is that of the ancestor. It is held that under the intestate act of 1833, if a daughter, to whom real estate has been devised by her father, die intestate, seised of it, leaving brothers and sisters of the whole and of the half blood, all being children of the same father, the devising ancestor, the estate goes to those of the whole blood in exclusion of the others. *Stark v. Stark*, 55 Pa. St. 62. But the half brothers and sisters of the blood of the ancestor from whom the estate came will inherit before relatives of the whole blood of more remote degree. *Baker v. Chalfant*, 5 Whart. (Pa.) 477; *Simpson v. Hall*, 4 S. & R. (Pa.) 337. So half-brothers and sisters of the blood of the ancestor from whom the estate descended inherit in preference to first cousins of such blood. *Hart's Appeal*, 8 Pa. St. 32. There is, however, no distinction between the half and the whole blood in the case of inheritance by relatives more remote than brothers and sisters.

Where one acquires an estate by devise or descent from his father, and dies seised of it, and his next of kin on his father's side are uncles and aunts, they inherit, under the intestate law of 1833, without distinction of blood. *Danner v. Shisler*, 31 Pa. St. 289. And it has been held that on the death of a child, who inherited from his father, the latter's half-brothers and sisters take in preference to a grandmother. *May v.*

Espensshade, 3 Luz. Leg. Obs. (Pa.) 142. Cousins of the whole and the half blood take equally. *Dorsey v. Vanhorn*, 9 W. N. C. (Pa.) 95; *Davis' Estate*, 9 W. N. C. (Pa.) 479; *Kiegel's Appeal*, 12 W. N. C. (Pa.) 179. And see *Graham's Estate*, 6 W. N. C. (Pa.) 402.

1. N. D. married M. A., daughter of N. A., and had issue, by this marriage, three children. M. A. died, and N. D. married her sister, L. A. By this marriage there was issue one child, the deceased. It was held that the property of this child, which came by descent from her mother, went to her three brothers and sisters of the half blood, who were the issue of the first marriage; for these were of the blood of the ancestor from whom the estate came to the deceased by descent, that is, of the blood of the mother of the deceased, in that they were descended from the same common stock. *Den v. Searing*, 8 N. J. L. 340.

The *Rhode Island* statute of 1822, gave the inheritance, when the intestate died without issue, "to the kin next to the intestate of the blood of the person from whom such estate came or descended, if any there be." The phrase "of the blood" in this statute was held to include the half blood. The court, by Story, J., said: "This is the natural meaning of the word 'blood' standing alone, and unexplained by any context. A half-brother or sister is of the blood of the intestate, for each of them has some of the blood of a common parent in his or her veins. A person is with the most strict propriety of language affirmed to be of the blood of another who has any, however small a portion, of the same blood derived from a common ancestor. In the common law the word 'blood' is used in the same sense. Whenever it is intended to express any qualification, the word whole or half blood is generally used to designate it, or the qualification is implied from the context on known principles of law." The learned judge then states that *Rhode Island* was for a time governed by the English Law of Descents and gives a historical review of the early

some ancestor not common to the full and the half blood relation—no distinction whatever is allowed.¹

It is occasionally found that statutes, which, either expressly or by implication, contain a general abolition of all distinction between the half and the whole blood, except the case of inheritance by the intestate's brothers and sisters, in which case a preference is given to the brothers and sisters of the whole blood. But this rule has received the approval of but very limited adoption,² and it does not effect any distinction between the half blood and the whole blood in the case of inheritance by collateral

legislation of the colony, showing thereby that the expression "whole blood" had been used therein, and continues: "When, therefore, the distinction between the whole and half blood was well known in the colony, not only as a part of the common law but as a part of its own legislation, and the proviso is dropped in which the words 'whole blood' were studiously used, and the words 'of the blood' only are found in any correspondent provision, it affords a strong presumption that the whole blood were no longer deemed to be exclusively entitled to inherit, but that the half blood should be let in. If the half blood were not permitted to inherit in cases of this sort, this anomaly might occur that a son might inherit from his parent the moiety of an estate directly, which he could not inherit from his brother of the half blood, to whom it had passed by descent from the same parent, if such brother should die without issue. We see no reason, then, to doubt that the words 'of the blood' include the half as well as the whole blood." *Gardiner v. Collins*, 3 Mason (U. S.) 398; 2 Pet. (U. S.) 58.

1. *Armington v. Armington*, 28 Ind. 74; *Van Sickle v. Gibson*, 40 Mich. 170; *Cutter v. Waddingham*, 22 Mo. 206; *Brown v. Burlingham*, 5 Sandf. (N. Y.) 418; *McCracken v. Rogers*, 6 Wis. 278.

The objection that a half-sister cannot inherit land of her deceased half-brother because she is not of the blood of the first purchaser, does not apply where the half-brother is himself the first purchaser; in which case she may inherit, whether she is half-sister on the part of the father or mother. *Vattier v. Hinde*, 7 Pet. (U. S.) 252.

It will be noticed that the exception as to ancestral estates in the *North Carolina* and *Tennessee* acts of 1784 applies only where such estates are derived by descent, and therefore where

the intestate took by devise, his brothers and sisters of the half blood, although not of the blood of the ancestor, inherit equally with those of the whole blood. *McKay v. Hendon*, 3 Murph. (N. Car.) 209; *Ross v. Toms*, 2 Hawks (N. Car.) 9; *Nichol v. Dupree*, 7 Yerg. (Tenn.) 415. Where the intestate acquired the estate by will of his father, the maternal sister of the half blood takes in exclusion of a nephew of the whole blood. *Doe v. Sheppard*, 3 Murph. (N. Car.) 333.

And in *New Jersey*, where the estate did not come by descent but by deed of gift from the father, brothers and sisters of the half blood by the mother's side are entitled to inherit together with the half-sisters of the deceased on the father's side. *Arnold v. Den*, 5 N. J. L. 997. Lands obtained by devise from the father of the intestate, who dies without issue, and without brother or sister of the whole blood, will descend to a sister of the half blood on the mother's side, under the statute of 1780. *Den v. McKnight*, 11 N. J. L. 385. See *Den v. Demarest*, 24 N. J. L. 431.

Where the estate is not derived by the intestate from an ancestor, within the meaning of that word as employed in these statutes, it is, of course, a new acquisition and descends as such. Thus in *North Carolina*, where land was devised by a father to a second son, who, as the law stood, was not the heir, and the son afterwards died without issue, leaving surviving him a sister of the whole blood, and the issue of a sister of the half blood on the mother's side, the court gave judgment that the latter should take a moiety of the land. *Burgwyn v. Devereux*, 1 Ired. (N. Car.) 583.

2. In the *Louisiana* Code there is an express provision preferring the brothers and sisters of the whole blood. See *Pearson v. Grice*, 6 La. Ann. 233.

relatives more remote than brothers and sisters.¹ Under the statutes which give a preference to kindred of the whole blood in equal degree, brothers and sisters of the whole blood of course exclude those of the half blood.² And, if the right of representation is in force, the children of a deceased brother or sister of the whole blood, since they occupy precisely the situation which their parents did, will take, to the exclusion of brothers and sisters of the half blood.³ But if there are only brothers and sisters of the half blood surviving, they will inherit, rather than more remote relations.⁴ In a number of states, the collaterals of the half blood take only half as much as those of the whole blood, or (this is found in most though not all of these statutes) as ascendants.⁵

(4) *No Application to Personality*.—Coming to the question as to application of the common-law rule in exclusion of the half blood to the case of succession to personal property, it would seem that, since the rule is but an outgrowth of the feudal doc-

1. In collateral successions, except in case of whole and half-brothers and sisters of a deceased brother or sister, there is no distinction between heirs of the whole blood and heirs of the half blood; they share equally. Blood is not the basis of inheritance in collateral successions, in which the proximity of the degree is alone regarded, without caring whether the relationship be of the whole or half blood. *Pearson v. Grice*, 6 La. Ann. 233.

2. *McLemore v. McLemore*, 8 Ala. 687; *Hulme v. Montgomery*, 31 Miss. 105; *Scott v. Terry*, 37 Miss. 65. See *Ex p. Mays*, 2 Rich. (S. Car.) 61.

3. *Hitchcock v. Smith*, 3 Stew. & P. (Ala.) 29; *King v. Neely*, 14 La. Ann. 160; *Hulme v. Montgomery*, 31 Miss. 105; *Scott v. Terry*, 37 Miss. 65.

By the *South Carolina* act of 1819, a sister of the half blood was excluded in distribution by sisters and children of a predeceased sister of the whole blood. *City Council v. Hagermeyer*, *Riley Eq.* (S. Car.) 117. It was held in *Felder v. Felder*, 5 Rich. Eq. (S. Car.) 509, where the distributees of the intestate were brothers and sisters of the half blood and children of predeceased brothers and sisters of the whole blood, that, under the fifth clause of the first section of the *South Carolina* statute of 1791, the children of every predeceased brother or sister of the whole blood took among them a share equal to the share of a brother or sister of the half blood.

4. Where an individual dies intestate, leaving no wife or descendants or brother of the whole blood, the brother

of the half blood inherits his estate, real and personal. *Fatheree v. Fatheree*, *Walk.* (Miss.) 311. A brother of the half blood is preferred to the brothers and sisters of the father. *Clay v. Cousins*, 1 T. B. Mon. (Ky.) 75. See *Kean v. Hoffecker*, 2 Harr. (Del.) 103; 29 Am. Dec. 336.

It was held that a statute enabling the half blood to inherit extended only to brothers and sisters and not to their issue. *Den v. Stretch*, 4 N. J. L. 182. See *Ex p. Mays*, 2 Rich. (S. Car.) 61.

5. See various state statutes: for example those of *Colorado*, *Florida*, *Kentucky*, *Missouri*, *Virginia*, *Wyoming*, and *West Virginia*. And see for applications of these statutes, *Ravenscroft v. Shelby*, 1 Mo. 694; *Nixon v. Nixon*, 8 Dana (Ky.) 5; *Petty v. Malier*, 15 B. Mon. (Ky.) 591; *Talbott v. Talbott*, 17 B. Mon. (Ky.) 1; *Sharp v. Klienpeter*, 7 La. Ann. 263; *Lee v. Smith*, 18 Tex. 141. See also *Brown v. Tuberville*, 2 Call (Va.) 390; *Blunt v. Gee*, 5 Call (Va.) 481; 2 Min. Inst. 474.

Under a statute providing that collaterals of the half blood shall inherit only half as much as those of the whole blood, or as ascending kindred when they take with either, and that a mother shall have the same share as a brother and sister, it was held that a mother should have twice the share of a brother of the half blood. *Milner v. Calvert*, 1 Metc. (Ky.) 472.

Where a decedent leaves no child, and no brother nor sister of the whole blood, but does leave brothers and sisters of the half blood, they are entitled to the entire portion which by law de-

trine that descent must be traced from the first purchaser, and that doctrine has probably never had any application to the distribution of personalty, there can be little question but that the half will take equally with the whole blood if the statutes are silent upon the subject.¹

VI. COURSE OF SUCCESSION—1. As Affected by the Common-Law Canons of Descent—*a. STATEMENT OF THE CANONS OF DESCENT.*—Though the law of succession established in the *United States* by the various statutes of descent and distribution is generally considered as having wholly supplanted the common law, the common-law rules or canons of descent have yet had sufficient influence in the law to demand some consideration. There were seven of these rules or canons.² Only the first five, or primary canons, will be here dwelt upon. All these canons savor more or less of feudal policy, and some of them are warranted by no other than feudal considerations.

scended to the brothers and sisters of the deceased. *Marlow v. King*, 17 Tex. 177.

1. It has been held that two children of the same mother, not being of the blood of the ancestor from whom the estate came to the intestate, their half-brother, would not inherit the real estate, but that the whole personal property passed by the law of distribution to the two sisters of the half blood. *Kelly v. McGuire*, 15 Ark. 555. Though a preference was given in the law of *Pennsylvania* to brothers and sisters of the whole over those of the half blood in the case of descent of realty, yet it was held that, in the distribution of personalty, if an intestate leaves neither wife nor children, but brothers and sisters of the half and of the whole blood, the former are entitled to equal distributive shares with the latter, the act not providing for such case. *Preston v. Hoskins*, 2 Yeates (Pa.) 545.

An intestate died without issue, leaving brothers of the whole blood and a sister of the half blood on the part of the mother. It was held that as to the personalty, the brothers and half-sister took equal shares; but that the brothers took the real estate to the exclusion of the half-sister. *Deadrick v. Armour*, 10 Humph. (Tenn.) 588. But see *Lawson v. Perddriaux*, 1 McCord (S. Car.) 456.

Under the English Statute of Distributions, which simply directed distribution to be made among the next of kin of equal degree to the intestate, it was, after some contradictory decisions on the subject, finally settled in *Crooke v.*

Watts, 2 Vern. 124; *Show*. P. C. 108 decided in 1690, that brothers and sisters of the half blood have an equal claim with those of the whole blood. 4 Burns' Ecc. L. 422; *Burnet v. Mann*, 1 Ves. 156; 1 Myl. & K. 672, note; *Smith v. Tracy*, 1 Mod. 209; *Jessopp v. Watson*, 1 Myl. & K. 665.

Some statutes expressly provide that there shall be no distinction between the half and the whole blood in the distribution of personal property. See the statutes of *Maryland*, *New York* and *Pennsylvania*. See *Seekamp v. Hammer*, 2 Har. & G. (Md.) 9; *In re Southworth*, 6 Dem. (N. Y.) 216; *Hallett v. Hare*, 5 Paige (N. Y.) 315.

2. Common-Law Rules or Canons of Descent.—The common-law rules or canons of descent, as enumerated by Blackstone, are as follows: first, inheritances shall lineally descend to the issue of the person who last died actually seised *in infinitum*, but shall never lineally ascend; second, the male issue shall be admitted before the female; third, where there are two or more males, in equal degree, the eldest only shall inherit, but the females altogether; fourth, the lineal descendants *in infinitum*, of any person deceased, shall represent their ancestor, that is, shall stand in the same place as the person himself would have done had he been living; fifth, on failure of lineal descendants or issue of the person last seised the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three next preceding rules; sixth, the collateral heir of the person last seised must be

b. RULE THAT INHERITANCE SHALL NOT LINEALLY ASCEND.

—It was an invariable rule of descent at common law, that the inheritance should never lineally ascend.¹ It was peculiar to the common law of *England*. No vestige of it seems to remain in any, save one,² of the states of the Union.³

c. PREFERENCE OF MALE TO FEMALE ISSUE AND STOCK.—

The canon that the male issue shall be admitted before the female is still preserved as a part of the English Law of Descent.⁴

his next collateral kinsman of the whole blood; seventh, in all collateral inheritances the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near), unless where the lands have in fact descended from a female. 2 Bl. Com. 208-234.

These rules may be divided into classes—namely, primary and secondary canons. The first five are devoted to determining the persons who are to take as heirs, and the shares wherein they are to take, and have, therefore, been called primary canons. The remaining two are employed as auxiliary, in order to ascertain the application of the former, and so have been denominated secondary canons. 2 Min. Inst. 455.

1. The rule is thus stated and illustrated by Littleton: If there be father and son, and the father has a brother, who is, therefore, uncle to the son, and the son purchase land in fee simple, and die without issue, living his father, the uncle shall have the land as heir to the son, and not the father, although the latter is nearer in blood, because it is a maxim in law that the inheritance may lineally descend but not ascend. Yet, if the son in this case die without issue, and his uncle enter into the land as heir to the son, and afterwards the uncle die without issue, living the father, the father shall have the land as heir to the uncle, and not as heir to the son, for he should rather come to the land by collateral descent than by lineal ascent. It was, moreover, a necessary consequence of this rule, coupled with the maxim, *Seisina facit stipitem*, that if, in the instance above put, the uncle did not enter into the land, the father could not inherit it, because a man claiming as heir in fee simple by descent must make himself heir to him who was last seised of the actual freehold and inheritance; and if the uncle, therefore, did not enter, he would have had but a free-

hold in law, and no actual freehold, and the last person seised of the actual freehold was the son, to whom the father could not make himself heir. Broom's Leg. Max., p. 527; citing Co. Litt. 11b.

But, even at common law, if the father happened to be also cousin to the son, and as such, his heir, he would in that remoter capacity, inherit immediately from the son. *Eastwood v. Vinke*, 2 P. Wms. 614.

2. In *New Jersey*, the rule of the common law that inheritances shall not lineally ascend, although modified so as to let in the father and to some extent the mother, has not been abolished. An estate may ascend to a decedent's parents but not to his grandparents, nor to any ascendant more remote than his parents. It has been said that it could not be pretended that the common-law maxim that the inheritance should never lineally ascend has been abrogated by an express enactment, nor could any repeal be found in the implications necessarily arising out of the laws appertaining to this subject, considered in connection with the ancient rules which regulated the succession to lands. *Taylor v. Bray*, 32 N. J. L. 182; *aff'd* in *Bray v. Taylor*, 36 N. J. L. 415. And see *Smith v. Gaines*, 35 N. J. Eq. 65.

3. It has been held that a mother inherits the estate of her child, though not specially named in the statute of descents and distributions, when she is the next of kin, and no person is living to whom the statute gives precedence over her. *Loftis v. Glass*, 15 Ark. 680; *Macomb v. Miller*, 9 Paige (N. Y.) 265; *Miller v. Macomb*, 26 Wend. (N. Y.) 229; *McCullough v. Lee*, 7 Ohio 15; *Owen v. Cogbill*, 4 Hen. & M. (Va.) 487.

4. Wms. R. P. 102. The reason for this preference of the males is deduced from feudal principles; for by the original and genuine policy of that constitution, no female could ever succeed to a proper feud, since they were incapable of performing those military serv-

In the English Statute of Distributions, which was based upon the 118th Novel of Justinian, by which all distinction between the sexes in the Roman law of succession was destroyed, and males and females admitted to an equality in the right of succession,¹ no preference is given to the male over the female issue or stock.²

In the states of the Union, all the children, females as well as males, inherit in general equally together, subject in some instances to the right of the eldest to the family mansion or homestead, on his paying to the others their respective shares of its value.³

d. PRIMOGENITURE AMONG MALES.—The rule that where there are two or more males in equal degree, the eldest only shall inherit, but the females altogether,⁴ is still the law in *England*,⁵ but not in any of the states of the Union, primogeniture having been abolished, sometimes expressly and sometimes by the establishment of another course of descent.⁶

e. RIGHT OF REPRESENTATION—(1) *Per Stirpes and Per Capita.*—Representation is that rule of law by which the children, or their descendants, of a deceased person who, if he had lived,

ices for the sake of which that system was established, and because they might, by marriage, transfer the possession of the feud to strangers and enemies. But the common law does not extend to a total exclusion of females, like the Salic law, and others, where feuds were most strictly retained: it only postpones them to males of the same degree; for, though daughters are excluded by sons, yet they succeed before any collateral relatives. 2 Bl. Com. 214; Wright Ten. 174, 178.

1. 2 Bl. Com. 234; 4 Kent's Com. 378.

2. As long ago as 1723 it was decided: "Where one died intestate, leaving a grandfather by the father's side and a grandmother by the mother's side, his next of kin, these shall take in equal moieties by the statute of distribution, as being in equal degree; for though the grandfather by the father's side may in some respects be more worthy of blood, yet here dignity of blood is not material." *Moore v. Barham*, cited in 1 P. Wms. 53.

3. For a collation of the various statutes upon this head, see Stimson's Am. Stat. Law, §§ 3101 and 3102. In some states the rule has been abolished formally; as, for example, in *New Jersey*, *North Carolina* and *Virginia*. See *Bray v. Taylor*, 36 N. J. L. 415; *Fidler v. Higgins*, 21 N. J. Eq. 138; *Bell v. Dozer*, 1 Dev. (N. Car.) 333; *Davis v. Rowe*, 6 Rand. (Va.) 353. See

to the point that the common-law preference of the male to the female stock does not obtain, *Bassil v. Loffer*, 38 Iowa 451; *Albee v. Vose*, 76 Me. 448; *Brown v. Burlingham*, 5 Sandf. (N.Y.) 418; *McCracken v. Rogers*, 6 Wis. 278. But see *Auger v. Taylor*, 2 Tyler (Vt.) 260, decided under an early *Vermont* statute.

Statutes frequently prefer the father to the mother. See the various state statutes; and see in reference thereto, *Kelly v. McGuire*, 15 Ark. 555; *Magness v. Arnold*, 31 Ark. 103; *Shadon v. Hembree*, 17 Oregon 14; *Jones v. Barnett*, 30 Tex. 637.

Preference of Male to Female Stock.—In *Hunt v. Kingston*, 23 N. Y. Supp. 352, it was held, by the court of common pleas, where an intestate left a great-uncle and great-aunts and the descendants of great-aunts, that, as the *New York* Statute of Descents included no collateral relation more distant than uncles and aunts, the common-law rule preferring male to the female stock still obtained, and that the uncle inherited to the exclusion of the females of the same degree and their descendants.

4. 2 Bl. Com. 214.

5. Wms. R. P. 102; 4 Kent's Com. 383.

6. See 3 L. C. Am. L. R. P. 411; *Brewer v. Blougher*, 14 Pet. (U. S.) 178; *Eslava v. Doe*, 7 Ala. 543; *Davis v. Rowe*, 6 Rand. (Va.) 355. But see *Walton v. Willis*, 1 Dall. (Pa.) 351.

would have taken property by virtue of an intestacy, stand in his place so as to take the property which he would have taken had he lived. These representatives take neither more nor less, but just so much as their principals would have done. As, if there be two sisters and one of them dies leaving six daughters, and then the father of the two sisters dies without other issue, these six daughters take among them exactly the same as their mother would have taken had she been living. This taking by representation is called succession *in stirpes*, according to the roots; all the branches of each root taking the share which the root it represents would have taken; the term is used in distinction from taking *per capita*, where each takes as next of kin to the deceased in his own right.¹

(2) *Common and Civil Law Rules*.—It is a rule or canon of descent of the common law that the lineal descendants of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living. Thus, the child, grandchild, or great-grandchild, either male or female, of the eldest son, will, at common law, succeed before the younger son, and so, *in infinitum*.² This principle is of importance in collateral succession. Since the right of representation of the parent by the issue is here, as well as in lineal descent, allowed to prevail *in infinitum*,³ this principle is of controlling influence in determining the collateral kindred upon whom the inheritance will descend. By the application of this rule, the issue of the intestate's brother will succeed to the inheritance before those of his uncle, and the latter before those of his great-uncle. The effect, therefore, of this doctrine is that, on failure of issue of the person last seised, the inheritance will descend to the other subsisting issue of his next immediate ancestor.⁴ In the Roman law, in the descending line, the right of representation continued *in infinitum*; and in all cases, the inheritance always descended *in stirpes*.⁵ But in collateral succession the rule of the Roman law differed from the common law; for, according to the former, the division of the estate among collaterals *per stirpes* only took place where the persons succeeding

1. 2 Bl. Com. 217; 3 Washb. R. P. 407.

2. Hale Hist. C. L. 236, 237.

3. The rule that when the estate descended upon collaterals, the lineal descendants *in infinitum* of any of such collaterals as were deceased, should represent such deceased, is an admitted principle of the common law. *Fidler v. Higgins*, 21 N. J. Eq. 138; *Schenck v. Vail*, 24 N. J. Eq. 538.

4. "Thus, if John Stiles dies without issue, his estate shall descend to Francis, his brother, or his representatives, he being lineally descended from Geoffrey Stiles, John's next immediate

ancestor, or father. On the failure of brethren or sisters and their issue, it shall descend to the uncles of John Stiles, the lineal descendant of his grandfather, George, and so on *in infinitum*." 2 Bl. Com. 225.

5. 4 Kent's Com. 379. Thus, if one of three daughters died leaving ten children, and then the father died, the two surviving daughters had each one-third of his effects, and the ten grandchildren had the remaining third divided between them; and so, if all the daughters had died before the father leaving, respectively, ten, six and two children,

to the inheritance were of unequal degree—representation had no place where such persons stood in equal degree.¹ The common-law mode of representation is the necessary consequence of the double preference which that law gives, first to the male issue and next to the first-born among the males,² to both which the Roman law is a stranger.

(3) *Statutory Modifications*.—It is to be expected that in the *United States*, where neither the common-law preference of males nor the doctrine of *primogeniture* is in force, the right of representation will be found to depart considerably from that of the common law.³ The statutes of the different states are, touching this subject, at considerable variance with each other. Those of a large number of the states contain provisions securing the right of representation among certain specified relatives. Other provisions, which limit the right of representation within certain degrees of relationship are frequently met with.

the estate would have been divided into three parts, going *in stirpes* to the offspring of each daughter.

1. Thus, in the case of succession by collaterals, the principle of representation would apply if any person of equal degree with the person represented were still subsisting, so that, if the deceased left one brother, and two nephews, who were the sons of a deceased brother, the nephews would take *per stirpes*. But this principle would have no application if all the persons succeeding to the inheritance stood in equal degree. So, if both of the brothers in the illustration employed above were dead, leaving issue, then the representatives in equal degree became themselves principals and shared the inheritance *per capita*; that is, share and share alike, they being themselves now the next in degree to the ancestor in their own right and not by right of representation. Hence, where the next heirs of J. S. were six nieces, three by one sister, two by another, one by a third, his inheritance by the Roman law was divided into six parts, and one given to each of the nieces; whereas the common law in this case would still divide it only into three parts and distribute it *per stirpes*, thus: one-third to the three children who represent one sister, and another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother. 2 Bl. Com. 217, 517; 2 Min. Inst. 461; Just. Inst. III, i. 6.

2. 2 Bl. Com. 218.

3. In *Schenck v. Vail*, 24 N. J. Eq.

538, *overruling* *Fidler v. Higgins*, 21 N. J. Eq. 138, the court, in deciding that the common-law right of indefinite representation was abrogated by the *New Jersey* statute, though there was no express provision to that effect, by Beasley, C. J., said: "The entire structure of this act seems to lead irresistibly to the conclusion, that it was the legislative design to exclude from the class of instances embraced in this particular clause the whole doctrine of representation, either as it existed at common law or as it is modified in the previous sections. Nor is such supposition unreasonable in itself. Such exclusion of the rule in this connection tends, I think, very decidedly in the direction of a sound policy. It harmonizes with the rule of law which circumscribes, within reasonable bounds, the right of representation in the distribution of personality. It prevents titles to realty from becoming uncertain and intricate, by reason of the vast multiplication of owners. In the present case, the claimants are one hundred and thirty-nine in number, and the subdivision of the land would be so enormous that if the property in dispute had consisted of but a few acres of ordinary value, the shares of some of these litigants would have to be awarded to them, not in dollars, but in pennies. Such an illimitable dispersion of the title to inheritable land has not, as far as I am informed, been sanctioned by the laws of any country. Certainly, in the English law there is no type of such a principle. In that system, when lands passed by inheritance to a class, such as

The right to take by representation is secured to the descendants of the intestate's children in probably all the states.¹ Some of the statutes which secure the right of representation in the intestate's descending line, enact, in substance, that the "heirs" of a deceased child of the intestate shall stand in the place of that child. While the word "heir," is not technically limited to children, it would yet seem that the term, as here employed, does not confer the right on other than the descendants of such child.²

It is with regard to the right of representation among collaterals that the lack of harmony in these statutory provisions is presented. The statutes frequently provide for succession, in certain cases, of the "children," "issue," "descendants," or "representatives" of deceased brothers and sisters of the intestate. These phrases convey the right of representation unless it is specially limited by other provisions. The right to take by representation is, either by statutes of this kind or by others

females, the subdivision of the estate in its devolution under the right of representation, was checked and thwarted by the concomitants of primogeniture and the superiority of the males. By the counteraction of such forces, the descending title was inevitably confined within a few channels. These considerations lead me to think that it was not unwise to throw out altogether the doctrine of representation among collaterals. If admitted at all, it would be tolerable only under narrow restrictions. But, as I have already remarked, the language of this section is utterly incompatible with the admission of the doctrine in any of its forms, and thus all speculation on the subject is useless."

1. 1 Woern. Am. L. Adm. 146. See *Payne v. Harris*, 3 Strobb. Eq. (S. Car.) 39.

The provision of the *Massachusetts* statute (Pub. Stats. 1882, ch. 125, § 1) declaring that the estate of an intestate shall be distributed "in equal shares to his children and to the issue of any deceased child by right of representation," was declared to affirm the rule that all lineal descendants, in whatever degree, shall share in the estate. *Bigelow v. Morong*, 103 Mass. 287.

In *Kansas* it is provided (Gen. Stats. 1889, § 2610) that the heirs of any deceased child shall inherit his share in the same manner as if the child had outlived his parent, which is supposed to be equivalent to the right of representation. *Crowe v. Ex. & Adm.*, § 514.

But the *Illinois* statute has been understood to extend the right of repre-

sentation only to the issue of children and grandchildren. *Crowe v. Ex. & Adm.*, § 514; citing *Illinois Ann. Stats.* ch. 39, par. 1.

2. It was held in *Iowa* that the statute which provided that, if any one of the intestate's children be dead, the heirs of such child shall inherit his share in the same manner as though such child had outlived the parent, did not authorize the widow of a deceased husband to inherit from their children who died before the death of the husband. In the case under consideration, the mother of the deceased child did not claim as the intestate's widow, but, on the contrary, alleged that she was divorced *a vinculo matrimonii* from the intestate some years before his death; she did not claim as his heir, but by right of representation through her deceased son. It was considered that while the word "heir" is not technically limited to children, yet it was not intended by its use in the phrase "heirs of such children," in the section of the statute referred to above, to embrace the widowed mother of a child that died before the death of the father. *McMenomy v. McMenomy*, 22 Iowa 148; *Journell v. Leighton*, 49 Iowa 601; *Overdieck's Will*, 50 Iowa 244. See *Leonard v. Lining*, 57 Iowa 648. The provision of the statute under which these cases arose, was afterwards changed so as to expressly establish a rule in conformity with these decisions. See *Blackman v. Wadsworth*, 65 Iowa 80.

In *Louisiana*, by express provision of the statutes, representation takes place *ad infinitum* in the direct descend-

of a more specific character, secured, in some states, to the children of the brothers and sisters of the intestate;¹ in other states, to the grandchildren of his brothers and sisters,² and in yet oth-

ing line, but does not take place in favor of ascendants, the nearest in degree always excluding those of a degree superior or more remote. *Louisiana Rev. Code* 1875.

1. It is provided in *California*, *Michigan* and *Nebraska* that an intestate's estate shall in certain cases go to children of deceased brothers and sisters by right of representation. *California*, Deering's Civ. Code, 1885, § 1386; *Michigan* Stats. (How. Ann. Code) 1882, § 5772 a; *Nebraska* Comp. Stats., ch. 23; to brothers and sisters, children of deceased brother or sister to take the share which their parent would have had. *South Carolina* Gen. Stats. 1882, § 1845.

In *Maryland*, it is provided that in certain cases the estate shall go to brothers and sisters and their descendants. *Maryland* Pub. Gen. Laws, art. 46, §§ 19, 20, 27. But this is limited by the provision that no representation is admitted among collaterals after brothers' and sisters' children.

In a case coming within a provision of the *California* Statute of Descents and Distributions, that "if there be no issue, nor husband, nor wife, nor father, then in equal shares to the brothers and sisters of the intestate, and to the children of any deceased brother or sister by right of representation," it was considered that the words "children" in this provision did not include the grandchildren, but was confined to the immediate offspring of the deceased brother or sister. Where the intestate left surviving, firstly, a sister, secondly, a nephew and a niece, who were, respectively, the children of two deceased sisters of the intestate, and, thirdly, certain sons and daughters of a deceased son of another sister who had died in the lifetime of the decedent, the first and second group of relatives, being, respectively, the surviving sister and the nephew and niece of the intestate, were entitled to share in the distribution; but it was held that the third class, the grand-nephews and grand-nieces of the decedent, were excluded from any share in the estate. *In re Curry's Estate*, 39 Cal. 529. To the same effect, see *Poaug v. Gadsden*, 2 Bay (S. Car.) 293.

Under the *Massachusetts* Statute of Distributions (Gen. Stats., ch. 91, § 1; ch.

94, § 16), which provided that if a person died intestate, leaving no issue, and no father nor mother, his estate went in equal shares to his "brothers and sisters, and to the children of any deceased brother or sister by right of representation," and "if he leaves no issue, and no father, mother, brother nor sister, then to his next of kin in equal degree," it was held that where an intestate left no issue, father nor mother, but left one sister, children of another sister, and children of deceased children of a third sister, these grand-nephews or grand-nieces could not share in the distribution. It was said these provisions affirmed the rule, that, in distribution among collaterals, only those in equal degree shall share, except in the single case of collaterals in the nearest possible degree to the intestate—namely, his brothers and sisters, with whom those of one degree further off, being the children of a deceased brother or sister, may partake. The court, by Gray, J., said: "The distinction between the words 'children' and 'issue' is carefully preserved throughout. 'Issue' necessarily includes children; but 'children' does not include more remote issue. The third clause of the statute in terms limits the right to share to 'the children of any deceased brother or sister.' The additional restriction in the fourth clause, excluding all issue, even children of deceased brothers and sisters, when all the intestate's brothers and sisters are dead and his mother survives, does not extend the right to partake, already clearly limited by the third clause, when some of the brothers and sisters are still living." *Bigelow v. Morong*, 103 Mass. 287. But, under the statute passed in 1876, which re-enacted the first clause above quoted, with the substitution of the word "issue" for the word "children," it would seem that in a case like the above, the grandchildren of a deceased sister would take a share of the estate. See *Conant v. Kent*, 130 Mass. 178.

2. As in *Maine*, *Pennsylvania* and *Georgia*. See *Quimby v. Higgins*, 14 Me. 309; *Davis v. Stinson*, 53 Me. 287; *In re Reynolds*, 57 Me. 350; *Lane's Appeal*, 28 Pa. St. 487; *Brenneman's Appeal*, 40 Pa. St. 115; *Hayes' Appeal*, 89 Pa. St. 256; *Perot's Appeal*, 102 Pa. St. 258.

ers, to the lineal descendants of brothers and sisters, through all descending generations.¹

The provision of the statutes commonly is that, where certain relatives survive, the estate shall go to brothers and sisters and "children" or "issue," etc., of deceased brothers and sisters. If the surviving relatives are those specified, so that the course of succession will be controlled by such provision, the right of representation will be as above stated. But if such provision is not to be applied, as where the facts of the case are such that the course of descent is directed by a clause in the statute which provides that, given a certain state of facts, the estate shall go to the intestate's next of kin, it has been held that there is no representation; so that, in cases where the children or issue of deceased brothers and sisters take merely as next of kin, and not by special mention in the statute, only those of equal degree take, the more remote being excluded.²

1. See the statutes of *Illinois, Texas, Mississippi, Connecticut, Ohio, Louisiana, Tennessee, Massachusetts, Minnesota, Nevada, New York*. See *Hannam v. Osborne*, 4 Paige (N. Y.) 336. As to the construction of the *Alabama* statute, see *Hitchcock v. Smith*, 3 Stew. & P. (Ala.) 27. As to the *Missouri* statute, see *Copenhaver v. Copenhaver*, 78 Mo. 55; 9 Mo. App. 200.

In *Pennsylvania*, by the act of April 27th, 1855, the right to take by representation was secured to the children of uncles and aunts. See *Perot's Appeal*, 102 Pa. St. 235.

The *New Jersey* statute for altering the law directing the descent of real estate (act of 24th May, 1780) in the second section directed that, if any ancestor shall die seised of real estate, without will and without issue, leaving brothers and sisters, such real estate shall descend to such brothers in such proportion, etc.; and, in continuation of this, "That if any of the brothers or sisters of such ancestors shall have died before such ancestor, leaving issue, the share or part of the said real estate, which such brother or sister so dying would have been entitled to under or by virtue of this act, if such brother or sister had survived such ancestor, shall descend to and be inherited by the said issue of such brother or sister, in the manner and proportions between male and female directed by the first section of this act." Under this statute, in a case where the intestate left surviving him, firstly, the daughter of a deceased brother; secondly, two sons of another deceased brother and the issue

of two deceased daughters of such brother; thirdly, the issue of a deceased sister, it was held that the children of the deceased daughter of the intestate's deceased brother, mentioned in the second group, would, by right of representation, stand in the same place that the daughter would herself have stood had she been living at the time of the death of the ancestor. *Kirkpatrick, C. J.*, said that, upon the words of the act, he could scarcely discern from whence the doubts in this case had arisen. "That the word issue, in legal, as well as common acceptance, comprehends all the descendants of an ancestor, however remote, I think cannot be made a question. Nor is there anything in the act, which in any way limits that general signification. There are no words to restrain it and make it to mean the children of such deceased brothers and sisters living at the time of the death of such ancestor. It extends to every lineal descendant however remote." *Den v. Smith*, 2 N. J. L. 3.

2. The third rule of the *Maine Rev. Stats.* of 1857, ch. 75, § 1, which, by the application of section 8, applied both to the distribution of personalty and the descent of realty, provided that "if he shall leave no issue nor father, his estate shall descend in equal shares to his brothers and sisters and to the children or grandchildren of any deceased brother," etc. The fifth rule was, "if no such issue, father, brother, mother, nor sister, it descends to his next of kin in equal degree," etc. It was said that these several rules were distinct and were to be construed separately and

It is only in a very few states that the right of representation does not seem to be restricted, but to extend to descendants of collateral relatives generally.¹ In some states, by express provisions to that effect, no representation is admitted among collaterals after brothers' and sisters' children.² And in other states this right is restricted to the descendants of brothers and sisters.³ The effect of these provisions is to limit or qualify the right of representation among collaterals, so that, in the case of succession by relatives farther removed from the intestate than those in the cases excepted, they can take only in their own right as next of kin *per capita*.⁴

So, under those provisions which deny the right of representation to collaterals after brothers' and sisters' children, the intes-

with reference to the conditions of each rule as therein set forth. And where an intestate left neither issue, father, mother, brother nor sister, but did leave nephews, nieces and grand-nieces, it was held, since this case came within the fifth rule, that the grand-nieces were not related to the deceased in equal degree with the nephews and nieces, and could not claim under that rule. The clause in rule three, "to his or her children or grandchildren by right of representation," was construed to apply only to that rule. *Davis v. Stinson*, 53 Me. 493, *distinguishing* *Doane v. Freeman*, 45 Me. 113, which was decided under a statute since repealed. See also *Hatch v. Hatch*, 21 Vt. 450; *Van Cleve v. Van Fossen*, 73 Mich. 342.

Under the *Massachusetts* statute of 1876, ch. 222, providing that if a person died intestate, leaving no issue and no father nor mother, his estate went in equal shares to his "brothers and sisters, and to the issue of any deceased brother or sister by right of representation;" and "if he leaves no issue and no father, mother, brother nor sister, then to his next of kin in equal degree," it was held that when an intestate leaves no issue and no father, mother, brother nor sister, the estate goes to the children of deceased brothers or sisters to the exclusion of children of deceased nephews or nieces. It was considered that the clear words of the second clause above quoted require that, if the intestate leaves no issue nor parent, and no brother nor sister, his estate shall go "to his next of kin in equal degree." The necessary consequence is that, when no brother nor sister of the intestate survives him, the estate goes to the children of deceased brothers or sisters as the next of kin of the intestate to

the exclusion of children of deceased nephews or nieces. *Conant v. Kent*, 130 Mass. 178.

1. See as to the *Rhode Island* statute, *Dexter v. Dexter*, 4 Mason (U. S.) 302; *Daboll v. Field*, 9 R. I. 289.

2. See various state statutes.

Restriction to Grandchildren of Deceased Brother.—In *Stetson v. Eastman*, 84 Me. 366, it was held under Rev. Stat. of *Maine*, ch. 75, § 1, cl. 3, which limits the right of representation to grandchildren of a deceased brother or sister, that a surviving brother of the decedent would take to the exclusion of the great-grandchildren of a deceased sister.

3. See various state statutes.

4. This was the effect given in *Davis v. Vanderweert*, 23 N. J. Eq. 558, to the proviso in the *New Jersey* Statute of Distributions "that no representation shall be admitted among collaterals after brothers' and sisters' children." It was there held that first cousins will take the personal estate of the intestate, to the exclusion of the children and grandchildren of other first cousins deceased. *Bedle, J.*, said: "Our act was passed in 1795, and is in all material respects (so far as it affects the question before us) a transcript of the act of 22 & 23 Car. II, ch. 10; the analogous proviso in which latter act is in these words: 'That there be no representation admitted among collaterals after brothers' and sisters' children.' It has been well settled by the courts in *England*, for over a century and a half, and always acted upon, so far as anything to the contrary appears, since the passage of the act, that the effect of this proviso is to limit or qualify the right of representation among collaterals, so that they can take only as next of kin, *per capita*, except in the one case of the

tate's grand-nephews and nieces cannot represent their deceased parents so as to take with surviving nephews and nieces.¹ When the statutes extend the right of representation to brothers' and sisters' "children," "descendants," "issue," or "representatives," or, when they so restrict the right, they invariably refer to the brothers and sisters of the intestate, even though they do not make use of the phrase "of the intestate" or its equivalent.² So, where one dies intestate, leaving uncles and aunts and the children

children of deceased brothers and sisters of the intestate, among whom alone, of the collaterals, the right to take *per stirpes*, by way of representation, may exist. *Carter v. Crawley*, T. Raym. 496; *Maw v. Harding*, 2 Vern. 223; *Peet's Case*, 1 P. Wms. 25; 1 Salk. 250; 1 Ld. Raym. 571; *Blackborough v. Davis*, 1 P. Wms. 41; *Bowers v. Littlewood*, 1 P. Wms. 594; *Woodroff v. Wickworth*, Pre. Ch. 527; *Walsh v. Walsh*, Pre. Ch. 54; *Durant v. Prestwood*, 1 Atk. 454; *Stanley v. Stanley*, 1 Atk. 455; 2 Ves. 213; *Toller on Exrs.* 383; 2 Wms. on Exrs. 1298; 2 Bl. Com. 515; *Bac. Ab.*, Exrs. and Admsrs. 1; 2 Kent's Com. 425; 4 Burns' Ecc. Law 358; L. R., 13 Eq. Cas. 286; *Ross' Trust*. This construction of the English statute was well understood when our act was adopted, and since then it has been recognized in our treatises in common use, and been approved of by the learned of the Bar. *Griffith's Treatise* 200; N. J. Justice 99; 4 *Griffith's Reg.* 1257.

1. *Van Cleve v. Van Fossen*, 73 Mich. 342; *Brother v. Francisco*, 1 Heisk. (Tenn.) 511; *Selby v. Hollingsworth*, 13 Lea (Tenn.) 145.

In *Pennsylvania*, the intestate act of 1833, § 25, provided "that there shall be no representation admitted among collaterals after brothers' and sisters' children." This would, where an intestate left nephews or nieces surviving, have excluded grand-nephews and grand-nieces, whose parents and grandparents were dead before the intestate, from inheriting with the former. It was, however, enacted by the act of 27th April, 1855, that "among collaterals, when by existing laws entitled to inherit, the real and personal estate shall descend and be distributed among grandchildren of brothers and sisters and the children of uncles and aunts by representation." The effect of this statute was to render competent to take by representation two classes who were formerly incompetent. It was held

that, by this act the children of a deceased nephew or niece, the latter being, respectively, the son or daughter of a deceased brother or sister of the intestate, are entitled to take, by representation, such part of the real estate of the intestate as their parent would be entitled to if living. *Lane's Appeal*, 28 Pa. St. 487.

2. Under the third clause of § 1, ch. 203, of the *New Hampshire* Gen. Laws of 1878, relating to descent and distribution, which provides that if there be no issue or father, the estate shall descend in equal shares to the mother and to the brothers and sisters or their representatives, it was held, in *Page v. Parker*, 61 N. H. 65, that neither uncles nor cousins of an intestate inherit by right of representation; but that the former, being next of kin, take the whole estate as against the latter. *Blodgett, J.*, said: "We do not think it was the intention of the legislature, by the use of the word 'representative,' to include representatives of the mother, but only those of the brothers and sisters; and this construction is supported by the history of past legislation. It is well known that our statute of Feb. 3, 1789, was taken substantially from the English Statutes of Distribution (22 & 23 Car. 2, ch. 10, and 1 Jac. 2, ch. 17), which provide that 'if, after the death of a father, any of his children die intestate, without wife or children, in the lifetime of the mother, every brother and sister and the representatives of them, shall have an equal share with her.' The language of the statute of 1789 is, 'that in case the mother be living, and no father, at the time of such decease, she shall be entitled to an equal share of the estate with the brothers and sisters of the intestate and their legal representatives. Representatives of the mother, as such, it will be noticed, are very plainly excluded. The provision quoted remained without alteration until the revision of 1842 (§ 1, ch. 136, cl. 3), when the language was

of other deceased uncles and aunts, the former take to the exclusion of the latter.¹ And if the intestate leaves first and second

changed to its present form. The change of language does not, however, indicate an intention to change the law, but only a purpose to render it more concise. *Crowell v. Clough*, 23 N. H. 210; *Jewell v. Holderness*, 41 N. H. 163; *Hatch v. Hatch*, 21 Vt. 455." In this case it was argued on behalf of the appellants, who were respectively the children of three deceased brothers and a deceased sister of the intestate's mother, that if they were not entitled to a portion of the estate under the above considered third clause they were clearly entitled under the fourth clause of the same section which in cases like the present gives the estate to the next of kin in equal shares. But the court said: "The answer is, that the appellants are collaterals to the intestate, and therefore are expressly barred by section 3 of the same chapter, which provides that 'no representation shall be allowed among collaterals beyond the degree of brothers' and sisters' children.' But it is claimed that the limitation relates to the collaterals, and not to the intestate, and that consequently the appellants take by representing the deceased brothers and sisters of the mother. No authorities are cited in support of this construction, and we have not been able to find any. On the contrary, in 1681, this question was elaborately considered in *Carter v. Crawley*, T. Raym. 496, and a few years later in *Maw v. Harding*, 2 Vern. 223; and it was held in both cases that no representation was admissible except between brothers and sisters of the intestate and their children. It was again considered in *Pett's Case*, 1 Salk. 250; 1 Ld. Raym. 571; 1 P. Wms. 25, and in *Bowers v. Littlewood*, 1 P. Wms. 594; and in all those cases it was held that the meaning of the words in the statute of 22 Car. 2, 'that there be no representation among collaterals after brothers' and sisters' children,' was, that there should be no representation beyond the degree of brothers' and sisters' children of the intestate; that the limitation related to the intestate, and not to the collaterals. *Parker v. Nims*, 2 N. H. 460, is to the same effect, and so also is *Porter v. Askew*, 11 Gill & J. (Md.) 346; and nearly four years after the adoption of our Revised Statutes, *Maw v. Harding*, 2 Vern. 223, and the other

English cases were cited in *Kelsey v. Hardy*, 20 N. H. 479. It is there said, by Gilchrist, J., on page 482, that 'these decisions, made at an early period, have been since considered as having settled the construction of the statute in the particulars to which they relate, and have not been successfully drawn in question since, so far as the cases have been brought to our notice.'

1. *Johnston v. Chesson*, 6 Jones Eq. (N. Car.) 146; *Shaffer v. Nail*, 2 Brev. (S. Car.) 160.

Under the *Maryland* act of 1820, ch. 131, § 4, which declares that there shall be no representation among collaterals after brothers' and sisters' children, it was held, where a person died intestate, leaving uncles and aunts and the children of deceased uncles and aunts, that the former took the whole estate to the exclusion of the latter. *Porter v. Askew*, 11 Gill & J. (Md.) 346; *Elwood v. Lannon*, 27 Md. 200; *Levering v. Heighe*, 2 Md. Ch. 81; *Levering v. Heighe*, 3 Md. Ch. 365; *Ellicott v. Ellicott*, 2 Md. Ch. 468.

Under the *New Hampshire* statute of February 3, 1789, where a person died seised in fee of lands which had descended to him from his father, leaving uncles and aunts on his father's side and on his mother's side, who were the next of kin, and also children of a deceased aunt, it was held that the land descended in equal shares to the uncles and aunts on both sides, but nothing descended to the children of the deceased aunt. *Parker v. Nims*, 2 N. H. 460.

An intestate died without issue, and without having had either brother or sister of the whole or half blood, and without leaving a wife or a father living. His mother survived him, and, by the statute, was entitled to his lands for life. His nearest relatives were two brothers of his father, a sister of his mother, and several children of deceased uncles and aunts. It was held that the children of his two uncles and aunt took to the exclusion of the children of the uncles and aunts who were deceased when he died, although both of the uncles and also the aunt died during his mother's lifetime. *Bailey v. Ross*, 32 N. J. Eq. 544.

By the *Pennsylvania* Act of 1833, § 8, the children of deceased uncles and aunts were excluded from the inheritance when uncles and aunts were in

cousins, the latter cannot take by representation.¹ Grand-uncles and grand-aunts, when next of kin, will take the inheritance, to the exclusion of the children and grandchildren of grand-uncles who have died before the intestate.² Children of a deceased great-great-uncle take to the exclusion of grandchildren of the same uncle.³

As has just been said, the statutes of a number of states restrict the right of representation to near kindred, by the use of express words to that effect. The same general result has, however, been held to be effected by the necessary implication of the general spirit and purpose of the statutes, as well as by a phraseology more or less specific.⁴

existence. *Good v. Herr*, 7 W. & S. (Pa.) 253; 42 Am. Dec. 236; *Herr v. Herr*, 5 Pa. St. 428; 47 Am. Dec. 416; *Parr v. Bankhart*, 22 Pa. St. 291; *Montgomery v. Petriken*, 29 Pa. St. 118. But this was changed by the Act of 27th April, 1855, under which such children take the share which their parents would have had if living. *Hayes' Appeal*, 89 Pa. St. 256; *In re Holmes Estate*, 12 Pa. Co. Ct. Rep. 401.

1. *Schenck v. Vail*, 24 N. J. Eq. 538. Where the intestate left first and second cousins, it was held that the former were exclusively entitled to the personal estate, no representation being provided for by the statute except in the case of brothers' and sisters' children. *Adee v. Campbell*, 79 N. Y. 52; 14 Hun (N. Y.) 551.

And, in *Louisiana* it was held that representation for the purpose of inheritance does not extend to children of first cousins of the deceased. *Ratcliffe v. Ratcliffe*, 9 Martin (La.) 335.

Under the *Pennsylvania* act of 1833, declaring that "there shall be no representation amongst collaterals after brothers' and sisters' children," children of a deceased first cousin take no share of the estate of an intestate, whose nearest relatives are first cousins. *Clen-daniel's Estate*, 12 Phila. (Pa.) 54; *Brenneman's Appeal*, 40 Pa. St. 115; *Shields v. McAuley*, 37 Fed. Rep. 302; and to the same effect, *Roger's Appeal*, 131 Pa. St. 382; *Byers v. McAuley*, 149 U. S. 608.

A died in 1810, intestate and without issue, seised of lands which descended to him on the part of his father, leaving no mother, brother, or sister, or any descendants from either, but leaving children and grandchildren of an uncle and aunt, the brother and sisters of his father. It was held that the chil-

dren of the deceased uncle and aunts took *per capita*. *Stewart v. Collier*, 3 Har. & J. (Md.) 289.

2. *Clayton v. Drake*, 17 Ohio St. 367. See *Cresoe v. Laidley*, 2 Binn. (Pa.) 279.

3. *Perot's Appeal*, 102 Pa. St. 235.

4. Under Provisions Directing Descent "In Equal Parts" to "Several Persons, All of Equal Degree of Consanguinity."

The sixth section of the *New Jersey* Statute of Descents (Nix. Dig., 4th ed. 236) was in the words following, viz.: "When any person shall die seised of, etc., without devising, etc., and without lawful issue, and without leaving a brother or sister of the whole or half blood, or the issue of any such brother or sister, and without leaving a father or mother capable of inheriting by this act the said lands, etc.; and shall leave several persons, all of equal degree of consanguinity to the person so seised, the said lands shall then descend and go to the said several persons of equal degree of consanguinity to the persons so seised, as tenants in common, in equal parts, however remote from the person so seised the common degree of consanguinity may be," etc. It was considered in a case which, since the intestate left no nearer kin than first, second and third cousins, was to be governed by the above quoted section, that under this section of the Statute of Descents, the class of kinsmen who were next in degree of consanguinity to the intestate, took the land in exclusion of those who stood in a more remote degree. For, by force of this section, the common-law right of representation did not exist. It was accordingly held that the first cousins took in preference to cousins of a more distant degree. The court, by Beasley, C. J., said: "The legislative endeavor in this passage is plain. It is to disig-

The question as to whether the right to take by representation exists may have an important bearing in ascertaining the persons entitled to share in the succession, and may also make a material difference in the shares which the respective heirs take.¹

In the case of distribution to or descent cast upon children, where some of the children are living, and others dead, leaving issue, the share to which each of the deceased children would, if living, have been entitled, goes to the issue of each respectively; such issue, in this case, take *per stirpes*.² It is the law in some states that the succession must invariably be *per stirpes*, where the estate descends or is to be distributed among the kindred in the intestate's direct descending line; although all such heirs stand in the same degree of consanguinity to the intestate, they,

nate the class of persons who are to take the land on the contingency specified. The terms used, considered intrinsically, are explicit and perfectly intelligible. Accepting them in their ordinary and natural meaning, the expression, 'several persons, all of equal degree of consanguinity' to a deceased person, admits of but a single interpretation; the words *ex vi terminorum* exclude all those who do not stand in the same degree of blood, and in their usual import they utterly refuse to comprehend in the same category both first and second cousins." *Schenck v. Vail*, 24 N. J. Eq. 538, *overruling Fidler v. Higgins*, 21 N. J. Eq. 138. It was held in another case coming within this section of the statute that, if there be but one collateral in the degree nearest to the person dying seised, such collateral will take the whole estate; thus, a single uncle or aunt will take in preference to, and in exclusion of, several cousins. *Taylor v. Bray*, 32 N. J. L. 182. See also *Van Cleve v. Van Fossen*, 73 Mich. 342.

1. In *Wetter v. Habersham*, 60 Ga. 193, the intestate left surviving grandchildren of an aunt, and also great-grandchildren of a deceased brother, who were the children of a deceased grandchild of such brother. In *Georgia*, the estate would, in this case, go to the kindred of the intestate according to the computation of the canon law. And, according to this method of reckoning degrees of kindred, the grandchildren of the aunt were in the third, and the great-grandchildren of the brother in the fourth degree. But it was also provided that there should be representation as far as grandchildren of brothers and sisters. It was held that under these provisions the grandchildren of

the aunt were entitled to the inheritance.

2. *Brown v. Taylor*, 62 Ind. 295; 1 Bouv. Inst., § 1976.

The *Ohio* Act of March 14th, 1853, regulating descents, provided that, when any person should die intestate, "if any of the children of such intestate be living, and any be dead, the estate shall descend to the children of such intestate who are living, and to the legal representatives of such of his or her children as are dead, so that each child of the intestate, who shall be living, shall inherit the share to which he or she would have been entitled if all the children of the intestate had been living, and so that the legal representatives of the deceased child or children of the intestate shall inherit equal parts of that portion of the estate to which such deceased child or children would have been entitled had such deceased child or children been living." Under this statute a case arose of which the following is a statement of the facts: D died intestate, in 1865, leaving six children, three children of one deceased child, and five children of another, surviving. It was considered that there was no occasion for doubt as to the meaning of so much of the above-quoted provision as prescribes the shares of the living children of the intestate. But it was contended, and the contention was sustained in the court below, that the latter part of the provision which prescribes the shares to be inherited by the representatives of the deceased child or children of the intestate, should be construed to mean that where the intestate leaves a living child or children, and two or more of his children are dead, severally leaving families of children, unequal in number, such grandchildren of the intestate are entitled to

nevertheless, take *per stirpes*.¹ This has been held to be the rule under the English Statute of Distribution,² and is in conformity with the rule of the Roman law. But it has been asserted by eminent authority that "the rule of representation applies only from necessity, or when there are lineal heirs in different degrees, as children and the children of a deceased child, or brothers and sisters and the children of a deceased brother or sister."³ And it is provided by statute in a number of states that, where all the lineal descendants of the intestate are in equal degree, they shall take *per capita*, but otherwise *per stirpes*.⁴ Where this is the law, if grandchildren alone survive the intestate, they take equally, or *per capita*, as next in degree or nearest in kin.⁵ In harmony with this theory, it has been held that, if a person dies intestate, without leaving any child surviving, but leaving grandchildren and great-grandchildren, the latter being the descendants of a deceased grandchild, the grandchildren are entitled *per capita*, taking share and share alike without regard to the number of the children of the intestate, and the great-grandchildren are entitled *per stirpes*, taking together the share which the deceased grandchild would have taken.⁶

In collateral succession, the right of representation exists, as has been shown above, to a limited extent. And, in the case of succession by relatives within the limits prescribed for representation, it seems to be a general rule that where such relatives are in

share equally in the aggregate portion of the estate which is made up of the several shares of their deceased parents, without any reference to immediate parentage, or to the inequality of numbers in the several families. But the decision of the court below was reversed. It was held that the members of each group of grandchildren were only entitled to share between them, the portion of their common parent; the three grandchildren of one family were entitled each to one twenty-fourth part of the estate, and the five of the other family were entitled each to one-fortieth part only. *Dutoit v. Doyle*, 16 Ohio St. 400.

1. In *Crump v. Faucett*, 70 N. Car. 345, where the intestate left three grandchildren by a deceased son and five by a deceased daughter, it was held that the grandchildren took *per stirpes*. And it was so held in *Odam v. Caruthers*, 6 Ga. 39, where the decedent left a wife and two grandchildren, the offspring of a deceased son, and seven grandchildren, the offspring of another deceased son.

2. In *Walker v. Gammage*, 37 Ch. Div. 517, a share of the residuary estate of a testatrix (a widow), which she had

given by her will, lapsed. She had only two children, a son and a daughter, both of whom died before her. The children of the son, and one child of the daughter, survived the testatrix. It was held that, under the Statute of Distributions, the four grandchildren took the lapsed share, so far as it arose from personal estate, *per stirpes* and not *per capita*. See also *In re Ross*, L. R., 13 Eq. 286; *Lockyer v. Wade*, Barn. Ch. 444.

3. This was said by Shaw, C. J., in *Knapp v. Windsor*, 6 Cush. (Mass.) 156.

4. See various state statutes.

5. 1 Bouv. Inst., § 1975; *Skinner v. Wynne*, 2 Jones Eq. (N. Car.) 41; *Earnest v. Earnest*, 5 Rawle. (Pa.) 219; *Person's Appeal*, 74 Pa. St. 121. See *Eshleman's Appeal*, 74 Pa. St. 42.

6. In *Cox v. Cox*, 44 Ind. 368, the deceased left a large personal estate undisposed of by will. Seven children had been born to him, all of whom died before him. Each of these children left children surviving them. Certain of the children left but one heir surviving them, while others left a larger number. One grandchild died leaving children surviving him. Thus only grandchildren and the descendants of grandchildren survived the deceased.

equal degree they will take *per capita*, but where they stand in unequal degree, or claim by representation, then they will take *per stirpes*.¹ Where the claimants stand in unequal degree, then the doctrine of representation is necessary, to prevent the exclusion of those in the remoter degree. So, in the case of the survival of a brother or sister, and children of deceased brothers and sisters, such children take *per stirpes*.² But when the claimants all stand in equal degree, as three nephews, three grand-nephews, etc., they take *per capita*, or each an equal share; because in this case representation, or taking *per stirpes*, is not necessary to prevent the exclusion of those in a remoter degree, and a more just and equal division of the intestate's property is effected without it.³ It has been held accordingly that when the intestate leaves, as his next of kin, nephews and nieces, the children of different brothers or sisters, such nephews and nieces take in equal shares, or *per capita*.⁴ This is the construction of the English Statute of

There were in all thirty-three of his lineal heirs, thirty-one of whom were grandchildren, and two were great-grandchildren. The heirs of certain of the children of the intestate filed their petition, alleging the foregoing facts and praying that the said estate should be distributed purely *per stirpes*; that is, the said estate should be divided into seven equal parts in accordance with the number of children born to the testator; in other words, that the children, though all dead before their father, should be made the basis of distribution. But the court, after an exhaustive review of the authorities, held that it is a well-settled rule of succession that the nearest of kin to the ancestor who are alive at the time of his death constitute the basis of distribution; these take in their own right while those who are of more distant degrees of relationship take by representation. And the *Indiana* statute was given a construction in conformity with this rule.

1. See various state statutes. See also *Kelly v. Maguire*, 15 Ark. 555; *Blake v. Blake*, 85 Ind. 65.

2. Under the *English* Statute of Distribution, if a person dies without children, leaving a widow and mother, brother and sister, and two nieces by a deceased brother, the widow would, according to the established doctrine, take a moiety, and the mother, brother, and sister would each take one-fourth, and the nieces the other one-fourth of the remaining moiety. This point was ruled in *Keilway v. Keilway*, 2 P. Wms. 347; and the doctrine was declared to be cor-

rect by Lord Hardwicke in *Stanley v. Stanley*, 1 Atk. 457.

3. See 2 Kent's Com. 425; 3 L. C. Am. L. R. P. 416. The object of the rule is well expressed in *Houston v. Davidson*, 45 Ga. 574, by McCay, J., as follows: "The object of the rule is that those nearest of kin shall always get just the share they would have got if all of equal degree with them were living; it is therefore best carried out by holding that if all the brothers and sisters be dead at the death of the intestate, then the distribution is between the nephews and nieces *per capita*, and if any of them be dead leaving children, distribution is to be made as though the nephews and nieces were all alive, the children of the deceased nephews and nieces standing in the place of their parents."

In *Re Bamber's Estate*, 2 Pa. Dist. Rep. 536, it was held that the descendants of an intestate's grandparents could not take by representation unless one or more grandparents survived the intestate.

Per Capita or Per Stirpes.—A *Pennsylvania* statute (Act of June, 1885) directs that persons "shall take in equal shares" whenever the persons upon whom the law casts the descent or who take as distributees are of the same degree of consanguinity to the decedent.

In *Re Cremer's Estate*, 156 Pa. St. 40, it was held that where the persons entitled were all first cousins of the intestate, they took *per capita* and not *per stirpes*.

4. *Barker v. Bourne*, 127 Ind. 466; *Snow v. Snow*, 111 Mass. 389; *Nichols v. Shepard*, 63 N. H. 391; *Wagner v.*

Distributions,¹ viz., that claimants standing in equal degree take *per capita* and not *per stirpes*.

The brothers and sisters of the intestate all being dead, their representatives in equal degree, to-wit, their children, become themselves principals, as standing next in degree of relationship to the intestate, and take in their own right. By the operation of the general rule stated above, if one or more collaterals claim in their own right, that is, by reason of propinquity to the intestate, and the claim of the others rests upon the representation of a deceased parent or ancestor, who, if living, would be in the same degree of relationship with the former, then the latter take *per stirpes*; that is, they collectively take as much as the deceased parent or ancestor would have taken, while the former take *per capita*.²

Sharp, 33 N. J. Eq. 520; White v. Williams, 2 Grant Cas. (Pa.) 249; De Haven's Estate, 1 Clark (Pa.) 336; Miller's Appeal, 40 Pa. St. 387; 2 Pittsb. (Pa.) 130; Stent v. McLeod, 2 McCord Eq. (S. Car.) 354. And see McKinney v. Mellon, 3 Houst. (Del.) 277.

But this was formerly not the law in New York. In Jackson v. Thurman, 6 Johns. (N. Y.) 322, it was held that where the intestate's nearest heirs were a nephew by a brother deceased, and two nephews by another brother deceased, such nephews inherit *per stirpes*, or such share as their parents respectively would have inherited if living. It will be observed that, in this case, the claimants all stood in equal degree of consanguinity, being all nephews to the common ancestor. The decision of this case was, however, based upon the express terms of the statute. The court, by Kent, C. J., admitted that it was carrying the doctrine of inheritance *per stirpes* further than it was carried in the case of lineal descent; and further than it was carried in the 118th Novel of Justinian, from which the Statute of Distributions was copied. But it was declared to be clearly the language and meaning of the statute. The statute under which this case was decided has been abrogated, and the law is now in accord with the text. Pond v. Bergh, 10 Paige (N. Y.) 140.

In North Carolina, it has been decided that collateral heirs, even if of equal degree, take *per stirpes*. It was so held, under the statute of 1808, in Clement v. Cauble, 2 Jones Eq. (N. Car.) 182. And this doctrine was subsequently adhered to in Haynes v. Johnson, 5 Jones Eq. (N. Car.) 124, and

in Cromartie v. Kemp, 66 N. Car. 382, which were based upon later statutes.

In Kentucky, the statutory provision is that if any or all of the class first entitled to inherit are dead, leaving descendants, such descendants shall take *per stirpes*. Kentucky Gen. Stats. (Bul. & Fel. 1888, ch. 31, § 2.)

And it is held in Maryland, that nephews and nieces will take *per stirpes*. McComas v. Amos, 29 Md. 132.

In Kennedy v. Kennedy, 1 Swift's System (Conn.) 286, a testator devised a portion of his estate among his relations, according to the law of the State of Connecticut. He had five brothers and sisters, who all died previously to the making of the will, each leaving a different number of children. It was held that such relations took *per stirpes*. See Pruden v. Paxton, 79 N. Car. 446.

In Pennsylvania, under the act of 1833, providing that "the real and personal estate shall descend and be distributed among the grandchildren of brothers and sisters, and the children of uncles and aunts, by representation, such descendants taking equally among them such share as their parents would have taken if living," it has been said that the grandchildren of brothers and sisters and the children of deceased uncles and aunts take *per stirpes* in all cases. Davis's Estate, 14 Phila. (Pa.) 256; Brennenman's Appeal, 40 Pa. St. 115; Hayes' Appeal, 89 Pa. St. 256.

1. Walsh v. Walsh, 1 Eq. Cas. 24; Janssen v. Bury, Bunb. 157; Durant v. Prestwood, 1 Atk. 454; Stanley v. Stanley, 1 Atk. 455; Lloyd v. Tench, 2 Ves. 215.

2. If a person dies, leaving nephews and nieces, and grand-nephews and nieces surviving, the former take *per*

f. RULE THAT DESCENT MUST BE TRACED FROM FIRST PURCHASER—(1) *Statement of Common-Law Rule.*—The rule of the common law that descent shall be traced from the first purchaser lays at the foundation of the law of collateral inheritance. The rule may be stated thus:—That upon a failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or, in other words, it shall result back to the heirs of the body of that ancestor from whom it either really has or is supposed by fiction of law to have originally descended.¹

In *England*, it is now provided by statute that descent shall be traced from the last purchaser of the property, and for this purpose the person last entitled to the property shall be deemed to be the purchaser, unless it be proved that he inherited it.² But where there is a total failure of heirs of the purchaser, or where the land shall be descendible as if an ancestor had been the purchaser, and there should be a total failure of the heirs of such ancestor, then the descent shall henceforth be traced from the person last entitled to the property as if he had been the purchaser.³

(2) *Partial Recognition of, in United States; Ancestral Estates.*—In the *United States* the common law of descent is so completely superseded by statute that the source whence the intestate's realty was derived will not be looked to, except in compliance with the demands of some statutory provision.⁴ But in pursuance of the policy of keeping real property in the line of the ancestor by whom it was brought into the family, statutes which give a partial recognition to the common-law rule that descent must be traced from the first purchaser, have been enacted in some of the states. As the common-law rule was of no practical importance in lineal descent, so, under the statutes, the distinction, which is founded upon the mode in which, and source whence, the intestate became entitled, does not affect the order of succession

capita, while the latter take *per stirpes*. *Garrett v. Bean*, 51 Ark. 52; *Blake v. Blake*, 85 Ind. 65; *Balch v. Stone*, 149 Mass. 39; *Copenhaver v. Copenhaver*, 9 Mo. App. 200, *aff'd* in 78 Mo. 55; *Preston v. Cole*, 64 N. H. 459; *Ewers v. Follin*, 9 Ohio St. 327; *Krout's Appeal*, 60 Pa. St. 380; 6 Phila. (Pa.) 422; *Illig's Estate*, 3 Luz. Leg. Obs. (Pa.) 102; *Lebo's Appeal*, 3 Luz. Leg. Obs. (Pa.) 103; *Davis v. Rowe*, 6 Rand. (Va.) 355. See *Doane v. Freeman*, 45 Me. 113.

1. For a statement of the history of this rule, see 2 Bl. Com. 217.

2. 3 & 4 Wm. IV, ch. 106, § 2.

3. 22 & 23 Vict., ch. 35, § 19.

4. See *Guardner v. Collins*, 2 Pet. (U. S.) 58; *Peacock v. Smart*, 17 Mo. 402;

Parker v. Nims, 2 N. H. 460; *Bell v. Scammon*, 15 N. H. 381; 41 Am. Dec. 706; *Prescott v. Carr*, 29 N. H. 453; 61 Am. Dec. 652; *Kelsey v. Hardy*, 20 N. H. 479; *infra*, this title, *Abrogation of the Rule*.

The provision in the *Mississippi* Statute of Descents of 1803, that in case there be no descendants of an intestate, nor brothers, nor sisters, nor father, nor mother, the estate "shall descend in equal parts to the next of kin to the intestate in equal degree, computing according to the civil law," was considered not to give a preference to the more remote relatives by blood on the side of the first purchaser, over the near relations by blood on the other side. It was held that brothers and sisters of the

in the descending line; it is only applied to succession in the collateral and ascending lines.¹

(a) *In Collateral Successions*—(1) *ANCESTRAL ESTATES; NEW ACQUISITIONS.*—In some states a distinction is made in the course of succession to what may be termed “ancestral estates,” and “new acquisitions” or “acquired estates.”² The expression “purchased estates” is not applied to the estates of the latter class, because many estates which at common law would be held to have come by purchase, as an estate devised by an ancestor, are, within the purview of these statutes, considered as ancestral.

Some of these statutes refer to the former class as estates “come by the father” or “mother,” or on “the part of the father” or “mother.”³ These expressions have the same meaning.⁴ They have been defined to include every case where the inheritance shall have come to the intestate by gift, devise, or descent from the parent referred to, or from any relative of the blood of such parent.⁵ Other statutes are more explicit, and refer in

mother would take in preference to the cousins of the father. *Doe v. Gilbert*, 1 How. (Miss.) 32.

1. See *Smith v. Smith*, 23 Ind. 202; *Coffman v. Bartsch*, 25 Ind. 201; *McClanahan v. Trafford*, 46 Ind. 410; *Heavenridge v. Nelson*, 56 Ind. 90; *Brower v. Hunt*, 18 Ohio St. 312.

2. *Life Estates.*—It was held in *Moyer v. Thomas*, 38 Pa. St. 426, that, under the *Pennsylvania* statute, the distinction was made in the descent of inheritances only, and did not apply to the descent of life estates; and that the husband of a deceased wife, to whose daughter an estate in fee had descended from her mother, was, upon the death of the daughter, intestate and without issue, entitled to a life estate in her real estate, under section 3 of the act of 1833; though by section 9 of that act he would not be entitled to an estate of inheritance as heir to his daughter, because he was not of the blood of the mother, from whom the estate descended.

3. See statutes of *Arkansas*, *Indiana*, *Maryland* and *New York*.

4. *Kelly v. McGuire*, 15 Ark. 555; *citing Maffit v. Clark*, 6 W. & S. (Pa.) 260.

5. The expression “on the part of the mother” or “father,” employed in the statute of *Arkansas*, was so defined by the same statute, Dig. Stat., § 2543. See *Kelly v. McGuire*, 15 Ark. 555; *Galloway v. Robinson*, 19 Ark. 396. It is likewise in *New York*. 3 *New York Rev. St.*, 7th ed., p. 2214, § 29. Where an uncle devised land to his nephew, it was considered that the devisee took an ancestral estate. *Oliver v. Vance*, 34

Ark. 564. So, where the intestate inherited his estate from his maternal uncle, it was held that the estate descended to him on the part of his mother within the meaning of the statute. *Garner v. Wood*, 71 Md. 37.

Land is to be considered as having come from, or by, or on the part of, the father or mother, when it comes either immediately from them or immediately through them from any person in their respective lines. *Shippen v. Izard*, 1 S. & R. (Pa.) 223.

The words “on the part of the mother,” employed in a statute directing the descent of real estate, were, in *Banta v. Demarest*, 24 N. J. L. 431, given a broader and more extensive signification than simply from the mother herself; it was considered that the phrase meant from the line, the ancestors, the blood of the mother, as well as the mother herself. The provisions of this statute were “that when any person shall die seised of any lands, etc., without devising the same in due form of law, and without leaving lawful issue, and without leaving a brother or sister of the whole blood, or any lawful issue of any such brother or sister, leaving a father, then the inheritance shall go to the father of the said person so seised, in fee simple, unless the said inheritance came to the person so seised from the part of his or her mother by descent, devise or gift, in which case it shall descend as if such person so seised had survived his or her father.” In this case the land had descended to the intestate from his grandfather on the mother’s side, and it was

contended that the father would not be excluded from the inheritance in such case. The court, by Potts, J., said: "If the legislature had intended to exclude the father, only in case the land came from the mother herself, it is remarkable that they did not say so; that, in so important a matter as the regulation of the descent of estates, they should have inserted the words 'part of,' where, if they mean anything at all, they must mean something more than from the mother herself. . . . The phrases *ex parte materna* and *ex parte paterna* have a well known signification in the law. They are found constantly used in the books to denote the line, or blood of the mother or father, and have no such restricted or limited sense, as from the mother or father, exclusively. *Jackson v. Lyon*, 9 Cow. (N. Y.) 664; *Den v. Searing*, 8 N. J. L. 348; 2 Bl. Com. 224, note (25), 225, note (26), etc. And it is reasonable to suppose the legislature intended to use the words in the unrestricted sense in which they are commonly used."

Nor, according to *New York* authority, is the phrase, as employed in these statutes, so restricted in meaning as to include only those estates which came by descent on the part of the mother; it may also include estates which came by devise or gift. Under a statute excluding a father from inheriting property of his son "which came to the son on the part of the mother," it was held that property which came as a gift to the son by the will of his grandfather on the mother's side, was a case within the statute and the father could not inherit. *Torrey v. Shaw*, 3 Edw. Ch. (N. Y.) 356. In the decision of this case *McCoun, V. C.*, said: "The words *ex parte materna* are of frequent occurrence in the common law, and would there seem to apply to none other than a descendible estate, where it becomes a question among the collateral kindred of the person last seised, whether those on the father's side or those on the mother's are the persons entitled to the inheritance; for, if it be property acquired by purchase, either by grant or devise, to the person last seised, and he dies without issue or lineal descendants, the heirs on the father's side are preferred, and those *ex parte materna* have no right unless all on the father's side are extinct. But, if the estate came to the person last seised by descent and he was in by no newly-acquired title and had done no act to change the descend-

ible nature and quality of the estate, then the question is, whether the heirs on the part of the father or those *ex parte materna* are entitled; for those to take must be of the blood of the first purchaser; and if the property came by descent from or through the mother or in her right, then those of the same blood with her are the persons to inherit. *Chitty Desc.* 131. Hence, I conclude that, in general, it is only with reference to property which has come to the person last seised by descent that the expression is used and the common-law rule permitting heirs on the part of the mother to take can be applied. But I think it does not follow that the legislature intended to use those words in that limited sense, or that they meant to restrict the application of them to estates coming by descent. Property may, with the same propriety, be said to come to a man when it is given or devised to him, as when he takes it by descent or operation of law; for he is as passive in the acquisition of it in the one case as in the other. In both it comes by no act of his own and, perhaps, without any previous knowledge on his part. If he were to make a purchase by paying money and receiving a deed, it could hardly be said that the property came to him within the meaning of the statute; but the other modes of acquiring it would seem to be within the letter, and I think are within the meaning also. So, 'on the part of his mother,' is a phrase which admits of property coming from the mother by gift as well as by descent, or, as in this instance, by devise from the grandfather on the mother's side; and the sense is complied with when it comes on her side of the house or family, as distinguished from the father's side, proceeding along the ancestral line of which she makes a part and following the stream which, in law, is supposed to run through the veins of parent, child, grandchild, etc., all being successively of the same blood. In this view of the subject it is quite immaterial by what means the transmission takes place—whether by the act of the ancestor or by the act of law. My conclusion is that William Shaw, the father, is not entitled, as heir of his deceased son, Robert, to the one-seventh of the estate in question; but that it must be regarded as property which came to the son from or on the part of his mother, though it came by devise or gift from his grandfather on her side, and not by descent."

express terms to inheritances which come to the intestate by descent, devise, or gift from some one of his ancestors.¹ And it seems that by the term "ancestor" is not meant one from whom the intestate would necessarily have inherited, but one from whom he would have inherited, under circumstances which, though not existent, might have taken place.²

The non-ancestral estate or "new acquisition" of these statutes is not the same as a "purchase," as that term was understood at common law. At common law, all who took in any way except by descent, were regarded as purchasers.³ Even the devisee of his father, or other ancestor, was regarded as the purchaser, within the meaning of the rule which required descent to be traced from the person who acquired or first brought the estate into the

But it was held in *Maryland*, that the words in the act of 1786, chapter 45, "and not derived from or through either of his ancestors" meant "and not by descent." *Hall v. Jacobs*, 4 Har. & J. (Md.) 245, approved in *Posey v. Budd*, 21 Md. 487.

1. By the terms of some of the statutes the distinction is made between cases where the estate was acquired by the decedent himself, or by descent, gift, or devise from an ancestor. See the *Ohio* statute; also the *Tennessee* Code of 1884, §§ 3260-70. And by other provisions very similar to these it is dependent on whether it came by descent, devise or gift from any kindred or ancestors or not. See the statutes of *Connecticut* and *Rhode Island*. In *North Carolina* the distinction is between cases where the inheritance has been transmitted by descent, devise, gift or settlement from any ancestor to whom the person thus advanced or inheriting was or would have been heir, and all other cases. *Stim. Am. Stat. L.*, § 3107.

2. A. B., though he had a sister, N. D., living, devised land to his nephew, R. D., who was a son of such sister. It was held that the deviser was the ancestor of his nephew, R. D., the intestate, within the meaning of the term "ancestor," as used in the provision of the statute regulating the descent of ancestral estates. It was argued that, as N. D., the sister of A. B. and mother of R. D., was living at the time of A. B.'s death, R. D. was not the heir of A. B., and could not, therefore, have inherited any portion of his estate, and R. D. not being such heir, A. B. was not his ancestor, because the word "ancestor" in the connection in which it was used in the statute was "the correlative

of heir." On the other hand, it was insisted that the word should not be confined in its signification "to those from whom the devisee, or donee, would have inherited, as heir, under the circumstances as existing;" but that "it embraces all from whom a title by descent could be derived under any circumstances." The court, by Davison, J., in sustaining the latter position, said: "The intent of the statute must govern its construction; and, from the whole enactment, it may be readily inferred that the legislature did not mean to employ the word 'ancestor' in its usually defined meaning, but to use it as synonymous with kindred. R. D. was of the blood of his uncle, A. B., from whom he derived the estate by devise, and it is enough to meet the intention of the law-maker, if, in the absence of a nearer heir, he could have inherited the same estate." *Greenlee v. Davis*, 19 Ind. 62.

But it has been held differently in *North Carolina*. Where land was devised by a father to a second son, who as the law stood was not the heir, and the son afterwards died intestate and without issue, it was held that the land descended as a new acquisition. *Burgwyn v. Devereux*, 1 Ired. (N. Car.) 583. A case where a grandfather devised land to his grandson, who died in the lifetime of his father, the devisee not being an heir or one of the heirs of the deviser, is to the same effect. *Osborne v. Widenhouse*, 3 Jones Eq. (N. Car.) 238.

3. See *Lewis v. Gorman*, 5 Pa. St. 164. Taking by devise is at common law a recognized form of purchase. *In re Donahue's Estate*, 36 Cal. 329; *Ramsey v. Ramsey*, 7 Ind. 607; *Hall v. Jacobs*, 4 Har. & J. (Md.) 245.

family—the first purchaser.¹ But, within the meaning of these statutes, one who takes gratuitously by devise from his ancestor, will not thereby become the person to whose blood regard must, in compliance with the provisions of these statutes, be had in tracing the descent of the property.² To become such fountain of inheritable blood, the devisee must be a purchaser for value in the popular sense of the term, or at least derive the estate by gift from some one other than an ancestor. By new acquisition is meant an estate which the intestate has acquired by his exertion or industry, or by will or deed from a stranger to his blood. In other words, it is an estate obtained by any means other than by descent, gift, or gratuitous devise from an ancestor.³

1. See *supra*, this title, *Who Is Ancestor*.

2. *Lewis v. Gorman*, 5 Pa. St. 164; *Hart's Appeal*, 8 Pa. St. 32; *Kinney v. Glasgow*, 53 Pa. St. 141.

3. See *West v. Williams*, 15 Ark. 682; *Brewster v. Benedict*, 14 Ohio 368.

Where the ancestor's deed of gift was founded on the consideration "of love and affection" and "one dollar," and the whole instrument showed it to be such, the pecuniary consideration was deemed to be merely formal, and it was held that it did not change the character of the conveyance from a gift to a purchase. *Morris v. Ward*, 36 N.Y. 587.

It has been held that where the father advances the money for the purchase of lands, and takes the deed in the name of the son, on the death of the son without issue, the lands vest in the father in fee. In such case, the lands came to the son "on the part of the father" by gift, and were not a new acquisition by the son, within the contemplation and meaning of the statute of descents and distributions. *Galloway v. Robinson*, 19 Ark. 396.

In *Patterson v. Lamson*, 45 Ohio St. 77, it appeared that a father, desiring to make a daughter a wedding gift, bargained for a tract of land, paid the agreed price in money, and caused the vendor to convey it to the daughter just prior to her marriage. She thereafter died intestate and without issue, leaving her husband surviving her. It was held that the title to the land did not come to her "by deed of gift from an ancestor" within the meaning of the section of the statute regulating the descent of ancestral estates. The controversy which chiefly engaged the discussion in this case arose from the necessity of showing facts outside of the deed to the daughter, which would impart to

it the essential qualities of a deed of gift. It was said by the court that in determining, in such case, whether an instrument for the conveyance of land is a deed of gift, or a deed of purchase, its recital of the payment and receipt of the consideration are material; and a recital in such deed that the conveyance by the named grantor to the grantee is made in consideration of a specific sum of money received by such grantor from the grantee so far concerns the operation and effect of the deed as that it is incompetent to show by parol proof that such instrument is in fact a deed of fact from a person not named in it, and that the main consideration was in fact paid by him.

If heirs exchange lands, the estate ceases to be ancestral. *Brower v. Hunt*, 18 Ohio St. 311. But a voluntary partition of the inheritance will not change the nature of the estate. It has been held that lands allotted to an heir by voluntary partition of the inheritance and mutual releases between co-heirs, are held by him by descent and not by purchase, and on his death such of his heirs as are not of the blood of the ancestor are excluded from the inheritance. *Conkling v. Brown*, 8 Abb. Pr. N. S. (N. Y.) 345.

On the death of A, her realty, subject to her husband's curtesy, descended to her two sons B and C. The husband was appointed guardian of the sons' estate, and obtained legislative permission to sell their realty and invest the proceeds with other moneys in a farm in his own name. The son C died unmarried and intestate. It was held that the farm was not ancestral realty and that B did not therefore take C's equitable interest by descent. *Watson v. Thompson*, 12 R. I. 466.

Where A received land in Decatur

But if the intestate became entitled to the estate by devise or gift from some person from whom he could not, in the absence of such gift or devise, have inherited it, this is a new acquisition.¹ And if he acquired the estate by his own exertion or industry, it is immaterial that the title was conveyed to him by means of a devise from his ancestor.² It may be that, if the testator plainly indicates his intention to treat his devisee as a purchaser, and to

County from his maternal grandfather, and A's father took up land in Tipton County in A's name, in consideration whereof A conveyed his Decatur lands to his father, it was held that Tipton lands would not be considered as maternal ancestral. *Armington v. Armington*, 28 Ind. 74.

Under a statute providing, among other things, that when the estate comes to the intestate by descent, devise, or gift of some one of his ancestors, all who are not of the blood of the ancestor shall be excluded, it was held that land which came to the intestate by forfeiture, incurred by his mother by a second marriage, she having inherited it from the intestate's brother, who inherited it from his father, was not within the provision. *Cutter v. Waddingham*, 22 Mo. 206.

It was held in *Alabama*, that an estate which the intestate acquired, not by inheritance from an ancestor, but by being set apart to her under §§ 2821, 2827 of the *Alabama Code*, out of her deceased husband's estate, as a homestead exempt from sale for his debts, was not governed by the rules which describe the descent of property which "came to the intestate by descent, devise, or gift from or of some one of his ancestors." *Eatman v. Eatman*, 83 Ala. 478.

Division by Tenants in Common.—After a division by tenants in common of an estate acquired by descent, each giving the other a quit-claim deed, the property is no longer governed by Revised Statutes of *Ohio*, § 4168, as an "ancestral estate." *Wilson v. Hall*, 6 Ohio Cir. Ct. 570.

Ancestral Estates—Half Blood.—In *Stone v. Doster*, 7 Ohio Cir. Ct. 8, it was held that "brothers and sisters," as used within the *Ohio* statute, providing for the descent of an estate acquired from the decedent's late husband or wife, included half-brothers and sisters.

1. *Barnes v. Loyd*, 37 Ind. 523; *Walker v. Dunshee*, 38 Pa. St. 430.

Where a person devised land to his sister-in-law, it was held that the de-

visée did not take an ancestral estate. *Penn v. Cox*, 16 Ohio 30.

Where a husband devised land to his wife, she being a stranger to his blood, both paternal and maternal, this was held to constitute a new acquisition. *West v. Williams*, 15 Ark. 682. So where a husband made a devise to his wife of an estate of inheritance, which would not have descended to her had he died intestate, it was held that she did not take an ancestral estate, as it was not one which "came to her from any ancestor." *Birney v. Wilson*, 11 Ohio St. 426. To the same general effect is *Culbertson v. Duly*, 7 W. & S. (Pa.) 195; *Opdyke's Appeal*, 49 Pa. St. 373.

Where land was devised to a grandson by his paternal grandfather, and the devisee died in the lifetime of his father, it was held that the devisee, not being an heir, or one of the heirs, of the devisor, the estate passed to his uncles and aunts on his mother's side, as well as to those on the side of his father. *Osborne v. Widenhouse*, 3 Jones Eq. (N. Car.) 238.

2. See *Walker v. Dunshee*, 38 Pa. St. 430.

In *Kelly v. McGuire*, 15 Ark. 555, the court, by Hempstead, J., said: "If the son should purchase land from the father or mother for a valuable consideration, it would be a new acquisition, and descend as such; because nothing is received by way of bounty at the hands of ancestors, which is the case as to lands descended from, or devised, or given by them to the intestate, and it was thought reasonable that they should remain in the hands of the blood from which they came."

So in *Hartman's Estate*, 4 Rawle (Pa.) 39, where an intestate had taken certain land at an appraised value, under the will of his father, paying to his brothers and sisters their share of the valuation, the court took a distinction between that portion of the estate for which he had paid, and that which he held gratuitously. As to the former, he was deemed a purchaser for value,

increase the burden, because he has increased the quantity devised above that which the devisee would have taken by descent, this will be a new acquisition.¹

Where the proceeds of realty are devised; *i. e.*, when land is directed to be sold and converted into money and the proceeds turned over by the executor to the devisee, it has been held that this is a devise of money.² It is shown later on that the devolution of personal property is not affected by the mode in which it is acquired by the intestate.³ If, therefore, a devisee elects to take the fund as land, as he may well do if of age,⁴ this is a new acquisition of title.⁵ So, where a person purchases land with money bequeathed to him by his ancestor, it is an original purchase.⁶

Where the legal and the equitable estate in the land come through different channels and in different modes, it has been held that it is the course of the legal, rather than the equitable, estate which determines whether it be an ancestral estate in the holder.⁷

and therefore the founder of a new stock, but as to the latter, though he took by virtue of the devise, he was not so regarded, and consequently the estate having come to him by way of testamentary gift on the part of his father, it was held that his mother was to be excluded from any portion of such share.

1. But it has been held that, independently of an express intent, the charge of a legacy on a devise greater than the devisee would take by descent, will not convert the devise into a purchase. *Kinney v. Glasgow*, 53 Pa. St. 141.

Where lands and personal estate were both devised charged with legacies, it was held that the legacy did not so change the nature of the real estate as to make it, in the hands of the intestate, a new acquisition within the meaning of the Statute of Descents. *West v. Williams*, 15 Ark. 682.

2. *Burr v. Sim*, 1 Whart. (Pa.) 252; 29 Am. Dec. 48; *Simpson v. Kelso*, 8 Watts (Pa.) 252; *Parkinson's Appeal*, 32 Pa. St. 458.

3. See *infra*, this title, *Whether Applicable to Distribution of Personality*.

4. *Burr v. Sim*, 1 Whart. (Pa.) 252; 29 Am. Dec. 48; *Smith v. Starr*, 3 Whart. (Pa.) 65; 31 Am. Dec. 498; *Com. v. Forney*, 3 W. & S. (Pa.) 357; *Stuck v. Mackey*, 4 W. & S. (Pa.) 197.

5. *Burr v. Sim*, 1 Whart. (Pa.) 252; 29 Am. Dec. 48; *Neely v. Grantham*, 58 Pa. St. 443; *Meily v. Wood*, 71 Pa. St. 493; 10 Am. Rep. 719; *Foster's Ap-*

peal, 74 Pa. St. 399; 15 Am. Rep. 553; *Simpson v. Kelso*, 8 Watts (Pa.) 252.

6. *Champlin v. Baldwin*, 1 Paige (N. Y.) 562.

Where lands were purchased for a daughter, after the death of her father, from the funds of her father's estate, it was held that the estate did not come to the daughter *ex parte paterna*, by the *Pennsylvania* law, and would descend, on her death, to her brother of the half blood on the mother's side, in preference to more remote kindred of the whole blood. *Simpson v. Hall*, 4 S. & R. (Pa.) 337.

7. *Nicholson v. Halsey*, 1 Johns. Ch. (N. Y.) 416; *Patterson v. Lamson*, 45 Ohio St. 77; *Shepard v. Taylor*, 15 R. I. 204, *citing* *Goodright v. Wells*, Doug. 771; *Wade v. Paget*, 1 Bro. C. C. 363; 1 Cox 74; *Selby v. Alston*, 3 Ves. Jr. 339. See *Wells v. Head*, 12 B. Mon. (Ky.) 166.

Thus, if the legal estate in fee descends on the part of the mother, and the equitable estate in fee on the part of the father, the equitable estate is merged in the legal and both go in the line of descent of the legal estate. Where A, having paid money for the purchase of land, died before any conveyance was made, and B afterwards took a conveyance of the land in trust for the infant daughter of A, to whom he afterwards executed a deed in fee, she was held to have acquired the legal estate by purchase; and on her death, without issue, the estate descended to her brothers and sisters of the half blood to the ex-

These statutes, then, divide the intestate's property into two classes: first, such as comes to him in the regular course of descent, including such as may have been devised to him, or which may have been conveyed to him by deed of gift, but which, or at least part of which, he might have inherited had there been no such devise or deed of gift; second, such as he may have acquired by his own industry, or by the devise or deed of gift of a person from whom he could not have inherited, either lineally or collaterally. Where the estate belongs to the latter class, there is, of course, no opportunity for the operation of the rule requiring ancestral blood;¹ descent will be traced with regard to the blood of the intestate only.²

(2) SUCCESSION TO ANCESTRAL ESTATES.—The rule prescribed by these statutes for regulating the succession to an ancestral estate may be said, speaking generally, to be that it shall descend only to those collaterals or ascendants who are of the blood of the person from whom the estate came.³ But the recognition thus given to the blood of the person from whom such estate came, is not a preference of the blood of the ancestor, to the exclusion of the blood of the intestate.⁴ The inheritance is cast upon the next

clusion of her paternal uncle. *Nicholson v. Halsey*, 1 Johns. Ch. (N. Y.) 417.

In *Shepard v. Taylor*, 15 R. I. 204, it appeared that A devised certain realty to a son B, in trust for another son C, giving B power to appoint a successor in the trust, or to convey the realty to C or his heirs when B might think proper. C died, and his son, C, Jr., inherited the equitable estate. B conveyed the legal title to C, Jr., and C, Jr., died under age and without issue. It was held that the legal title did not come to C, Jr., "by descent, gift, or devise from the parent or other kindred of the intestate," and therefore, was not an ancestral estate.

1. *Hall v. Jacobs*, 4 Har. & J. (Md.) 254; *Van Sickle v. Gibson*, 40 Mich. 170.

2. *Brewster v. Benedict*, 14 Ohio 369; *Shellenberger v. Ransom*, 31 Neb. 61.

By the common law, if a man purchases land, he is by fiction understood to hold *ut feudum antiquum*, not as land descended either *ex parte paterna* or *ex parte materna*, for the law will not ascertain it, but as an estate derived to him from some unknown ancestor; if he dies intestate and without issue it will go first to the heirs on the part of the father, and on failure of such heirs, then to the heirs on the part of the mother, the males being always preferred to the females, and among males the right of primogeniture prevailing. *Hall v. Jacobs*, 4 Har. & J.

(Md.) 245. But the rule of the common law, which gives a preference to the blood of the father in the descent of a newly purchased inheritance, is now very generally abolished. *Brown v. Burlingham*, 5 Sandf. (N. Y.) 418. See *supra*, this title, *Preference of Male to Female Issue and Stock*.

3. See various state statutes. In many states, this distinction is effected by provisions abolishing the distinction between the whole and the half blood, except when the estate of the intestate came to him by devise, descent or gift of an ancestor, when all those who are not of the blood of the ancestor are excluded from the inheritance. See *Stim. Am. Stat. L.*, § 3133 (E); note to *Prescott v. Carr*, in 61 Am. Dec. 652.

4. See *Brower v. Hunt*, 18 Ohio St. 312.

The complainant was the sister of J. M. J., who devised land to his deceased brother's son, Van R. J., who died intestate, leaving a mother and four brothers surviving. The complainant claimed the intestate's realty as the heir of the testator J. M. J. and his nearest in blood. It was said that though the real estate, since it came from a relative in blood of Van R. J.'s father, must be considered as ancestral, it did not follow that the donor or deviser in such case became himself the *propositus* from which descent was to be traced. The court, by Eakin, J., said: "The person last enti-

of kin to the intestate.¹ But these statutes give a preference to those of the kindred of the intestate who are of the blood of the ancestor. While the person last seised, or last having ownership or title to the property, remains the *propositus* whose nearest kindred must be traced, such kindred must, however, be of the blood of the person from whom the estate came. Some courts, in construing these provisions, give this rule so broad an application that the intestate's whole line of kindred, who are not on the side of the ancestor, will be postponed to the remotest kinsman in that line which is of the blood of the person from whom the ancestral estate came—that is to say, the line of succession must be traced in that ancestral line, leaving off the side which has none of the blood of such person.²

tled to possession, or last invested in the vested remainder, remains the *propositus*, whose nearest heirs are to be traced. They must, however, be of the blood of the person from whom the benefit came—that is to say, the line of descent must be traced on that line, leaving off the side which bore no relation to the donor. In the case in judgment, we drop the mother altogether, since the land did not come through her, nor any of her blood. We take the father's line, because we find the land came from a relative of the blood of the father. But we retain the deceased Van R. as the *propositus*, and seek his heirs on that side, and not the heirs of the original donor. . . . Any construction of the law, which on failure of descendants of a donee, would make the donor the *propositus*, would, in effect, enable one by gift or devise of land to a kinsman, to reserve a reversion to his heirs after an estate of inheritance given to another. This would contravene the policy of our laws." It was accordingly held that the estate would descend to the intestate's four brothers. *Oliver v. Vance*, 34 Ark. 564.

To the effect that the person who last died seised remains the *propositus*, see discussion in *Den v. Searing*, 8 N. J. L. 340.

1. *Speer v. Miller*, 37 N. J. Eq. 492; *Miller v. Speer*, 38 N. J. Eq. 567; *Brower v. Hunt*, 18 Ohio St. 312; *Montgomery v. Petriken*, 29 Pa. St. 118; *Ramck's Appeal*, 113 Pa. St. 98.

2. *Valentine v. Wetherell*, 31 Barb. (N. Y.) 655; *Conkling v. Brown*, 57 Barb. (N. Y.) 655.

It was held in *Arkansas* that half-sisters of the intestate by the mother take nothing in real estate descended from a father, but that it goes to the pa-

ternal grandfather and descendants of a paternal aunt. *Kelly v. McGuire*, 15 Ark. 555. And see *Scull v. Vangine*, 15 Ark. 695; *Campbell v. Ware*, 27 Ark. 65; *Beard v. Moseley*, 30 Ark. 517.

A woman seised of lands derived by devise from her father, died intestate, leaving no issue, brothers, sisters or their descendants, but leaving a surviving mother and paternal uncles and aunts. It was held that under the *Indiana* Rev. Stat. of 1831 the paternal uncles and aunts and the descendants of such of them as were deceased inherited the land. *Ramsey v. Ramsey*, 7 Ind. 607.

Where the ancestral estate came to the intestate on the part of his father, brothers of the half blood on the mother's side were excluded in favor of paternal aunts. *Cutter v. Waddingham*, 22 Mo. 206.

Though some early *North Carolina* cases, under statutes not now in force, give a preference to the half blood not of the blood of the ancestor to more remote kindred of such blood, it was held in *Caldwell v. Black*, 5 Ired. (N. Car.) 463, where one who was seised in fee of land which she took by descent from her father, died intestate, leaving no issue, nor brother nor sister, but a mother and paternal uncles, that the mother took no estate in the land, but that it descended immediately to the uncles. For other cases in this state which give a preference to more remote collaterals of the blood of the ancestor, see *Bell v. Dozier*, 1 Dev. (N. Car.) 333; *Felton v. Billups*, 2 Dev. & B. (N. Car.) 308; *Dozier v. Grandy*, 66 N. Car. 484.

In *Wisconsin*, it was held in the case of *Perkins v. Simonds*, 28 Wis. 90, that the exception in the course of descent which the statute makes in regard to

In some states it is only on the failure of kindred in that line that resort will be had to the other. But the preference which is thus given to those next of kin to the intestate who are of the blood of the ancestor does not operate to the exclusion of the next of kin of the intestate who are not of the blood of such ancestor, if there are no kindred of such blood. It is usually provided, in terms or by implication, that if there are no kin of such blood, then the kindred of the intestate without common blood with such ancestor shall take the estate rather than that it shall escheat.¹ And the distance which may be gone into the ancestral line from which the estate came in search of an heir, is even limited in some states, and if an heir is not found within a certain degree, the estate will go to other kindred of the intestate, who are nearer related, though not of the blood of the ancestor.²

However, under the construction given to these provisions by other courts, the above-stated rule is given a much more limited effect. According to the doctrine established by these courts, if there are several kinsmen of the intestate in the same degree, some of whom are of the blood of the ancestor while the others are not, then only those will take who are of such blood. But this is as far as the statutes go; they are not in any case to be so construed as to divert the descent of an ancestral estate from the nearest of kin; a remote relative of the blood of the ancestor

ancestral estates applies to all cases falling within its terms, and is not limited to cases where the intestate does not leave issue, widow, father, mother, brother and sister, and therefore where an intestate left a mother, his estate descended from his father goes to his father's brothers and their representatives in preference to the intestate's half-sisters by the mother. But compare *Kirkendall's Estate*, 43 Wis. 167.

In *Pennsylvania*, where a father died seised, leaving two children, one of whom afterwards died leaving the other his heir, who also died, it was held that a paternal uncle would take before the mother of the person last seised, for while she was of the blood of her child she was not of the blood of her husband. *Maffit v. Clark*, 6 W. & S. (Pa.) 258. And see *Hart's Appeal*, 8 Pa. St. 32; *Roberts' Appeal*, 39 Pa. St. 417; *McWilliams v. Ross*, 46 Pa. St. 369. These cases, it will be observed, were in a state where an ancestor farther removed than the intestate's immediate ancestor will be looked to for the source of inheritable blood. In *Pennsylvania*, the heir must be of the blood of the person who last acquired the estate by purchase other than by gift or devise from an ancestor.

Where one died seised of real estate which descended from her father, leaving, as her nearest kindred, her mother, a paternal aunt and maternal aunts and uncles, it was held that the paternal aunt alone was entitled as next of kin of the blood of the ancestor from whom the estate descended. *McWilliams v. Ross*, 46 Pa. St. 369; *Maffit v. Clark*, 6 W. & S. (Pa.) 258; *Bevan v. Taylor*, 7 S. & R. (Pa.) 397.

1. *Dowell v. Thomas*, 13 Pa. St. 41; *Parr v. Bankhart*, 22 Pa. St. 291. Where an estate had been transmitted by descent, and the blood of the acquiring ancestor had become extinct, upon the death of the person last seised intestate and without issue, the estate was held to descend to her nearest collateral relations, who were a brother and two sisters of the half blood on her father's side, the land having descended from a maternal ancestor. *University v. Brown*, 1 Ired. (N. Car.) 387.

2. Under section 2472, *Indiana Rev. Stat.* 1881, where one to whom land has come by descent dies intestate, unmarried and without issue, and leaves no brother or sister either of the whole or half blood having the blood of the ancestor from whom the property descended, a half-brother not of the blood

does not exclude a nearer relative not of such blood.¹ It is clear that, under either of these constructions, those kindred of the intestate who are of the blood of the ancestor will exclude his kindred in the same degree who are not of such blood.²

In the construction of these statutes, the question has arisen how far back in the chain of title by descent, or by gift or gratuitous devise from an ancestor, it is necessary to go in fixing upon the person to whose blood regard is to be had in tracing the

of such ancestor will inherit to the exclusion of kindred of the blood more distantly related to the intestate. *Pond v. Irwin*, 113 Ind. 243.

1. By the construction of the *Michigan* statute the estate, though ancestral, will not, in that state, be diverted from the intestate's nearest of kin in any case; the estate will not pass over near kindred for those who are remote in order to vest in the person who is of the blood of the ancestor. It was considered that the true construction of the statute would confine the operation of the rule which excludes those who are not of the blood of the ancestor from whom the inheritance came to the intestate by descent, devise or gift, from taking such estate, to those cases where there is more than one person in the same degree of kindred, and where they are not all relatives of the blood of the ancestor from whom the estate is derived. If there is a single next relative, he or she will take the whole estate without reference to whether the relationship is on the side of the one parent or the other. If there are several kindred in the same degree, and they are not all related on the same side, then only such of them will take as are of the blood of the ancestor from whom the estate was derived. It was accordingly held that property which descended to an intestate from his father passed to his maternal grandmother, who was not related to his father, in preference to more distant relatives, uncles and aunts, who were so related. *Ryan v. Andrews*, 21 Mich. 229; *aff'd* in *Rowley v. Stray*, 32 Mich. 70. This view prevailed in *North Carolina* under the construction of the earlier statutes of that state. *Ballard v. Hill*, 3 Murph. (N. Car.) 410; *Seville v. Whedbee*, 1 Dev. (N. Car.) 160. And see *Pritchard v. Turner*, 2 Hawks (N. Car.) 435. This rule obtains in *Tennessee*. *Nesbit v. Bryan*, 1 Swan (Tenn.) 468. Under the *Tennessee* Code, § 2420, subdivisions 2 and 3, the half-brother of an intestate

succeeds to his property to the exclusion of his maternal aunt and uncle, though it descended from his mother. *Chaney v. Baker*, 59 Tenn. 424. See *Clay v. Cousins*, 1 T. B. Mon. (Ky.) 75.

In *Alabama*, this rule is established by the terms of the statute, which, in directing the descent of ancestral estates, excludes all those kindred who are not of the blood of the ancestor from the inheritance, "as against those of the same degree." *Alabama* Code, 1886, § 1919. It was held under this statute, that the half-brothers and sisters, though not of the blood of the ancestor from whom the land descended to the intestate, are entitled to inherit in preference to own uncles and aunts of such intestate, as they are one degree farther removed than the half-brothers and sisters. *Cox v. Clark*, 93 Ala. 400.

2. *Murphy v. Henry*, 35 Ind. 442; *Parr v. Bankhart*, 22 Pa. St. 291; *Eby's Appeal*, 50 Pa. St. 311; *Beaumont v. Irwin*, 2 Sneed (Tenn.) 291.

Where J. M. J. devised land to his deceased brother's son, Van R. J., who died intestate, leaving his mother and four brothers surviving him, it was held that the estate would go to the brothers to the exclusion of the mother, since the land did not come through her nor any of her blood, but came from a relative of the blood of the father. *Oliver v. Vance*, 34 Ark. 564.

So the estate that a daughter inherits from her mother does not, upon her death, go to her father, but to the other children. *Tillinghast v. Coggeshall*, 7 R. I. 383. And where A died intestate, seized of real and personal estate descended to him through his deceased father, leaving a mother and brothers and sisters of the whole blood, it was held that A's brothers and sisters took the entire estate, as if the mother were dead. *Harris v. Hayes*, 6 Binn. (Pa.) 422.

The father of A died, leaving lands by will to A and his brother. The brother died without issue. The mother married again and had a daughter, B, by

course of succession. It has been held that the heir must be of the blood of the ancestor who last acquired the estate by purchase other than by gift or gratuitous devise from an ancestor, no matter how many intervening transfers of the title by descent or by gift or gratuitous devise from an ancestor there may have been.¹

On the other hand, by the construction placed upon these statutes in other states it is only necessary to look to the intestate's immediate ancestor, and no inquiry will be made as to the mode

her second husband. It was held that, since descent should be traced from the father, this being an ancestral estate, B was not entitled, as claimed by her, to one-half of the deceased brother's share, for she had none of the blood of such ancestor. *Butler v. King*, 2 Yerg. (Tenn.) 115.

Land held by a son under a deed of gift from the father descends, upon the death of the son without children, to the son's brothers and sisters, *ex parte paterna*, of the whole and half blood, subject to the dower of the son's widow. *Prichitt v. Kirkman*, 2 Tenn. Ch. 390.

Where lands came to the intestate by descent, his brothers and sisters of the whole blood take in exclusion of brothers and sisters of the half blood who are not of the blood of the ancestor. *Aldridge v. Montgomery*, 9 Ind. 302; *Den v. Urison*, 2 N. J. L. 197; *Pipkin v. Coor*, 2 Murph. (N. Car.) 231; *Deadrick v. Armour*, 10 Humph. (Tenn.) 588. See *Cliver v. Sanders*, 8 Ohio St. 501; *Kelly v. McGuire*, 15 Ark. 555. So, where the intestate had taken his estate by descent from his father, his half-brother, who was the issue of the mother's second marriage, and therefore had none of the blood of the intestate's father, could not inherit the estate. *Wheeler v. Clutterbuck*, 52 N. Y. 68. And where the issue represents the parent, if an estate descended to the intestate from his mother, a niece of the whole blood will take in exclusion of a sister of the half blood of the intestate on the paternal side. *Ham v. Martin*, 1 Hawks (N. Car.) 423. If land be devised by a grandfather to his grandson, who would have succeeded him in case of his dying intestate, such land descends to the devisee's first cousin, in case the devisee dies intestate, rather than to a half-brother, not of the blood of the deviser. *Felton v. Billups*, 2 Dev. & B. (N. Car.) 308.

1. *Bevan v. Taylor*, 7 S. & R. (Pa.) 397; 3 S. C. Am. L. R. P. 394; *Lewis v. Gorman*, 5 Pa. St. 164; *Hart's Ap-*

peal, 8 Pa. St. 32; *Dowell v. Thomas*, 13 Pa. St. 41. So in *Wilkerson v. Bracken*, 2 Ired. (N. Car.) 315, it was said that the descent to be looked to is not the immediate one, but that to find it it is necessary to go back to the person who originally brought the estate into the family.

A died intestate in 1794, seised of lands, leaving B, a son, and C, a daughter, between whom a division and partition were made according to law. In 1797, C died intestate and without issue, leaving B, her brother, her heir at law. In 1810, B died intestate and without issue, or father, mother, brothers or sisters or descendants from either, but leaving D, the eldest son of E, deceased, who was the eldest brother of A, and who was the eldest and only uncle of B, and which E died before B. He also left other children and grandchildren of E, and the children, grandchildren and great-grandchildren of sisters of A. It was held that the lands which descended from C to her brother B, on his death intestate and without issue, were embraced by the said act of 1786, ch. 45, and were to descend under the provisions of the act. *Stewart v. Evans*, 3 Har. & J. (Md.) 287.

This case was affirmed in *Stewart v. Jones*, 8 Gill & J. (Md.) 1. The facts of this case were that A died in 1797 intestate, and seised of two parcels of land, which had descended to her from her father, leaving an only brother her heir at law. Upon the death of the brother, without issue and intestate, it was held that though the descent from his sister to him was an immediate descent, according to the principles of the common law, it was also mediate from the father from whom the brother derived his inheritable blood, and was therefore a descent upon the part of the father, and embraced by the act of descents of 1786, ch. 45. The court, by Stephen, J., in effect, said that although according to the English common law the descent from

in which such ancestor obtained his title; the person referred to in these provisions as the new fountain of inheritable blood is the ancestor from whom the property came to the intestate by immediate descent, gift, or devise.¹

(b) *In Succession to Estate of Unmarried Infant.*—Under the statutes of many states regard is to be had to the source whence the deceased derived his estate, if he was an infant and unmarried, or, according to some of these statutes, without issue.²

brother to brother is immediate, and title may be made by one brother to another without mentioning their common ancestor, yet such ancestor is regarded as the fountain of inheritable blood and consequently the descent is mediate from him. The act of 1786, ch. 45, changed the English law of inheritance and imparted new inheritable capacities. On failure of lineal heirs in the descending line, if the estate descended to the intestate on the part of the father, it directs that it shall descend to the brothers and sisters of the blood of the father. In this case, although the descent to the intestate from his sister was an immediate descent, according to the principles of the common law, it was also mediate from the father, from whom the brother derived his inheritable blood, and consequently must be deemed a descent on the part of the father.

1. *Buckingham v. Jacques*, 37 Conn. 402; *Smith v. Croom*, 7 Fla. 81; *Murphy v. Henry*, 35 Ind. 442, *overruling Johnson v. Lybrook*, 16 Ind. 473; *Barnes v. Loyd*, 37 Ind. 523; *Cutter v. Waddingham*, 22 Mo. 206; *Den v. Stretch*, 4 N. J. L. 182; *Valentine v. Wetherill*, 31 Barb. (N. Y.) 655; *Hyatt v. Pugsley*, 33 Barb. (N. Y.) 373; *Clover v. Sanders*, 8 Ohio St. 501. See *Curren v. Taylor*, 19 Ohio 36. Real estate was devised by A to his daughter B. On her death it descended to her son C. C died intestate without issue and without brothers and sisters or their representatives. It was said that the "ancestor" intended by the statute with regard to the distribution of an ancestral estate, is the one from whom the estate immediately and not the one from whom it remotely descended, and held that the estate descended to C's next of kin, though not of the blood of A, from whom the estate originally came. *Clark v. Shaller*, 46 Conn. 119. So, it was held that property which was inherited by a son from his father and descended to the son's daughter, passed, on her death without issue, to her fa-

ther's half-brothers and sisters, though not of the blood of the grandfather. *White v. White*, 19 Ohio St. 531.

On the death of R. one-half of his estate descended to his son P. and the other half to his daughter L. L died and her share devolved upon her brother P. Upon the death of P., while it was held that the half of his estate which had descended to him from his father would not go to his half-brother, who was the issue of his mother's second marriage, and therefore not of the blood of the father, yet, the half which he had inherited from his sister would go to the half-brother, he being of the blood of his sister L., who was the ancestor to whose blood regard should be had in the descent of this estate, since she was the immediate ancestor from whom the intestate received the inheritance. *Wheeler v. Clutterbuck*, 52 N. Y. 68. And see *Emanuel v. Ennis*, 48 N. Y. Super Ct. 431; 16 N. Y. Wkly. Dig. 430; *Prickett v. Parker*, 3 Ohio St. 394; *Cutter v. Waddingham*, 22 Mo. 206. The father of an intestate, dying without issue, was held to take an estate which descended to such intestate from her sister, although such sister had inherited it through the maternal line. *Morris v. Potter*, 10 R. I. 58.

In construing the *Rhode Island* statute of 1822, which was worded the same as the Public Statutes of 1882, ch. 187, § 6, the court in *Gardner v. Collins*, 2 Pet. (U. S.) 58, by Story, J., said: "As to descents, as well as gifts and devises from a parent, it is plain that the act looks only to the immediate descent or title. A descent from a parent to a child cannot be construed to mean a descent through and not from a parent. So a gift or devise from a parent must be construed to mean a gift or devise by the act of that parent, and not by that of some other ancestor more remote, passing through the parent."

2. It is provided sometimes that on the death of an infant without issue, such estate as came to him from either

parent shall go to the other children of the same parent or to their issue; sometimes a statute provides that such estate shall go to the parent. See statutes of the various states.

Virginia.—Dr. Minor has collated the cases bearing upon the provision of the *Virginia* Code which declares that the estate of an infant who dies without issue and which has been derived from a parent shall go to the infant's kindred on the side of that parent, or, in default of such kinsmen, to the kindred on the side of the other parent. See *Brown v. Turberville*, 2 Call (Va.) 398; *Tomlinson v. Dillard*, 3 Call (Va.) 105; *Dillard v. Tomlinson*, 1 Munf. (Va.) 183.

An application of the *Virginia* statute is found in the case of *Vaughan v. Jones*, 23 Gratt. (Va.) 444. In that case the real estate of a female infant was sold under decrees in chancery for the purpose of partition and reinvestment, and the proceeds committed to her guardian. The infant married and the guardian paid over the proceeds to the husband. Then the wife died under the age of twenty-one years, leaving a child which survived her but a few hours, and her husband, who survived the child. It was held that the proceeds descended as real estate to the child, subject to the husband's curtesy, and upon the death of the child passed still as real estate to the heirs of the child on the part of the mother.

Under the Statute of Descents of 1792, where an infant, having title to real estate of inheritance derived by purchase or descent immediately from his father, dies without issue, and with no brother or sister, or descendant of either, the father being dead, but the mother living, the right of inheritance is not in abeyance, but goes to the brothers and sisters of the father in parcenary or their lineal descendants; so, the mother being dead, and father living, in such case, the estate derived from the mother goes to her brothers and sisters, or their lineal descendants in parcenary. *Templeman v. Steptoe*, 1 Munf. (Va.) 339; *Addison v. Core*, 2 Munf. (Va.) 279.

Under the act of 1792, land inherited by an infant directly from his father, on the death of the infant, leaving no relatives but a grandmother and uncle in the paternal line, goes wholly to the uncle. *Liggon v. Fuqua*, 6 Munf. (Va.) 281.

Where a statute provided that "if, after the death of a father, any of his children shall die intestate, without

wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her," it was held that by "brother and sister" was intended brother and sister by the same father. *Bailey v. Teackle*, Wythe (Va.) 8.

California.—In *California*, the provision of the Statute of Descents and Distributions relating to this matter was construed as providing in effect that if the intestate shall have no issue, or husband, or wife, the estate shall go to his or her father; provided, that if any person shall die leaving several children, and any one of them shall die unmarried, etc., the share of such decedent child coming from such deceased parent shall go to the surviving children of the same parent. *DeCastro v. Barry*, 18 Cal. 96.

New Hampshire.—Where a man dies leaving several children, and one of them dies under age and unmarried, the surviving children of the deceased father will take the deceased child's share in their father's estate, to the exclusion of his brothers and sisters of the half blood by the same mother, but by a different father. *Clark v. Pickering*, 16 N. H. 284; *Crowell v. Clough*, 23 N. H. 207.

Kentucky.—In the 5th section of the *Kentucky* act of 1794, directing the course of descents it was enacted that "where any infant shall die without issue, having title to any real estate of inheritance, derived by purchase or descent from the father, the mother of such infant shall not succeed to, nor enjoy the same, nor any part thereof, if there be living any brother or sister of such infant, or any brother or sister of the father, or any lineal descendant of either of them, saving, however, to such mother any right of dower which she may have in the said real estate of inheritance." It was contended that the whole effect of this section was to exclude the mother as heir upon the contingencies mentioned, and the estate was left to descend according to the rules of inheritance prescribed by the statute as it would do if no mother was living. The argument was that this section did not declare who was to inherit the estate, but only excluded the mother, and as it failed to designate the persons to whom the inheritance was to be transmitted, they must be ascertained by reference to other sections of the statute, and as the mother was expressly excluded, the estate should descend as if there was no mother, nor brother, nor

As to the nature of the descent under these provisions, it has been held that the estate to which an infant, who died unmarried and without issue, derived title by gift, devise, or descent (in some statutes it is only by descent) from one of his parents, will descend as if such infant had died in the lifetime of the parent, and the estate is to be considered as descending from the parent.¹

sister, nor other descendants; it should be divided into moieties, one of which would go to the paternal, and the other to the maternal kindred. But the court, by Simpson, J., said: "The fifth section of the statute does not expressly declare that the persons therein named, upon the exclusion of the mother, shall themselves succeed to the inheritance, but such seems to be the necessary and inevitable implication arising out of its provisions. This section excludes the mother, upon the ground that the son derived the estate from the father. Following out the principle upon which the exclusion of the mother is founded, the estate, in the event that there are no brothers nor sisters of the infant, nor their descendants, should be transmitted to the kindred on the side of the father. The brothers and sisters of the father are therefore mentioned as the persons who are to exclude the mother, and must necessarily be regarded as being substituted in her place, and entitled to the estate which would have passed to her had she not been excluded. The interpretation of this section, by which the mother is excluded, and the general rule of descents established by the statute is applied in giving direction to the transmission of the infant's estate, would defeat the operation of the principle upon which the exclusion of the mother evidently rests. One moiety of the estate would pass to the maternal kindred, although the mother herself cannot inherit it, and she would, although living, be superseded, that a moiety of the estate might be transmitted to kindred on the same side, that were more remote. Such a result was not contemplated by the legislature, and would be entirely inconsistent with the object and design intended to be accomplished by the exclusion of the mother. As the estate was derived from the father, the design was, if the infant died without issue, leaving no brother or sister, or lineal descendants of either, to confine the succession to the kindred on the part of the father, if any of his brothers or sisters, or any lineal descendant of either

of them, should be living. In *Gill v. Logan*, 11 B. Mon. (Ky.) 234, a similar construction was given to the sixth section of the statute, in reference to the real estate of an infant, derived by descent from the mother, in which case it was decided that upon the death of the infant it passed by descent from him to the brothers and sisters of his mother, and his relations upon his father's side were not entitled to any part of it." See *Renfro v. Taylor*, 12 B. Mon. (Ky.) 402.

It has been held that if real estate is devised by the father to an infant, who dies in infancy, leaving neither brother nor sister, the estate passes to the uncles and aunts of the infant on the father's side. *Driskell v. Hanks*, 18 B. Mon. (Ky.) 855.

Maine.—See *Decoster v. Wing*, 76 Me. 450.

1. *Perkins v. Simonds*, 28 Wis. 90; *Wiesner v. Zaun*, 39 Wis. 188.

Under the *Connecticut* statute providing that "if any minor child shall die before marriage, and before any legal disposition of the estate, the portion of such deceased child shall be equally divided among the surviving children and their legal representatives," it was held that the portion of such deceased child was to be distributed, not as the estate of such child, but as a part of the estate of the deceased parent; and that, therefore, the section of the statute which provided that where an intestate leaves no children, the estate shall be distributed equally to the brothers and sisters of the whole blood, and those who legally represent them, had no application to the case. *In re North's Estate*, 48 Conn. 583.

It has been said in *Massachusetts*, that the interpretation given to the varying and ambiguous language there used in the successive statutes from a very early time down to 1806, has been to give effect to a general intention of leaving the estate of a child dying under age and unmarried, to go among the surviving children of the parent from whom the estate was derived, as if the child had died before the parent. See *Shel-*

But, though this is the general purpose of these statutes, it does not thereby follow that the title of such infant is defeasible upon his death. It seems that it is his absolute property while he lives; and that it can be taken for such debts as he was bound to pay, or be used for his support.¹

By the terms of the statutes this provision concerns estates to which the minor derived title in the specified way from one of his parents only, and it has been held that they do not apply to such real estate as the infant so derived title to from other persons, as, for example, brothers or grandparents.² And if the infant took

field *v.* Lovering, 12 Mass. 489; Runey *v.* Edmonds, 15 Mass. 291; Nash *v.* Cutler, 16 Pick. (Mass.) 491; Goodrich *v.* Adams, 138 Mass. 552.

1. See Goodrich *v.* Adams, 138 Mass. 552.

It seems that if the estate of such deceased minor should, under a statute, have been sold for his maintenance or education, the purchaser would acquire a perfect title, which would not be divested on the minor's death. Wiesner *v.* Zaun, 39 Wis. 188.

2. **Estates Derived from Grandparents.**—It has been held that estates derived from grandparents are not within the purview of these provisions. Goodrich *v.* Adams, 138 Mass. 552; Whitten *v.* Davis, 18 N. H. 88. See Case *v.* Wildridge, 4 Ind. 51.

The *Kentucky* statute providing that "If an infant dies without issue, having title to real estate derived by gift, devise, or descent from one of his parents, the whole shall descend to that parent and his or her kindred, as hereinbefore directed . . .," has been held to relate to such real estate as the infant derives title to by gift, devise, or descent, from one of his parents, but not to such real estate as the infant derives title to by gift, devise, or descent, from other persons. Title to real estate derived by an infant by gift, devise, or descent from the maternal grandparent descends to the father of the infant if the infant dies without issue. Walden *v.* Phillips, 86 Ky. 302; Duncan *v.* Lafferty, 6 J. J. Marsh. (Ky.) 47; Smith *v.* Smith, 2 Bush (Ky.) 522; Turner *v.* Patterson, 5 Dana (Ky.) 292; Wells *v.* Head, 12 B. Mon. (Ky.) 166.

Estates Derived from Brother.—A father devised his estate to two infant children, subject to the dower interest of their mother. One of the children died shortly after the death of his father, an infant and unmarried. By the law of descents then in force in *Ken-*

tucky, his mother was excluded from inheriting any part of his real estate, inasmuch as it was derived by devise from his father. It descended to his brother. This brother also died, an infant and unmarried. It was held that the part of his estate which descended to him from his brother would not pass to the uncles and aunts on the father's side, like that part which had been devised to him by his father, but would go to the mothers, brothers and sisters living at the time of his death. The court, by Simpson, J., said: "On the part of the appellant, Hanks, section 9 of the act of Descents, in the Revised Statutes 280, is relied upon as entitling the kindred on the part of the father to the whole of the infant's real estate. The infant's real estate, at the time of his death, consisted of that which had been devised to him by his father, and that which he had inherited from his deceased brother. The section relied upon only applies to the real estate belonging to the infant, the title to which he had derived by gift, devise, or descent from one of his parents. It has no application to that which he derived by descent from his brother, nor could it be made to apply to it by any reasonable construction of the language used. That which has descended to him from his brother, he certainly did not derive title to by gift, devise, or descent from his father, but whatever title he had to it was derived from his brother and not from his father. One-half of his real estate, therefore, being that half which was devised to him by his father, passed, on his death, to his uncles and aunts on his father's side. The other half, under the first section of the act, passed to his mother and his half-brother, who was living at the time of his death." Driskell *v.* Hanks, 18 B. Mon. (Ky.) 863.

But a different construction was given to a statute which provided that "when any of the children of the intestate die

an estate by inheritance, through a parent, by right of representation, from a more remote ancestor, he cannot be regarded as having taken it by inheritance from the former.¹

These statutes only look to the immediate descent; it is immaterial how the parent from whom the decedent derived his title acquired the estate.² But, under these statutes, the source from which the estate is derived will be looked to only in those cases which they specify.³

(c) **Whether Applicable to Distribution of Personalty.**—In the construction of statutes which prescribe the course of descent of realty and distribution of personalty in the same provisions, it is considered that though the statute contains a provision which gives the common-law rule a partial recognition, such provision has no application to the distribution of personal property which is distributed

before his arrival at the age of twenty-one years, and unmarried, such deceased child's share shall descend equally among the surviving brothers and sisters, and such as legally represent them." J. P. died intestate, leaving surviving him his widow and their two minor sons, D. and P. J. D., died, and his share of the estate went to P. J. The widow afterwards married, and had issue thereby two daughters. On the death of P. J. the question arose as to whether that part of his estate which had been his brother D.'s should descend to his half-sisters, who were of the blood of D., or should go to those of his kin who were of the blood of J. P., which would exclude the half-sisters from the inheritance. It was held that the latter was the true rule, it being considered that the estate did not descend from his brother D., but from his father, J. P. *Perkins v. Simonds*, 28 Wis. 90. This case is *affirmed* in *Wiesner v. Zaun*, 39 Wis. 188, although it is questioned, in an opinion by Cole, J., whether the rule there established is supportable on principle.

1. *Sedgwick v. Minot*, 6 Allen (Mass.) 171.

2. The *Kentucky* Gen. Stat., ch. 31, § 9, provided: "If an infant dies without issue, having title to real estate derived by gift, devise, or descent from one of his parents, the whole shall descend to that parent and his or her kindred, as hereinbefore directed." A devised land to his widow for life, the remainder to children of a deceased daughter. One of such children married and died, leaving one child. The child died in infancy. It was held, under the statute, that the estate went to the kindred on the mother's side, and the maternal grandfather, surviving the intestate, in-

herited the estate. The court, by Pryor, J., said: "The maternal kindred of the child took the estate, and not those who were the next of kin to its great-grandfather, the deviser from whom the mother derived the estate. It is not a question as to how or from whom the mother of the infant obtained the title." *Power v. Dougherty*, 83 Ky. 187.

3. See *Stitt v. Bush*, 22 Oregon 239. If the intestate was not under twenty-one years of age the statute can have no application. *Prescott v. Carr*, 29 N. H. 453; 61 Am. Dec. 652. It is likewise when the intestate did not take in the manner specified in the statute. Where the statute provided that, when any child shall die under age, not having been married, his share of the inheritance that came from his father shall descend in equal shares to his father's other children then living, and to the issue of any of such other children who shall have died, by right of representation, it was held that this proviso did not apply to land which came to the intestate by devise from his father; and, consequently, that a share of such estate descended to the intestate's mother. *Nash v. Cutler*, 16 Pick. (Mass.) 491. And see *M'Afee v. Gilmore*, 4 N. H. 391; *Bell v. Scammon*, 15 N. H. 383; 41 Am. Dec. 706.

An early *New Hampshire* statute which directed that, under the specified circumstances, the estate should go among the surviving brothers and sisters, was held to have no application where the deceased infant did not leave any brothers or sisters. It was held that, in their absence, the statute did not make any distinction in the descent founded upon the source from which the property was derived. *Kelsey v.*

without reference to the source from whence it came to the intestate.¹

(3) *Abrogation of the Rule*.—In some states the statutes do not in any case recognize any distinction in the descent or distribution of the property of a deceased person in consequence of the source from whence it came. And it has been uniformly held, under such statutes, that the rule of the common law that the heir must be of the blood of the first purchaser is wholly abrogated.²

2. *General Outline of Course of Succession*.—*a. TO THE SPECIALLY DESIGNATED RELATIVES*—(1) *In General*.—The state statutes generally prescribe the order in which the nearer relatives of the decedent shall take his property, by a designation of relationship instead of by computation of the degrees of kinship. Most of the statutes fix the order of succession by children and their descendants, the widow and husband, the father and mother, and the brothers and sisters, *nominatim*. Consequently, it is only where the decedent's property goes to kindred outside this series of especially designated relatives, that the method adopted for reckoning degrees of kinship is resorted to in determining the order of succession.³

(2) *Descendants*.—The general rule in the *United States* is that all the children take in equal shares, both as to realty and to per-

Hardy, 20 N. H. 479. And see Benson v. Swan, 60 Me. 161; Decoster v. Wing, 76 Me. 450; Albee v. Vose, 76 Me. 448; Cramer's Appeal, 43 Wis. 167.

1. Deloney v. Walker, 9 Port. (Ala.) 497; Kelly v. McGuire, 15 Ark. 555; Byrd v. Lipscomb, 20 Ark. 19; Moss v. Ashbrooks, 20 Ark. 128; Oliver v. Vance, 34 Ark. 564; Jones v. Dexter, 8 Fla. 276; Henson v. Ott, 7 Ind. 512; Jenks v. Trowbridge, 48 Mich. 94; Kyle v. Moore, 3 Sneed (Tenn.) 183; Kirken-dall's Estate, 43 Wis. 167; *In re Shuman's Estate*, 80 Wis. 479. *Contra*, Bushnell v. Dennison, 13 Fla. 77, Westcott, J., *dissenting*. See also Kelsey v. Hardy, 20 N. H. 479.

2. Kean v. Hoffecker, 2 Harr. (Del.) 103; 29 Am. Dec. 336; Peacock v. Smart, 17 Mo. 402; Hatch v. Hatch, 21 Vt. 450; so formerly in *Alabama*, Deloney v. Walker, 9 Port. (Ala.) 497; Hitchcock v. Smith, 3 Stew. & P. (Ala.) 29.

In *Texas*, it is specially enacted that there is no distinction between property derived by descent, etc., from the father, or that which may have been derived by descent from the mother; and all the estate vests at death of the intestate as if he had been the original purchaser thereof. Sayle's Civil Stats., § 1647. And see Jones v. Barnett, 30

Tex. 638; Chandler v. Copeland, 31 Tex. 151; McKinney v. Abbott, 49 Tex. 371.

3. *Course of Succession to Ancestral Estates*.—The *Rhode Island* statute (Rev. of 1822, pp. 222-3) provided that "when the title to any real estate of inheritance as to which the person having such title shall die intestate, came by descent, gift, or devise from the parent or other kindred of the intestate, and such intestate die without children, such estate shall go to the kin next to the intestate, of the blood of the person from whom such estate came or descended." It was considered that this last clause, directing the descent of ancestral estates to "next of kin," etc., did not direct the descent of such estates to "next of kin" in the strict sense of those terms as understood by the civilians, but that the course of descent of such estates, as well as estates acquired by the intestate, was directed and controlled by the first and subsequent clauses prior to the last, which by the terms of the first clause extended to "any estate of inheritance." It was held that where A died without issue, leaving an estate which came to her by descent from a deceased brother, such estate passed in equal shares to her mother, brothers, and sisters, they being, by the rule established

sonalty, and that the issue of deceased children take the share of the parent by right of representation.¹

(3) *Other Near Relatives*.—Besides providing specially for the succession by descendants, the statutes generally regulate the order in which the nearer ascendants and collaterals, as parents, husband or wife, and brothers and sisters, shall stand in the course of succession. But the provisions which prescribe the order of succession by such relatives, vary so radically in the different states, that it would serve no practical purpose to set these provisions out here. Reference must be had to the statutes of the different states.²

b. *GENERALLY TO THE NEXT OF KIN*.—If there are none of the series of specially named relatives, which generally consists of the decedent's descendants, parents, husband or wife, brothers and sisters, surviving him, his estate goes to his next of kin.³

by the statute, of the same degree of kindred to the intestate. *Smith v. Smith*, 4 R. I. 1, *affirmed* in *Pierce v. Pierce*, 14 R. I. 514.

1. To "Child or Children."—The deceased left grandchildren and also a wife surviving. It was said that the section of the *Indiana* statute concerning descents, providing "that if a husband or wife die intestate, leaving no child and no father nor mother, the whole of his property, real and personal, shall go to the survivor," taken in connection with other sections in which ample provision was made for inheritance by grandchildren, should be construed as if it read "leaving no children nor their descendants," and it was held that the widow could not under this provision, inherit the whole of the estate to the exclusion of the grandchildren. *Kyle v. Kyle*, 18 Ind. 108.

It was held in *Scott v. Silvers*, 64 Ind. 76, that the words "children alive," as used in the proviso of section 24 of 1 *Indiana* Rev. Stats. 1876, p. 412, should, to give effect to section 2 of said act, be construed to mean "children or their descendants alive."

But, in the construction of the *Texas* statute providing that, upon the dissolution of the marriage relation by death, all the common property belonging to the community estate of the husband and wife should go to the survivor, if the deceased had no child nor children; but that if there were such child or children, they should take half, it was held that the words "child" and "children," as here used, did not include a grandchild or grandchildren or descendants in a more remote degree.

Burgess v. Hargrove, 64 Tex. 110; *Cartwright v. Moore*, 66 Tex. 55; *McKinney v. Moore*, 73 Tex. 470. See *CHILD*, vol. 3, p. 229.

To "Descendants."—See *DESCENDANT*, vol. 5, p. 641.

2. See *Stim. Am. Stat. L.*, art. 310. In *England*, it is a rule controlling the descent of real property that on failure of issue the inheritance shall go to the intestate's lineal ancestors or their issue, each of the ancestors taking in preference to his issue, but so that a nearer lineal ancestor and his issue are to be preferred to a more remote lineal ancestor and his issue other than such nearer ancestor and his issue. 2 Br. & Had. Com. 377. But the course of distribution prescribed by the English Statute of Distributions is more in accordance with the order of succession in the *United States*. See R. & L. L. Dict., tit. *Next of Kin*.

3. See various state statutes. A *Rhode Island* statute (Rev. Stat. 1844, 237) provided that if there be no child, nor father, nor mother, nor sister, nor descendants of either, "the inheritance shall go in equal moieties to the paternal and maternal kindred." It was held that under the provision of the same statute, that when "the inheritance is directed to go by moieties to the paternal and maternal kindred, if there be no such kindred on the one part, the whole estate shall go to the other part," so long as there is any kindred, however remote, on the part of the paternal line, they take one moiety of the estate, and the inheritance, after once being divided, cannot be again united, and descend

c. TO THE STATE; ESCHEAT.—Provisions to the effect that when a person dies intestate, leaving real property and no heirs or person entitled to succeed under the law of descents, or, when a person dies intestate leaving personal estate not required for debts and there is no person entitled thereto under the statutes of distributions, the property escheats either to the state, county, town, or otherwise, are commonly found in the statutes of the different states.¹

VII. DOCTRINE OF SHIFTING INHERITANCE.—It is a doctrine of the common law that, although lands may, by the operation of the feudal rule that the freehold should not be in abeyance, descend to him who is heir at the intestate's death, this inheritance may be divested at any time if there should come into existence another person whose degree of consanguinity to the ancestor is such that, had he been alive at the time of the descent cast, he would have excluded the person who has actually taken.²

The rule of shifting inheritance has been recognized in some of the states of the Union;³ but in others it has, by judicial decision, been rejected as being an inconvenient rule which was

in one line until there ceases to be a representative of the other line. *Cozzens v. Joslin*, 1 R. I. 122.

Where none of the series of specially designated relatives survive the intestate—i. e., where he leaves no descendants, husband or wife, parents or brothers and sisters—the next in the line of succession must be the grandparents. Grandparents take precedence of uncles and aunts unless the statutes provide otherwise. *Cole v. Batley*, 2 Curt. (U. S.) 562; *In re Afflick*, 3 MacArthur (U. S.) 95; *Phillips v. Petert*, 35 Ala. 606; *Barger v. Hobbs*, 67 Ill. 592; *Martindale v. Kendrick*, 4 Greene (Iowa) 307; *Bassil v. Loffer*, 38 Iowa 459; *Power v. Dougherty*, 83 Ky. 187; *Cables v. Prescott*, 67 Me. 582; *Decoster v. Wing*, 76 Me. 450; *Ryan v. Andrews*, 21 Mich. 229; *Kelsey v. Hardy*, 20 N. H. 479; *Sweezy v. Willis*, 1 Bradf. (N. Y.) 495; *McDowell v. Addams*, 45 Pa. St. 430; *Kirkendall's Estate*, 43 Wis. 167. But see *Bray v. Taylor*, 36 N. J. L. 415; *Gillespie v. Foy*, 5 Ired. Eq. (N. Car.) 280; *Curren v. Taylor*, 19 Ohio 36; *Liggon v. Fuqua*, 6 Munf. (Va.) 281.

Next after grandparents in the order of succession are the decedent's nephews and nieces, uncles and aunts and great-grandparents, for all are related to him in the third degree. And it has been held that uncles and aunts and nephews and nieces being in equal degree, share equally on distribution in default of nearer kindred. *Durant v.*

Prestwood, 1 Atk. 454; *Hurtin v. Proal*, 3 Bradf. (N. Y.) 414.

Great-grandparents have precedence over great-uncles and aunts. *Cloud v. Bruce*, 61 Ind. 171.

Next in the order of succession stand first cousins, great-uncles and aunts, and great-great-grandparents; all these stand in the fourth degree. Hence it has been held that a great-uncle and first cousin, both being related in equal degree to the person last seised, and being his nearest surviving kindred, are entitled to succeed to his land in equal moieties. *Smith v. Gaines*, 35 N. J. Eq. 65. See *supra*, this title, *Preference of Male to Female Issue and Stock*, and *Right of Representation*.

1. See ESCHEAT, vol. 6, p. 854. See also *Berens v. Dupre*, 6 La. Ann. 495; *Thomas v. Frederick Co. School*, 7 Gill & J. (Md.) 369; *Rock Hill College v. Jones*, 47 Md. 1; *Patapsco Female Inst. v. Rock Hill College*, 51 Md. 470.

The state in a case of escheat of property, is not to be deemed an heir, within a statute directing notice of probate of a will to be given to presumptive heirs of the deceased. The state takes, not as heir, but because there are no heirs. *State v. Ames*, 23 La. Ann. 69.

2. 2 Bl. Com. 208; 2 Greenl. Cru. R. P. 145; Co. Litt. 2, 6; 3 Cru. Dig. 230. See 2 Min. Inst. 455; 3 Bac. Abr. 106.

3. *Cutlar v. Cutlar*, 2 Hawks (N. Car.) 324; *Seville v. Whedbee*, 1 Dev. (N. Car.) 160; *Caldwell v. Black*, 5 Ired. (N. Car.) 463. But in *Grant v. Bustin*,

grounded on feudal reasons and was merely an incident to the now universally superseded common-law canons of descent and which is inconsistent with the modern theory of intestate succession.¹ And, to prevent the evil of a shifting inheritance, the statutes now sometimes require from the heir the capacity of taking at the intestate's death.²

VIII. SUCCESSION BY AND FROM BASTARDS.—With respect to the right of inheritance, a bastard is, by the common law, considered *quasi nullius filius*.³ And, being nobody's son, he is incapable of becoming heir to either his ascendants or collaterals. Moreover, as a bastard cannot become heir himself, so neither can he have any ancestral or collateral heirs—he can have no heirs but those of his own body.⁴

The civil law differed from the common law with regard to this

1 Dev. & B. Eq. (N. Car.) 77, it was held that under the statute for the distribution of intestate estates, no person could take as next of kin who was not in *esse* or in *ventre sa mere* at the time of the intestate's death.

1. Bates v. Brown, 5 Wall. (U. S.) 711, construing the statutes of Illinois; Cox v. Matthews, 17 Ind. 367; Drake v. Rogers, 13 Ohio St. 21, overruling Dunn v. Evans, 7 Ohio 169, and Springer v. Fortune, 2 Handy (Ohio) 52.

Posthumous Child.—The rule established by these cases is simply that when descent is cast, and the estate vested in him who is heir at the death of the ancestor, the estate cannot be devested by the subsequent birth of nearer heirs. This, obviously, does not interfere with the rule that a child *en ventre sa mere* is considered in *esse* for the purpose of inheriting. See Cox v. Matthews, 17 Ind. 367. It has been said that "the example suggested by Blackstone, of the divestiture of the estate of a collateral by the birth of a posthumous child is hardly a case of a shifting inheritance in the strict sense; since at the time of the father's death the infant *en ventre* was in *esse* and had the right of inheritance, an inchoate right, it is true, and subject to be destroyed by his death unborn, but still a right, and it is questionable how far, in such case where the doctrine of shifting inheritance is acknowledged, the first heir would be permitted to deal with the inheritance as his own, for if he were allowed absolute mastery he might ruin it or sell it, in spite of notice that an heir, whose advent into the world could not long be deferred existed." 3 L. C. Am. L. R. P. 461. See *supra*, this title, *Posthumous Children*.

2. This rule was at an early day incorporated in the statutes of Virginia. In the first statute of descents in that state, which took effect 1st of January, 1787 (Stat. 12 Hen. 138), there was a provision that none but children of the intestate should inherit, unless they were in being, and capable to take as heirs at the death of the intestate. This supposes, of course, that the child is *en ventre sa mere* at that time, but limits the case to the children of a decedent. Blunt v. Gee, 5 Call (Va.) 481. Since 1840, this policy has been extended to all persons. See 2 Min. Inst. 455.

In North Carolina, it was provided by statute that "no inheritance shall descend to any person as heir of the person last seised, unless such person shall be in life at the death of the person last seised, or shall be born within ten lunar months after the death of the person last seised." Battle's Rev., ch. 36, § 7.

The Tennessee Acts, 1842, p. 193, § 2, provides "that, when the estate is vested by the descent, the same shall not be devested by the birth of an heir, a child, or issue, unless such heir, child, or issue be born within ten calendar months after the death of the intestate." See Grimes v. Orrand, 2 Heisk. (Tenn.) 298, and Melton v. Davidson, 86 Tenn. 129, both overruling Baker v. Heiskell, 1 Coldw. (Tenn.) 642. See *supra*, this title, *Posthumous Children*.

3. Co. Litt. 123; 1 Bl. Com. 458; Rex v. Hodnett, 1 T. R. 101; Haines v. Jeffee, 1 Ld. Raym. 68.

4. "For as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred, and, consequently, can

status of bastards.¹ And it has, under the statutes of the different states, frequently been contended that, since these statutes were borrowed from the civil law, they should be so construed as to place the bastard in the position which he occupied in that system. But this view has been generally rejected.² The common law disabilities of bastards still obtain in the *United States*, except so far as they are expressly removed by statutory provisions.³ Where, therefore, a statute makes use of the word "children," it must of necessity be construed to mean such as the law recognizes as children; its meaning cannot be so extended as to include illegitimate children, except so far as they are recognized by other provisions of the statute.⁴ And it is so

have no legal heirs, but such as claim by a lineal descent from himself." 2 Bl. Com. 249.

1. Blackstone says: "The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after its birth the mother was married to the father; and also if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet she and her bastard son were admitted each to one-twelfth of the inheritance; and a bastard was likewise capable of succeeding to the whole of his mother's estate, although she was never married; the mother being sufficiently certain, though the father is not." 2 Bl. Com. 247.

2. *McCool v. Smith*, 1 Black (U. S.) 459; *Cooley v. Dewey*, 4 Pick. (Mass.) 93; 16 Am. Dec. 326; *Barwick v. Miller and Jones v. Burden*, 4 Desaus. (S. Car.) 434.

Connecticut Doctrine.—But in *Connecticut* it has been held that natural children to the same mother might be heirs to each other. *Brown v. Dye*, 2 Root (Conn.) 280. It does not appear that there was any express provision of the statutes to this effect. This case was followed by another, decided under a statute by which the property of an intestate was made to descend "to and among the children, and such as legally represent them," in which it was held that a bastard might inherit from his mother. *Heath v. White*, 5 Conn. 228. It was intimated in this case that the legislature of *Connecticut* probably intended to adopt the principle of the civil law on this subject. The court, however, by Hooper, C. J., placed no stress on the fact that the civil law was the source from which the *Connecticut* statute was derived, but asserted that unless the words of the law were restrained

and not permitted to mean what they literally declared, they definitely settled the question as to whether an illegitimate could inherit land from her mother; that the English Law of Descents had never been adopted in *Connecticut*, and, therefore, furnished no subject-matter to restrain the signification of the term "children" as used in the statute; and, finally, that the *Connecticut* law did not, like that of some other states, restrain succession to the lawful issue of the intestate.

In *Dickinson's Appeal*, 42 Conn. 491; 19 Am. Rep. 553, it was held that the estate of A was inheritable by B as heir at law, through C his grandmother, a sister of A, and D his mother, the illegitimate daughter of C.

3. See *Stevenson v. Sullivan*, 5 Wheat. (U. S.) 207; *Doe v. Bates*, 6 Blackf. (Ind.) 533.

4. *In re Wardell's Estate*, 57 Cal. 484; *Orthwein v. Thomas*, 127 Ill. 554; 11 Am. St. Rep. 159; *Drain v. Violet*, 2 Bush (Ky.) 155; *Kent v. Barker*, 2 Gray (Mass.) 535.

It has been held that the word "children," as used in the statutes of descent and distribution, did not comprehend bastards, and that an illegitimate child could not inherit from its mother. *Porter v. Porter*, 7 How. (Miss.) 106.

Where a statute provided that illegitimate children of an unmarried woman should inherit from the mother, and another statute provided that the property of an intestate should descend to the "children," it was held that the word children in the latter statute had reference to lawful children only, and that the illegitimate children of a married woman were left subject to the common-law rule, and could not inherit from her. The court, by Sheldon, C. J., in effect said that if the statute had

where a statute employs the word "kindred" or the phrase "next of kin."¹

But this matter is now, throughout the *United States*, largely regulated by statute. While the statutes of the different states are all in the line of a more liberal and generous public policy than that of the common law, they yet show a considerable variance in their provisions. The courts have frequently said that legislation giving to illegitimate children the right of succession is undoubtedly in derogation of the common law, and should be strictly construed.² But it has been held that a statute endowing bastards with heritable blood applied to even such as were the offspring of an incestuous connection.³ And it has been held that a statute of legitimation enabling the legitimated to "inherit," by necessary implication gave them the right to take as distributees.⁴

The statutes of probably all the states now recognize the right of a bastard to succeed to the estate of his mother; in most of these states he inherits the mother's estate with the legitimate children share and share alike, though in a few he is constituted the heir of his mother only in default of lawful issue.⁵ Where a

contained the latter provision and nothing more, the point urged by the appellant's counsel that the rule of the common law was superseded by the statute of descents, by which the property of an intestate was made to descend to and among the children and their descendants; that the complainant, though illegitimate, was the child of his mother, and was embraced within the plain words of the statute; that there was nothing restricting the customary meaning of the word children; that it should be allowed to have force and the positive law of the statute should prevail over the common-law rule, might have been one worthy of consideration, though it is a rule of construction that, *prima facie*, the term "children" means lawful children (*citing Dorin v. Dorin*, L. R., 7 H. L. 568). But, the provision of the statute that the illegitimate child or children of any single or unmarried woman shall be deemed able and capable in law to inherit the estate of their deceased mother was considered to be an implied recognition of the existence of the rule of the common law, and of its being in force, and was an abrogation of it to a certain extent. "It shows the understanding of the makers of the statute that 'children' did not embrace illegitimate as well as legitimate children; and that, in order that a particular class of illegitimate children, those of any single or unmarried woman, might

be able to inherit from their deceased mothers, it was necessary to go further and make an express provision to that effect. The general assembly have legislated upon the very subject, expressly providing in what cases illegitimate children may inherit from their mothers; and such must be taken as being all the cases, and that, in all other cases previous to the statute of 1872, their incapacity to inherit remains as at common-law." *Blacklaws v. Milne*, 82 Ill. 505; 15 Am. Rep. 339.

1. *McCool v. Smith*, 1 Black. (U. S.) 459. But see *Rogers v. Weller*, 5 Biss. (U. S.) 166; *Miller v. Williams*, 96 Ill. 91; *In re Magee's Estate*, 63 Cal. 414.

So, where a statute provided that, after the payment of the debts, funeral expenses, etc., "if there be no kindred of said intestate, then she (the widow) shall be entitled to the whole of said residue," it was held that the mother of an illegitimate child could not claim to be of kindred to such child within the meaning of this statute. *Hughes v. Decker*, 38 Me. 153.

2. See *Cope v. Cope*, 137 U. S. 682; *Brewer v. Hamor*, 83 Me. 251; *Pratt v. Atwood*, 108 Mass. 40.

3. *Brewer v. Blougher*, 14 Pet. (U. S.) 178.

4. *Swanson v. Swanson*, 2 Swan (Tenn.) 446.

5. See *Stim. Am. St. L.*, § 3151.

statute gives an illegitimate child the capacity to take from the mother, the bastard will take equally with legitimate children; his right to inherit from the mother is not restricted to cases where no lawful children exist,¹ except where the bastard is, by the terms of the statute, made the heir and distributee of his mother, only if she has no legitimate child.² But the right of succession given by a provision of this kind must be confined to the mother and her illegitimate children. Thus, a bastard cannot ordinarily take by descent or share in the distribution of the estate of his mother's ancestors or collateral relatives.³ And the bastard's children cannot succeed to their grandmother's estate, though the bastard would, if living, be entitled thereto; where an illegitimate child dies before his mother, and, therefore, never has taken or inherited from her, he cannot transmit to his descendants a right which never was in him.⁴ A statute which merely enables

1. *Earle v. Dawes*, 3 Md. Ch. 230; *Opdyke's Appeal*, 49 Pa. St. 373.

Under the *Mississippi* statute regulating the descent and distribution of the estates of intestates, an illegitimate child takes equally with legitimate children in the estate of their deceased mother. *Alexander v. Alexander*, 31 Ala. 241.

2. See *Brown v. Kerby*, 9 Humph. (Tenn.) 460.

In *North Carolina*, the act of 1799 limited the capacity of bastards to inherit from their mother to cases in which there was no legitimate issue. *Sawyer v. Sawyer*, 6 Ired. (N. Car.) 407.

3. In *re Mericlo*, 63 How. Pr. (N. Y.) 62. But see *Waggoner v. Miller*, 4 Ired. (N. Car.) 480.

Under a *Tennessee* statute providing "that if a woman die intestate, leaving a natural born child or children, such natural born child or children shall take as heir to the mother; and in case of intestacy without issue, the brothers and sisters of such natural born child or children, shall inherit from him or them," it was held that a bastard could not take his mother's share of the grandfather's estate, she being dead, without legitimate children. *Brown v. Kerby*, 9 Humph. (Tenn.) 460.

But in *McGuire v. Brown*, 41 Iowa 650, it was held that illegitimate children may inherit from their grandparents under provisions which make illegitimate children inherit from the mother, aided by others which give the right of representation to the heirs of the intestate's children.

In *Massachusetts*, the statute of 1828, ch. 139, provided that "every illegitimate child shall be considered as heir at law

of his mother, and inherit as such when she shall die intestate." But that statute, according to the opinions of the commissioners upon the Revised Statutes, and of Chancellor Kent, did not enable such a child to claim, as representing his mother, any part of the estate of her kindred, lineal or collateral, and an express clause to that effect was inserted in the Revised Statutes, Rev. Stat., ch. 61, § 2, and commissioners' note; 4 Kent's Com. 413, note. But, by statute of 1851, it was provided that every illegitimate child should be considered as heir of his mother and of any maternal ancestor, and that his issue might take by descent from such ancestor. Still, it was held that a bastard could not take from his mother's collateral kindred. *Pratt v. Atwood*, 108 Mass. 40. So, it was held that a bastard could not claim through his sister any part of her son's estate. *Haraden v. Lairabee*, 113 Mass. 430.

It was held in *Parks v. Kimes*, 100 Ind. 148, that, under *Indiana* Rev. Stat., § 2474, an illegitimate child, if its mother be dead, takes by inheritance from her any property or estate which she would if living, have taken by gift, devise or descent from any other person.

4. *Edwards v. Gaulding*, 38 Miss. 118; *Steckel's Appeal*, 64 Pa. St. 493. But see *In re Magee's Estate*, 63 Cal. 414.

The *Massachusetts* Revised Statutes, ch. 61, § 2, provided that an "illegitimate child shall be considered as an heir of his mother, and shall inherit her estate in like manner as if he had been born in lawful wedlock."

In *Curtis v. Hewins*, 11 Met. (Mass.) 294, this language received a construction so strict as to exclude a bastard's

an illegitimate child to inherit from the mother and does not provide that the mother shall inherit from her illegitimate child does not enable his mother, brothers, or sisters to inherit from him.¹

The right of a mother to succeed to the estate of her illegitimate child is now generally recognized.²

Statutes sometimes provide that illegitimate children may inherit or transmit an inheritance "on the part of the mother" in like manner as if they had been lawfully begotten of such mother, or, in one state, in like manner as if they had been born in lawful wedlock. Courts in their expositions of these expressions have questioned whether they establish the right of a mother to succeed to the estate of her illegitimate child.³ However that may be, the words "on the part of" the mother seem to have been regarded as signifying no more than "from the mother;" it has been held that a bastard cannot inherit from his mother's ancestors.⁴ There are *dicta*, it is true, to the effect that the object of the legislature seems to have been to remove the common-law impediment to the descent of the mother's property and of the property of her ancestors, either to her own illegitimate children or their legitimate offspring, and to give him capacity to inherit in the ascending line and through his mother.⁵ But even the courts which have entertained this view go no further; it has been said that although bastard children are, by virtue of the provisions under consideration, *quasi* legitimate in these respects, they are nevertheless bastards in all others, and, as such, have neither father, brothers, nor sisters. And that the language of these statutes is not sufficient to remove the common-law impediment to collateral inheritance by bastards, but leaves the illegitimate child subject to all the disabilities of bastardy as to his col-

children from the estate of his mother, when he died in her lifetime.

1. *Miller v. Stewart*, 8 Gill. (Md.) 128; *Doe v. Bates*, 6 Blackf. (Ind.) 533.

2. See *Stim. Am. Stat. L.*, § 3154; 3 *L. C. Am. L. R. P.* 438; *Neil's Appeal*, 92 Pa. St. 193; *Webb v. Webb*, 3 Head (Tenn.) 68.

In *Louisiana*, it was held that the mother of a natural child, deceased without posterity, is entitled to the inheritance, to the exclusion of natural brothers and sisters. *Nolasco v. Lurty*, 13 La. Ann. 100.

3. In the *Virginia* statute of 1785, it was provided that "bastards shall be capable of inheriting or transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother." This was copied *verbatim* into the *Kentucky* Statute of Descents, in 1796, and was the first innovation upon the common-law rule in that state.

See *Remington v. Lewis*, 8 B. Mon. (Ky.) 607. It has been held that a bastard is not, by a provision of this kind, rendered capable of transmitting an estate by descent to his mother or to his illegitimate brothers. *Bent v. St. Vrain*, 30 Mo. 268. But it seems to have been decided in *Stover v. Boswell*, 3 Dana (Ky.) 234, construing such statute, that the mother of a bastard might inherit from and transmit an inheritance to her bastard children, and that she inherited an estate conveyed to them.

4. *Jackson v. Jackson*, 78 Ky. 390; 39 Am. Rep. 246.

5. See *Stevenson v. Sullivan*, 5 Wheat. (U. S.) 207. There are some expressions in *Scroggin v. Allan*, 2 Dana (Ky.) 363; *Remington v. Lewis*, 8 B. Mon. (Ky.) 606, and *Allen v. Ramsey*, 1 Metc. (Ky.) 635, which seem to indicate that a bastard may inherit through his mother from her ancestors; "but," said the court in *Jackson v. Jack-*

lateral kindred, is the view taken by what seems to be the weight of authority. It has been held that these statutes do not make the bastard and legitimate children of the same mother heirs to each other.¹ And so it has been held that a bastard cannot, by

son, 78 Ky. 390; 39 Am. Rep. 246, "no such question was presented in any of the cases, and it seems unreasonable to suppose that the legislature intended to give to an illegitimate the right to inherit through his mother from the mother's ancestors and not from her collaterals; and in order to preserve harmony in the construction of the statute, we are compelled to hold that a bastard cannot inherit through his mother from her ancestors."

1. *Hawkins v. Jones*, 19 Ohio St. 22. In *Stevenson v. Sullivant*, 4 Wheat. (U. S.) 207, in which the *Virginia* statute was construed, it was held that bastard children could not inherit from legitimate children of the same mother.

It was held in *Scroggin v. Allan*, 2 Dana (Ky.) 363, that the legitimate children of a bastard's mother were not such brothers and sisters of the bastard as to prevent the estate which had descended from the bastard to his legitimate son from passing to the mother of the bastard's son dying under age and without issue, after the death of the bastard's mother. The consequence of which was, that the wife of the bastard took by descent from her infant son the estate descended to him from the father, though the fifth section of the statute interdicts the mother in such case, if there be any brother, sister, or other descendants, either of the infant decedent or of his father, from whom the estate had descended to him. It was said another consequence would be, that the mother would take the estate of her legitimate adult son, dying intestate and without father or issue, to the exclusion of her illegitimate children, though the fourth section of the act prescribes that if there be no father, the estate shall go to the mother, brothers, and sisters, and their descendants.

But, under the *Ohio* act of 1853, which provided that "if the mother be dead, the estate of such bastard shall descend to relatives on the part of the mother as if the intestate had been legitimate," it was held that legitimate children succeeded to the estate of their mother's illegitimate child. *Lewis v. Eutsler*, 4 Ohio 355. Though the decision in this case was based upon an express statute, so that there was no difficulty in arriv-

ing at this conclusion, Ranney, J., took occasion to criticize certain of the cases which have established the rule stated in the text. See also *Gibson v. McNeely*, 11 Ohio St. 131.

In an early *Vermont* case it was held that one illegitimate child can inherit from another illegitimate child of the same mother. *Burlington v. Fosby*, 6 Vt. 83. But in a later case it was held that illegitimate children do not inherit from legitimate children of the same mother, and the decision in the earlier case was questioned. The court, by Redfield, C. J., said: "The statute then (at the date of *Burlington v. Fosby*) in force, and the same in force in 1822, when this descent was cast, only provided that 'bastards shall be capable of inheriting and transmitting inheritance on the part of the mother.' This strictly extends no farther than to inheritance between the mother and the child. It was, by construction, in the case of *Burlington v. Fosby*, extended to create the relation of brother and sister between illegitimate children of the same mother. We are now asked to extend it so as to create the same relation between illegitimate children and legitimate children of the same mother. That is certainly going a very great way beyond the statute. It will enable the mother by illicit means to multiply at will the heirs to the property of her legitimate children, which may thus deprive them, in case of the decease of their brothers and sisters, of the enjoyment of the property derived from their own fathers. This is certainly something not contemplated by the court in the case of *Burlington v. Fosby*, and entirely beyond the purview of the statute. In fact, the decision in *Burlington v. Fosby* evidently goes beyond the statute. The statute probably never contemplated anything more than the present statute more specifically expresses, that illegitimate children should inherit from their mother and she from them." *Bacon v. McBride*, 32 Vt. 585.

In *Rhode Island*, it was held in a decision based upon the statutory provision under consideration, that where a bastard dies intestate leaving a bastard sister of the same mother, her estate will pass to that sister. *Briggs v.*

virtue of these provisions, inherit from collaterals from whom his mother, if living, would have inherited, nor they from him.¹

Statutes which give illegitimate children the right to inherit from the mother, and the mother from her illegitimate children, do not necessarily enable the illegitimate children of the same mother to inherit from each other.²

But it has been provided in some states that illegitimate children of the same mother may inherit or share in the distribution of each other's estate.³ It has been held that a provision of this kind does not establish the right of succession between the legitimate and illegitimate children of the same mother.⁴ But, in most of these states, this right of succession is expressly established as well between illegitimate as legitimate children of the same mother.⁵ And where a statute provided, in the case of a bastard dying intestate and without issue, that his brothers and

Greene, 10 R. I. 495, citing *Garland v. Harrison*, 8 Leigh (Va.) 368, and referring to the earlier of the above cited Vermont cases.

In *Garland v. Harrison*, 8 Leigh (Va.) 368, a case construing the Virginia statute, the whole court vigorously repudiated the soundness of the decision of the United States Supreme Court in the case of *Stevenson v. Sullivan*, 5 Wheat. (U. S.) 207, and held that, under that statute, where a bastard dies intestate, leaving no children or descendants, but leaving his mother living, and two bastard brothers by other fathers, his estate will pass to his mother and bastard brothers. But in such case the brothers will be considered as of the half blood only, and will each inherit only half as much as their mother. See also *Hepburn v. Dundas*, 13 Gratt. (Va.) 219; *Bennett v. Toler*, 15 Gratt. (Va.) 588; 78 Am. Dec. 638; *Butler v. Elyton Land Co.*, 84 Ala. 384.

1. *Gibson v. McNeely*, 11 Ohio St. 131. It has been held that the brothers and sisters of the mother cannot inherit from her illegitimate child. *Little v. Lake*, 8 Ohio 289; nor the illegitimate child from such brothers and sisters. *Allen v. Ramsey*, 1 Metc. (Ky.) 635; and that the son of an illegitimate daughter of the intestate's sister cannot inherit from the intestate or share in the distribution of his personal estate. *Berry v. Owens*, 5 Bush (Ky.) 452.

Kentucky Gen. St., ch. 31, § 5, providing that "bastards shall be capable of inheriting and transmitting an inheritance on the part of or to the mother," does not provide for the transmission of a bastard's estate through the mother,

and on to her collateral kindred. *Croan v. Phelps* (Ky. 1893), 21 S. W. Rep. 874.

2. *Woltemate's Appeal*, 86 Pa. St. 219.

3. See *Rogers v. Weller*, 5 Biss. (U. S.) 166, construing the Illinois statute of 1853.

4. In *Remington v. Lewis*, 8 B. Mon. (Ky.) 606, it was said that the Kentucky statute of 1840, providing "that the mother shall be, and is hereby rendered, capable to inherit and take by descent or distribution as heir or distributee of her bastard child; and brothers and sisters of the same mother, born out of wedlock, shall be capable to inherit and take by descent or distribution from each other, as though born in wedlock, and as brothers and sisters of the whole blood," permitted the mother to inherit from her illegitimate child, and her illegitimate children from each other; but, the question in that case being whether the legitimate brother of the bastard, or the latter's wife, should take, it was held that it did not operate to establish a right either in the illegitimate children to inherit from the legitimate, or in the legitimate to take from the illegitimate.

5. See *Webb v. Webb*, 3 Head (Tenn.) 68; *Riley v. Byrd*, 3 Head (Tenn.) 20. Upon the death of an illegitimate child, leaving a mother and her children living, some of whom were legitimate and others illegitimate, it was held that, under the North Carolina act of 1799, the estate of the deceased descended to the children, legitimate and otherwise, of his mother, in exclusion of her. *Flintham v. Holder*, 1 Dev. Eq. (N. Car.) 345.

A was the mother of a legitimate son B and illegitimate daughter C. C in-

sisters by the same mother should take his estate, it was held that this could not be limited to any particular description of brothers and sisters, but that it referred alike to those lawfully and unlawfully begotten.¹

A view seems to have been taken with regard to the effect of certain of these statutes (provisions declaring that bastards by the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other) in accordance with which they have the effect not only of establishing the right of succession between bastard brothers and sisters as if they were legitimate, but also between their legitimate descendants; at least, it has been held that the legitimate children of a bastard inherit from the bastard brother of their parent who dies after the death of such parent.²

termarried with D. C and D died, leaving a daughter E, to whom A devised her lands. E died, and it was held that the lands so devised descended to the brothers and sisters of her deceased father, to the exclusion of her mother's legitimate brother B. *Sawyer v. Sawyer*, 6 Ired. (N. Car.) 407. It was held in *Ehringhaus v. Cartwright*, 8 Ired. (N. Car.) 39, that, though bastards of the same mother were allowed to inherit from each other and legitimates might take with them as co-heirs, the bastard could not inherit from the legitimate children.

Where a statute (that of *North Carolina* is referred to: Bat. Rev., ch. 36, rule 11) declares that illegitimate children shall be deemed legitimate as between themselves and their representatives, and that their estates shall descend accordingly in the same manner as if they had been born in wedlock, and, in the case of death without issue, to such person as would inherit if all such children were born in wedlock, it is held that the estate of such illegitimate dying intestate without issue shall descend to his or her brothers and sisters born of the body of the same mother, and their representatives, whether legitimate or illegitimate. *Powers v. Kite*, 83 N. Car. 156, citing former *North Carolina* cases. See, to similar effect, *Southgate v. Annan*, 31 Md. 113; *In re Magee's Estate*, 63 Cal. 414; *McBryde v. Patterson*, 78 N. Car. 412.

1. It was held under the provision of the *Tennessee* statute that when a bastard having property dies intestate and without children, "his brothers and sisters shall take his estate." *Riley v. Byrd*, 3 Head (Tenn.) 20. But it was held in a later case that, while legiti-

mate children could inherit from the illegitimate, the latter could not inherit from the former. *Woodward v. Duncan*, 1 Coldw. (Tenn.) 562. To remedy this the act of 1866-67 was passed. See *Tennessee Code* (M. & V. 1884), § 3274; *Scoggins v. Barnes*, 8 Baxt. (Tenn.) 560.

2. An intestate had six illegitimate brothers and sisters by the same mother, of whom two only survived the intestate. The legitimate children of the deceased brothers and sisters sought to share, in the division of the estate, with the surviving brothers and sisters. The court said: "If the appellees in this case were bastards, undoubtedly they could not inherit from the brother of their deceased parents; but, being legitimate, why do they not succeed to all the inheritable rights of their parents? The latter and the intestate were all bastards by the same mother. This being so they could, by the express language of the statute, inherit from each other. It says: 'Bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other, as if such bastards were born in lawful wedlock of the same parents.' It is urged that the bastardy of the parents stopped the current of inheritable blood. While this is true at common law, yet the statute has declared that it shall flow on as between bastards of the same mother, and that they shall inherit from each other. It legitimates bastard children by the same mother—first, as to their mother; and, second, as to each other. It puts them upon the footing of legitimate brothers and sisters, as to each other; and the statute of descent applicable to legitimate brothers and sisters, therefore, applies, as between them and to their

In a number of states, illegitimates are put upon the same footing with legitimates as to the mother's side.¹

Statutes are occasionally met with by which a bastard may inherit from his father, if recognized or acknowledged by him.²

legitimate descendants. It follows from this, in our opinion, that the legitimate child of a deceased bastard may inherit from the bastard's mother, and that such a child succeeds to the parent's right of inheritance from a bastard brother or sister. The legitimate child of a bastard has all the rights of any child as to the parent; and the bastard parent can transmit to his or her legitimate child all the rights he or she has equally with any other parent. Among them is the right to inherit from a bastard brother or a bastard sister; and, if they are brothers and sisters in contemplation of law, it follows logically that the legitimate child of a deceased one should succeed to the inheritance that would have belonged to the parent were he or she alive." *Sutton v. Sutton*, 87 Ky. 216; 12 Am. St. Rep. 476.

A bastard died intestate and without issue, leaving a widow, and, as his next of kin, the daughter of a bastard half-brother, born of the same mother. It was held that the widow was entitled to one-third of the personal estate, and the daughter of his bastard brother to the residue. *Coor v. Starling*, 1 Jones Eq. (N. Car.) 243.

Under the *Illinois* statute, which provides that an illegitimate child shall be heir of its mother and any maternal ancestor, and of any person from whom its mother might have inherited, if living, and that the lawful issue of an illegitimate person shall represent such person, and take by descent any estate which the parent would have taken if living, it is held that the lawful issue of a deceased illegitimate son may inherit the estate of a legitimate son of the same mother, the legitimate son having died subsequent to the death of the mother and the illegitimate son. *Bales v. Elder*, 118 Ill. 436; *Jenkins v. Drane*, 121 Ill. 217.

Representation.—In *Houston v. Davidson*, 45 Ga. 574, the *Georgia* Revised Code, § 2488, providing that representation among collaterals shall extend to children and grandchildren of brothers and sisters, was construed, with the act of 1816, permitting illegitimate children of the same mother to share equally with their brothers and sisters, to extend also to distribution among

brothers and sisters of illegitimates and their representatives. And under the *North Carolina* statutes (Bat. Rev., ch. 36, rule 11) a representation of the brothers and sisters was permitted. *McBryde v. Patterson*, 78 N. Car. 412; *Powers v. Kite*, 33 N. Car. 156. The law still remains the same. (Code 1883, § 1281, rules 9, 10); 3 L. C. Am. L. R. P. 435.

1. *Stim. Am. Stat. L.*, § 3154; 3 L. C. Am. L. R. P. 438. And see *Briggs v. Greene*, 10 R. I. 495; *Burlington v. Fosby*, 6 Vt. 83; *Garland v. Harrison*, 8 Leigh (Va.) 368; *Bales v. Elder*, 118 Ill. 436; *Jenkins v. Drane*, 121 Ill. 217.

Where a statute provided that illegitimate children should be capable of inheriting and transmitting an inheritance on the part of the mother "in like manner as if they had been legitimate of their mother," it was said that a bastard may inherit and transmit an inheritance from and to any and all collateral relations on the mother's side who are of her blood. *Greg'ev v. Jackson*, 38 Ark. 487.

2. In *Louisiana*, an acknowledged bastard may take from his father who leaves no descendants, ascendants, or collateral relatives (Code, § 918); but if unacknowledged he cannot so take, although his paternity may have been judicially ascertained. *Dupre v. Caruthers*, 6 La. Ann. 156.

In *California*, a bastard is made the heir of the person who shall, in the presence of a witness, declare in writing that he is his father. *California*, *Deering's Civ. Code*, § 1387. And by the *Iowa* Rev. Stats., 1888, § 2466, and the *Kansas* Gen. Stats., 1889, § 2614, a bastard, acknowledged by his father, or whose paternity has been proved in the lifetime of the father, may take as his heir. If the acknowledgment be mutual the father may take from the son; and in *Iowa* he will have the same rights as the mother of an illegitimate child. (Rev. Sts., § 2467); but in *Kansas* the mother and her issue will be preferred. *Gen. Stats.*, §§ 2615-16.

It was held in *Willoughby v. Motley*, 83 Ky. 297, that an agreement by the father of a bastard with the mother to make the bastard his heir does not enable the child, though brought up by the father and acknowledged as his

But it has been held that such recognition does not make the bastard legitimate, but merely gives to him the quality of inheritor.¹ The husband or wife of a deceased bastard is, under the statutes of the states, generally allowed to claim inheritance from the deceased.²

Bastards may be made legitimate by act of legislature.³ This

child, to inherit the father's estate, where the provisions of the *Kentucky* General Statutes, ch. 3, § 17, are not complied with.

In *California*, the requisite declaration must be by a writing executed for the express purpose of changing the status of the child; thus, where in a will the testator simply spoke of the illegitimate as "my daughter," it was held insufficient to make her an heir. *Pina v. Peck*, 31 Cal. 359. And so a contract for nursing a child calling her "the female child of Samuel Sandford," and signed by the father and two other persons, was held not a sufficient declaration to confer heirship. *Sandford's Estate*, 4 Cal. 12. In *Iowa*, though the recognition must be in writing or notorious, the writing need not, as in *California*, be formal; accordingly, a sufficient acknowledgment has been found in a series of letters written by a father to and about his natural son at school. *Crane v. Crane*, 31 Iowa 296.

In *Indiana*, if a man dies without legitimate heirs resident in the *United States*, or children capable of inheritance without the *United States*, his illegitimate children who have been acknowledged by him in his lifetime may take. *Indiana* Rev. Sts., 1881, § 2475. It has been held that under this statute the word "heirs" is not to be taken in the sense of lineal heirs, and brother and sisters resident in the *United States* will exclude an illegitimate child from the inheritance. *Borroughs v. Adams*, 78 Ind. 160.

1. *Brown v. Belmarde*, 3 Kan. 41.

2. *Brooks v. Francis*, 3 MacArthur (D. C.) 109; *Scoggins v. Barnes*, 8 Baxt. (Tenn.) 560; *Doe v. Bates*, 6 Blackf. (Ind.) 533; *Keeler v. Dawson*, 73 Mich. 600; *Hawkins v. Jones*, 19 Ohio St. 22; *Southgate v. Annan*, 31 Md. 113; *Succession of Briscoe*, 2 La. Ann. 268; *Coor v. Starling*, 1 Jones Eq. (N. Car.) 243; but under a later *North Carolina* statute it was held that upon the death of a bastard son, intestate, married, and without issue, a legitimate half-sister, born of the body of the same mother, inherits his real estate to the ex-

clusion of the widow of such son. *Powers v. Kite*, 83 N. Car. 156.

Under section 2 of the *Illinois* act of 1872, relating to descents, providing that the estate of an illegitimate intestate leaving no lineal descendants should go to the widow, and section 78, declaring that the widow of a testator may, by renouncing the provisions of the will, "be allowed the same property" as if he had died intestate, it was held that where the widow of an illegitimate person waives the provisions of the will, she takes the whole estate. *Evans v. Price*, 118 Ill. 593.

3. The legislative power may legitimate a bastard child either by general or by special law. 1 Bl. Com. 459, *citing* 4 Inst. 36. In *Killam v. Killam*, 39 Pa. St. 120, the court, by Woodward, J., incidentally remarks that "an estate that has already descended to the legal heir cannot be divested and given to the bastard by a subsequent act of legitimation, but that the taint of his blood may be cured, for purposes of future inheritance, by the healing touch of the legislature, is not to be doubted." And in *McGunnigle v. McKee*, 77 Pa. St. 81; 18 Am. Rep. 428, the court, by Mercur, J., said: "The legislative power to legitimate a bastard child has long been recognized both in *England* and in this country. Commencing with the case of the three sons and a daughter of John of Gaunt, begotten of Catharine Swynford, a governess of his children, legitimated by act of Parliament in the 14th century, history records many other acts of legitimation in the two succeeding centuries. The history of our own state has been prolific with special legislation legitimating bastard children. As our constitution is silent on the subject, the legislative power so to enact is most ample. *Sharpless v. Mayor*, etc., of Philadelphia, 21 Pa. St. 147; 59 Am. Dec. 759; *Killam v. Killam*, 39 Pa. St. 120; *Miller's Appeal*, 52 Pa. St. 113."

Retroactive Statutes of Legitimation.—Statutes legitimating bastards may be retrospective and retroactive. It was held in *Virginia*, where an act was passed in 1785 to take effect January 1,

is often accomplished in special cases by private act.¹ And it is often done by acts providing a general way of legitimation, such as, that the subsequent marriage of the parents of a bastard and his recognition by them shall render him legitimate.² In some states, the issue of marriages deemed null in law, or dissolved by a court, are nevertheless declared legitimate.³ Such statutes are

1787, rendering legitimate children born out of wedlock whose parents afterwards intermarried, that an illegitimate child born in 1775, whose parents intermarried and acknowledged the child in 1776, was legitimated by this act. *Sleigh v. Strider*, 5 Call (Va.) 439; *Garland v. Harrison*, 8 Leigh (Va.) 368, disagreeing with the view taken of this act in *Stevenson v. Sullivan*, 5 Wheat. (U. S.) 207. But while an act of this kind may be retroactive, it cannot take effect to divest vested rights. Where the descent has been cast upon the legal heir it will not be divested by the legitimation of a son of the intestate. *Killam v. Killam*, 39 Pa. St. 120; *McGunnigle v. McKee*, 77 Pa. St. 81; 18 Am. Rep. 428. So, where a man dies intestate unmarried and without leaving lawful issue, but leaving collateral heirs and an illegitimate son, who is legitimated by an act of the legislature giving to him the benefits and rights of a child born in lawful wedlock, as if he has been born in lawful wedlock, which act, however, was not approved until the day after the decease of the intestate, such act does not divest the right of the commonwealth to collateral inheritance tax on the whole estate. *Galbraith v. Com.*, 14 Pa. St. 258.

1. Statutes to make bastard children legitimate are frequently passed on the application of the father. And when not passed on his application his assent is to be presumed. *Beall v. Beall*, 8 Ga. 210; 2 Bish. Law of Married Women, § 35.

The averment of the parentage of a child in a legislative act legitimatizing it, is *prima facie* evidence of its truthfulness. *McGunnigle v. McKee*, 77 Pa. St. 81; 18 Am. Rep. 428.

A statute reciting that A was the illegitimate child of B. Perry, changed his name to Perry, and declared him "legitimated and made capable to inherit, etc., in as full and ample a manner, etc., as if born in lawful wedlock." It was held that, by necessary implication, such child was legitimated as the child of B. Perry. *Perry v. Newsom*, 1 Ired. Eq. (N. Car.) 28.

It was held that an act of the legislature changing the name of an illegitimate child and declaring her legitimate and capable of inheriting, and of like privileges in law as if she had been born in lawful wedlock, inasmuch as it did not declare her the legitimate heir of anybody, had only the effect of changing the name of the illegitimate. *Edmonson v. Dyson*, 7 Ga. 512.

2. See 3 Washb. R. P. 437; 3 L. C. Am. L. R. P. 438; *BASTARDY*, vol. 2, p. 129, n. 4.

In *Virginia* it was held that a bastard child born before January 1, 1787, whose parents intermarried also before that day, was entitled to an equal distribution with the children born after the marriage, of the father's estate not disposed of by his will, the father having died in 1799, and in his will recognized the child as his own, "though born before wedlock." *Rice v. Eford*, 3 Hen. & M. (Va.) 225.

Only a valid marriage can thus legitimate an earlier-born child. It was held that where a person obtained a decree of divorce which was invalid, and then married the mother of an illegitimate child which he recognized as his own, such child was not thereby legitimated. *Adams v. Adams*, 154 Mass. 290, citing *Loring v. Thorndike*, 5 Allen (Mass.) 257; *Greenhow v. James*, 80 Va. 636; 56 Am. Rep. 603.

It has been held that statutes legitimating bastard children by the marriage of their parents do not apply to the fruits of an adulterous intercourse. *Sams v. Sams*, 85 Ky. 396.

It was held in *Bailey v. Boyd*, 59 Ind. 292, that if a man marries a woman, although he then denies that a child with which she is pregnant is his own, as charged by her, and afterwards cohabits with her, the child is his legitimate heir. See criticism of the decision in this case in 3 L. C. Am. L. R. P. 441.

3. See 3 Washb. R. P. 438-9; 3 L. C. Am. L. R. P. 441; *BASTARDY*, vol. 2, p. 142, n. 2; *McCalla v. Bane*, 45 Fed. Rep. 828; *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.) 460; 22 Am. Dec. 41; *Adams v. Adams*, 154 Mass. 290; *Linecum v.*

to be confined to their proper purpose—namely, the legitimation of the bastard so far as to render him capable of inheritance; they will not be carried further.¹ In general, where a statute declares a bastard to be legitimate, or that he shall inherit as if legitimate, the legitimacy thus imparted is not treated as a limited or restricted legitimacy; the legitimation has been considered to have the effect of putting the legitimated in the status of one born in lawful wedlock.²

Linecum, 3 Mo. 441; *Buchanan v. Harvey*, 35 Mo. 276; *Hartwell v. Jackson*, 7 Tex. 576; *Carroll v. Carroll*, 20 Tex. 731. Thus, the issue of the marriage of a woman who married a second time while the first marriage was in force has been held legitimate. *Stones v. Keeling*, 5 Call (Va.) 143.

In *Louisiana*, the legitimation of the offspring of null marriages appears to be confined to cases wherein the parents, or one of them, acts in good faith, as where a woman ignorantly weds a married man. *Louisiana Code*, arts 119, 120; *Abston v. Abston*, 15 La. Ann. 137. It was held that a child begotten of a mother who had married in good faith, and before any doubt had arisen in her mind as to the existence of any legal impediment to her marriage, is entitled to all the rights of a legitimate heir of the mother. *Harrington v. Barfield*, 30 La. Ann. 1297. To the same effect see *Patton v. Philadelphia*, etc., 1 La. Ann. 98.

1. *Physick's Estate*, 2 Brew. (Pa.) 179.

2. *McCalla v. Bane*, 45 Fed. Rep. 828; *Dyer v. Brannock*, 66 Mo. 391; 27 Am. Rep. 359; *Pratt v. Pratt*, 5 Mo. App. 539; *McKamie v. Baskerville*, 86 Tenn. 459. And see *Graham v. Bennet*, 2 Cal. 503; *Williams v. Williams*, 11 Lea (Tenn.) 652.

An ante-nuptial child becomes legitimated by the marriage of its parents, and, surviving its father, is entitled equally with its surviving mother, brothers and sisters, to inherit the estate of a deceased intestate uncle. *Jackson v. Moore*, 8 Dana (Ky.) 170.

In 1853 the legislature enacted "that George W. K., son, and Emily M., daughter of George K., shall have and enjoy all the rights and privileges, benefits and advantages of children born in lawful wedlock, and shall be able and capable in law to inherit and transmit any estate whatsoever as fully and completely, to all intents and purposes, as if they had been born in lawful wedlock." It was judicially ascertained that

George and Emily were the children of the same father and mother, and that the parents survived them, Emily dying in 1860, leaving issue, and George in 1859, without issue, intestate, and seised in fee of a tract of land, which was afterwards sold by the mother. In an ejectment, brought by the father against the purchaser, it was held that, by the act of 1853, George, the son, was legitimate when he died in 1859, and that he could transmit, and Emily, the daughter, could inherit, under the intestate laws, land conveyed to him by his father, in consideration of love and affection, as if no defect had existed. *Killam v. Killam*, 39 Pa. St. 120.

A bastard married and died, leaving a legitimate child, and the parents of the bastard afterwards married. The father of the bastard, before the father's marriage, in the lifetime of the bastard, recognized her as his child, and also after his marriage, which was after the death of the bastard. It was held that the child of the bastard might inherit through his mother from her father. *Ash v. Way*, 2 Gratt. (Va.) 203.

But, where the legislature provided by special enactment that A. should be heir at law of S., "in as full and perfect a manner as if she had been the daughter of S., born in lawful wedlock," and S. died before A., it was held that this act gave A. no right to any share in the estate of a brother of S., who died intestate after S., and from whom S., if she had been living, would have inherited. *Moore v. Moore*, 35 Vt. 98.

The adoption of an illegitimate child by the putative father, pursuant to *Vermont* General Statutes, ch. 56, § 6, which provided that "the child shall thereafter be considered, as respects such father, legitimate and capable of inheriting; and the same rights, duties, and obligations shall exist between such father and child as if the child were born in lawful wedlock," was held not to render such child capable of inheriting as the legal representative of such father, but only

IX. SUCCESSION BY AND FROM ADOPTED CHILDREN.—Though the adoption of children is unknown to the common law,¹ the civil law recognized the practice.² And it has, to a certain extent, been thence adopted into the law of the *United States*. Statutes which prescribe the formalities and declare the results of adoption have been enacted in a number of the states.³

The general effect of these statutes is that the adopted child becomes entitled to succeed to the estate of the adopting parent in the same manner as if it had been a child of the blood of such parent.⁴ And it has been held that if an adopted child dies before its adopting parents, its children will take by right of representation in the same manner as if it had been a natural child.⁵ But the adopted child becomes heir to the adopting parent only; if the law permits adoption by the husband without the assent of his wife, the child so adopted becomes the heir of the husband alone, and sustains no relation to and is not heir of the wife.⁶ And, indeed, the general effect of the decisions is to deny the right of the adopted child to succeed to the estate of any mem-

legitimated it as respects the father. *Safford v. Houghton*, 48 Vt. 236.

The father of an illegitimate child procured the passage of an act by the legislature to have his name changed; which act also declared "that the child shall in all respects, both in law and equity, be upon an equal footing with the other children of the father." It was held that whatever might be the effect of this law, in enabling the illegitimate child to inherit from his father, the latter could not, nor could the legitimate brothers and sisters of the half blood inherit from him. *M'Cormick v. Cantrell*, 7 Yerg. (Tenn.) 615.

Where an illegitimate child had been legitimated in accordance with the requirements of a statute which declared that a child so legitimated should "inherit from his lineal and collateral kindred, and they from him," and had died leaving children, it was held that such children of the illegitimate inherited from their grandfather (the father of the deceased illegitimate) such portion as their mother would have inherited from his estate. *Brewer v. Hamor*, 83 Me. 251.

By special statute, M. B.'s name was changed to M. D., and he was made capable of "inheriting," etc., as if he were born the son of J. D.; but he died leaving children, before J. D. died. It was held that his children took as his representatives in the distribution of J. D.'s property. *Pace v. Klink*, 51 Ga. 220.

1. *Brown Dom. Rel.* 71; *Sch. Dom. Rel.*, § 232.

2. See 3 L. C. Am. L. R. P. 446..

3. 3 L. C. Am. L. R. P. 446; *Stim. Am. Stat. L.*, §§ 6640-6651.

4. *Barnes v. Allen*, 25 Ind. 222; *Krug v. Davis*, 87 Ind. 590. See *Isenhour v. Isenhour*, 52 Ind. 328; *Schafer v. Eneu*, 54 Pa. St. 304.

Adopted Children.—In *Fosburg v. Rogers* (Mo. 1893), 21 S. W. Rep. 82, it was held that an adopted child, at whose adoption all the formalities prescribed by a *Missouri* statute had been followed, was capable of inheriting from his adoptive parents.

An *Indiana* statute provides that if an intestate who had married twice has no children by his second wife, but leaves children by his first wife, such children shall inherit his realty subject to a life estate in the widow. It was held that a child adopted by a decedent and his first wife was within this statute and took the realty subject to a life estate of the second wife. *Markover v. Krauss*, 132 Ind. 294.

So in *Massachusetts*, where it was provided that an adopted child shall inherit from his adopting parents as if born to such parents in lawful wedlock, it was held that an adopted child was "issue" within the meaning of a statute providing that when a husband dies intestate and "leaves no issue living," his widow shall receive a certain portion of his land. *Buckley v. Frazier*, 153 Mass. 525.

5. *Pace v. Klink*, 51 Ga. 220; *contra*, *Sunderland's Estate*, 60 Iowa 732.

6. *Barnhizer v. Ferrell*, 47 Ind. 335. See *Barnes v. Allen*, 25 Ind. 222.

ber of the adopting family other than the adopting parents. So, it has been held that an adopted child does not succeed to the estate of the adopting parents' ancestors,¹ nor to the estate of children born to the adopting parents.²

It has been held that though the child acquires certain additional rights because of the adoption, there is nothing in the act of adoption which takes away other existing rights, and, on becoming entitled to inherit from its adopting parents, the adopted child does not thereby lose its right to inherit from its natural parents.³

It seems that though adopted children become the heirs of the persons adopting them, the adopting parents do not become entitled to succeed to the estate of the adopted child; it has been held that, upon the death of an adopted child unmarried and without descendants, its estate, in the absence of statutes to the contrary, vests in its natural parents to the exclusion of its adopting parents,⁴ even though the estate may have been derived from the latter.⁵

X. WHAT LAW GOVERNS.—Although there was formerly much conflict of opinion concerning the question as to what law governs the devolution of movables, the doctrine that, at common law, the succession to personal property is governed exclusively by the law of the actual domicile of the intestate at the time of his death is now well established.⁶ But, it is in the power of any state to enact statutes which change the law in this respect; for

1. *Sunderland's Estate*, 60 Iowa 732; *Meader v. Archer*, 65 N. H. 214.

2. *Keegan v. Geraghty*, 101 Ill. 26; *Helms v. Elliott*, 89 Tenn. 446.

3. *Wagner v. Varner*, 50 Iowa 532.

4. *Krug v. Davis*, 87 Ind. 590; *Lathrop v. Young*, 25 Ohio St. 451; *Com. v. Powel* (Pa.), 20 Cent. L. J. 343; *Upson v. Noble*, 35 Ohio St. 655; *Hole v. Robbins*, 53 Wis. 514.

5. *Barnhizel v. Ferrell*, 47 Ind. 335; *Reinders v. Koppelman*, 68 Mo. 482; 30 Am. Rep. 802.

6. *Whart. Confli. L.*, § 561; *Story Confli. L.*, p. 677; *Lynch v. Paraguay*, L. R., 2 P. & M. 268; *Armstrong v. Lear*, 8 Pet. (U. S.) 52; *Price v. Tally*, 10 Ala. 946; *Brock's Administrator*, 51 Ala. 85; *Gibson v. Dowell*, 42 Ark. 164; *Hewitt v. Cox*, 55 Ark. 225; *Paschall v. Hailman*, 9 Ill. 285; *Irving v. M'Lean*, 4 Blackf. (Ind.) 52; *Thieband v. Sebastian*, 10 Ind. 454; *Townes v. Durbin*, 3 Metc. (Ky.) 352; 77 Am. Dec. 176; *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191; 3 Am. Dec. 535; *Noonan v. Kemp*, 34 Md. 73; 6 Am. Rep. 307; *Brewer v. Cox* (Md. 1891), 18 Atl. Rep. 864; *Harvey v. Richards*, 1 Mason (U. S.) 381;

Garland v. Rowan, 2 Smed. & M. (Miss.) 617; *Ennis v. Smith*, 14 How. (U. S.) 400; *Sherwood v. Wooster*, 11 Paige (N. Y.) 441; *Mercure's Case*, 1 Tuck. (N. Y.) 288; *In re Braithwaite*, 19 Abb. N. Cas. (N. Y.) 113; *Williamson v. Smart*, Cam. & N. (N. Car.) 146; *Moye v. May*, 8 Ired. Eq. (N. Car.) 131; *Thurman v. Shelton*, 10 Yerg. (Tenn.) 383.

A resident of *Indiana* died, leaving heirs of the whole blood and the heirs of a deceased half-sister. The intestate owned property in *Indiana* and in *Mississippi*, and an administrator was appointed in each of the states. By the laws of the latter state, heirs of the half blood did not inherit. Three hundred dollars remained in the hands of the administrator in *Indiana*, and \$3,277 in the hands of the administrator in *Mississippi*. Under an order of the court of the latter state, to which the heirs were not parties, the administrator there distributed to the brothers and sisters of the whole blood the sum in his hands, which amounted to over \$600 to each. The heirs of the half blood, in their petition, claimed the whole amount in the

every state has a right to prescribe the rules governing the succession to all personal estate within its limits, and no other state can change the rules of such succession.¹

With regard to real estate, or immovable property, a very different principle prevails at common law. The law of the domicile of the owner cannot affect the devolution of real property; its descent is exclusively governed by the law of the country within which it is actually situate.² The reason of the rule includes

hands of the administrator in *Indiana* for distribution, but the court below refused to grant their petition. It was said that the *Mississippi* court should have been governed by the *Indiana* law in making the distribution, and held that there was no objection to allowing the petitioners the \$300 in the hands of the administrator in *Indiana*. *McClerry v. Matson*, 2 Ind. 79.

1. *Jones v. Marable*, 6 Humph. (Tenn.) 116; *McCollum v. Smith*, Meigs (Tenn.) 342; 33 Am. Dec. 147; *Kneeland v. Ensley*, Meigs (Tenn.) 620; 33 Am. Dec. 168. When the law of the domicile is repugnant to the policy of the state in which it is sought to be enforced, the rule that the former governs the distribution of the personalty of deceased persons does not apply, whether it be a law of contracts or of property. *Mahorner v. Hooe*, 9 Smed. & M. (Miss.) 247.

In *Mississippi*, the statute (Code 1880, § 1270) provides that not only real estate but "all personal property situated in this state shall descend and be distributed according to the laws of this state." It was questioned in *Speed v. Kelly*, 59 Miss. 47, whether the statute would include as "personal property situated in this state," a debt the evidence of which was in possession of the intestate when he died at his domicile in another state. But the difficulty of the court arose from a doubt as to the true construction of the act and not as to the right of the legislature to enact a law of such nature. The court, by Cooper, J., said: "... we entertain no doubt of the power of the legislature to overturn the fiction of law that personal property has its *situs* at the domicile of the owner, and to make it distributable by the laws of this state; that the character of the property in no manner impairs the power; that the locality given to choses in action, by the fiction that it follows the person of the owner, is as susceptible to be changed and fixed at the place of the residence of the debtor for the purposes

of distribution, as the fiction that tangible property is governed by the laws of the domicile may be changed and fixed at the place of the actual *situs* of the property. The fiction is not a rule of international law, but a mere principle, which produces uniformity of judicial action, and is applied by the courts through comity, but which no court would enforce against either a positive statute or the public policy of its state." It was held that, under this statute money in a bank in the State of *Mississippi*, and a note secured by real estate there, are not included, if the deposit certificate and book and the note are found at the foreign domicile of the intestate, who has no creditors, heirs, or property in this state, and the domiciliary court orders distribution. But in *Jahler v. Rascoe*, 62 Miss. 699, it was held that choses in action held by an agent in this state for an owner domiciled in another state, taken in the course of business of lending money in this state, must be distributed under its laws.

2. Wharton Conflict of Laws, § 560; Storv Conflict of Laws, § 483; *Coppin v. Coppin*, 2 P. Wms. 295; *Doe v. Vardill*, 5 B. & C. 451; 9 Bligh R. 479, note; 1 Rob. R. 627; 11 E. C. L. 266; *Bunbury v. Bunbury*, 3 Jur. 644; 1 Beav. 318; *U. S. v. Crosby*, 7 Cranch (U. S.) 115; *Kerr v. Moon*, 9 Wheat. (U. S.) 565; *McCormick v. Sullivant*, 10 Wheat. (U. S.) 192; *Darby v. Mayer*, 10 Wheat. (U. S.) 465; *Lingen v. Lingen*, 45 Ala. 410; *In re Baubichon's Estate*, 49 Cal. 19; *Lucas v. Tucker*, 17 Ind. 41; *McNitt v. Logan*, Litt. Sel. Cas. (Ky.) 60; *Dunbar v. Dunbar*, 5 La. Ann. 159; *Potter v. Titcomb*, 22 Me. 300; *Brewer v. Cox* (Md. 1889), 18 Atl. Rep. 864; *Cutter v. Davenport*, 1 Pick. (Mass.) 81; 11 Am. Dec. 149; *Applegate v. Smith*, 31 Mo. 166; *Smith v. Kelly*, 23 Miss. 167; 55 Am. Dec. 87; *Hosford v. Nichols*, 1 Paige (N. Y.) 220; *Stent v. McLeod*, 2 McCord Eq. (S. Car.) 354; *Jones v. Marable*, 6 Humph. (Tenn.) 116; *Holman v. Hopkins*, 27 Tex. 38.

leasehold and chattel interests in land,¹ servitudes and easements, and other charges on lands, as mortgages and rents and trust estates; all of these are deemed to be, in the sense of the law, immovables, and governed by the *lex rei sitæ*.² And, as to what constitutes immovables or real property, resort must also be had to the *lex loci rei sitæ*.³

Since, then, the *lex rei sitæ* governs the descent of real property, and the *lex domicilii* the distribution of personal property, it is to these laws, respectively, that we must look in order to ascertain the persons who are to take and the shares to which they shall succeed, whether the question respects primogeniture, the right of representation, the proximity of blood, etc., and, in some states, legitimacy. It has been held that there cannot be such extra-territorial effect given to the statutes of legitimation in one state as to enable a person legitimated thereby to take land by inheritance in another where the law would not hold him legitimate if he were a citizen of or resident in that state.⁴ But other decisions are to the effect that when an illegitimate child has been made legitimate by any mode sanctioned by the laws of the state or country in which it and its parents at the time reside, its status of legitimacy becomes thereupon established, and entitles it everywhere to inherit as the legitimate offspring of such parents.⁵ No one is heir to the living, and no one has a vested right to be the future heir of one living. And, since the right of succession does not become a vested right until the death of the ancestor, the heir presumptive has no other reason to rely upon succeeding to the property than the promise held out by the stat-

1. Story Conf. L., § 447, citing Freke v. Carbery, L. R., 16 Eq. 461; Goods of Gentili, 9 Ir. Rep. Eq. 541.

2. Story Conf. L., § 447; Knox v. Jones, 47 N. Y. 389.

3. Chapman v. Robertson, 6 Paige (N. Y.) 627; 31 Am. Dec. 264.

4. In a well-considered English case, Doe v. Vardill, 5 B. & C. 438; 6 Bing. N. Cas. 385; 9 Bligh N. S. 32; 11 E. C. L. 266; 37 E. C. L. 421; *sub nom.* Birtwhistle v. Vardill, 2 Cl. & F. 571; 7 Cl. & F. 895, it was held that a person born out of wedlock and legitimated by the Scotch law by the subsequent marriage of his parents, cannot inherit land in *England*. In Smith v. Derr, 34 Pa. St. 126; 75 Am. Dec. 641, following the above case, it was decided that a child born out of wedlock and legitimated by the law of *Tennessee*, was not thereby rendered capable of inheriting land in *Pennsylvania*. The court, by Lowrie, C. J., said: "The fact that inheritable capacity is granted by law elsewhere cannot change our law of descents. A capacity in *Tennessee* does not prove capacity here." These cases were fol-

lowed in *Lingen v. Lingen*, 45 Ala. 410; *Stoltz v. Doebring*, 112 Ill. 234; *Barnum v. Barnum*, 42 Md. 251.

5. In *Scott v. Key*, 11 La. Ann. 232, a natural son who had been legitimated by an act of the *Arkansas* legislature was held legitimate in *Louisiana*. And see *Ross v. Ross*, 129 Mass. 243; 37 Am. Rep. 321; judgment of Lord Justice James in *Goodman's Trust*, L. R., 17 Ch. Div. 266. It has been held that if an illegitimate child is once legitimated by the subsequent marriage of the parents in a state whose laws attach such effect to such marriage, the legitimacy follows the child everywhere, and entitles him to the right of inheritance. *Miller v. Miller*, 91 N. Y. 315; 43 Am. Rep. 669; *Dayton v. Adkisson*, 45 N. J. Eq. 603.

The case of *Smith v. Kelly*, 23 Miss. 167; 55 Am. Dec. 87, might at first sight seem to recognize the same principle as do the above cases; but, as has been pointed out by a discriminating writer, it will, upon examination, be seen to rest upon a different ground. It was there held "that a resident of *South*

ute of descents and distributions. But this promise is no more than a declaration of the legislature as to its present view as regards the proper order of succession—a view which may at any time change, and then the promise may properly be withdrawn and a new course of succession declared.¹ An anticipatory interest in property cannot be said to be vested in any person so long as the owner of the interest in possession has full power by virtue of his ownership to cut off the expectant right by grant or devise.² But after property has once vested under the laws of succession, it cannot be divested by any change in those laws.³ Since, then, the rights of heirs are considered as arising at the moment of the death of the ancestor, those laws which are in force at that time must control.⁴ So, the right of illegitimate children to inherit from their parent is to be governed by the statutes in force at the time of the death of the parent.⁵

Carolina, born out of wedlock, whose parents had afterwards married and had acknowledged him, could not inherit in *Mississippi*, because under the law of *South Carolina*, such marriage and acknowledgment did not work legitimation, though they could have done so in *Mississippi*. The reason and propriety of this decision are plain—a legitimating statute can act only on citizens of the legitimating power, and the *South Carolinian* was never subject to the *Mississippi* legislation, hence he never became legitimate anywhere. See note, 3 L. C. Am. L. R. P. 445, by Mr. Henry Budd.

1. Cooley's Const. L. 359; Gregley v. Jackson, 38 Ark. 487; Herrold v. Reen, 58 Cal. 443; Marshall v. King, 24 Miss. 85; Hall v. Hall, 13 Hun (N. Y.) 306; Watson v. Thompson, 12 R. I. 466; Lee v. Smith, 18 Tex. 141.

2. *In re Lawrence*, 1 Redf. (N. Y.) 310.

3. Brenham v. Story, 39 Cal. 179; Rock Hill College v. Jones, 47 Md. 1; Hardy v. Gage (N. H. 1891), 22 Atl. Rep. 557; Hosac v. Rogers, 6 Paige (N. Y.) 415; Norman v. Heist, 5 W. & S. (Pa.) 171; 40 Am. Dec. 493. See Lynch v. Paraguay, L. R., 2 P. & M. 268. So it was held that the *North Carolina* statute of 1823, declaring that "no inheritance shall descend to any person as heir of the person last seised, unless such person shall be in life at the death of the person last seised, or within ten months" afterwards, applies only where the ancestor has died since the passage of the act. Rutherford v. Green, 2 Fred. Eq. (N. Car.) 121.

4. Lynch v. Paraguay, L. R., 2 P. & M. 268; Rich v. Tubbs, 41 Cal. 34; Betts

v. Bond, 1 Ill. 287; Noel v. Ewing, 9 Ind. 37; Brown v. Critchell, 110 Ind. 31; McGaughey v. Henry, 15 B. Mon. (Ky.) 383; White v. White, 2 Metc. (Ky.) 185; Parkman v. McCarthy, 149 Mass. 502; Miller v. Miller, 10 Met. (Mass.) 393; Marshall v. King, 24 Miss. 85; Lee v. Smith, 18 Tex. 141; Lindsay v. Freeman, 83 Tex. 259. In construing a special act of the *Texas* legislature, passed in 1856, granting land certificates to "the heirs" of one who was killed in the Goliad massacre in 1836, it was held that the word "heirs" in the special act referred to the person or persons entitled to the estate under the law of descents in force at the date of the special act. Goodrich v. O'Connor, 52 Tex. 375.

But in *Armstrong v. Armstrong*, 1 Oregon 207; 75 Am. Dec. 555, it was held that a law passed after the death of an intestate, but before distribution of his personal estate, controlled such distribution.

Ancestral Estates.—It seems that the question as to whether an estate shall descend as ancestral or as a new acquisition is to be determined by the law in force at the time when the intestate became entitled to the estate in question. Where a husband devised land to his wife, and, upon the wife's death, the question arose as to whether the estate should descend as ancestral or acquired, it was held that the character in which the wife took the estate from her husband was to be determined by the act in force at his decease, and not by the act in force at the death of the wife, under which the descent from her is to be cast. Birney v. Wilson, 11 Ohio St. 426.

5. Brewer v. Hamor, 83 Me. 251; Carroll v. Carroll, 20 Tex. 731.

XI. HOW HEIRSHIP ESTABLISHED.—In order to establish the right of heirship it is first necessary to show that the ancestor is dead.¹ But, since testacy is the affirmative and intestacy the negative of a fact, it will, upon proof of the ancestor's death, be presumed that he died intestate, and that the title to his land has passed to his heirs by descent, in the absence of proof to the contrary.² It is, however, necessary for one claiming as heir not only to show his relationship with the deceased,³ but also that no other rela-

1. *Hayward v. Ormsbee*, 7 Wis. 111; *Taylor v. Whiting*, 4 T. B. Mon. (Ky.) 364. See 2 Greenl. Ev., § 355.

The fact of the death of a person may be inferred from the grant of letters of administration on his estate in the absence of any controlling circumstances, since it is not the course to grant administration without some evidence of the death. *Succession of Hamblin*, 3 Rob. (La.) 130.

2. *Lyon v. Kain*, 36 Ill. 362; *Baxter v. Bradbury*, 20 Me. 260; 37 Am. Dec. 49.

A man resident in the State of *New York* died there leaving a will, but there was no evidence as to the contents of the will or how it was executed. In *Stephenson v. Doe*, 8 Blackf. (Ind.) 508; 46 Am. Dec. 487, it was held that under those circumstances a jury might find that the land of the deceased in *Indiana*, if he had any, descended to his legitimate children as his heirs.

3. *Taylor v. Whiting*, 4 T. B. Mon. (Ky.) 364; *Birney v. Hann*, 3 A. K. Marsh. (Ky.) 322; 13 Am. Dec. 167; *Jackson v. Hilton*, 16 Johns. (N. Y.) 96.

The testimony was that the intestate left no issue, but left surviving his brother, his nephew and niece. It was held incompetent; that to sustain the claim of heirship of the persons named the relationship of the alleged brother to the deceased must be shown by proof of his descent from the parents of the deceased and their marriage; and that the relationship to the deceased of the parents of the alleged nephew and niece must be shown; also their marriage, and that such parties were the issue of such marriage. *Morrill v. Otis*, 12 N. H. 466. If required, some evidence more than mere identity of names must be produced to prove that the plaintiff is the same person who is shown to be entitled to an interest in real estate. *Mooers v. Bunker*, 29 N. H. 420. It was always presumed that a person was of the whole blood until the contrary was shown. 2 Br. & Had. 387, note.

In proving title by descent, proof of facts from which a legal marriage may be inferred is sufficient. *Pratt v. Pierce*, 36 Me. 448; 58 Am. Dec. 758.

The plaintiffs claimed as heirs of A, and proved that they were the heirs of B, and that B was the daughter of A. There was nothing to cast any doubt on the legitimacy of B nor any proof that A was ever married. It was held that the marriage of A and the heirship of the plaintiffs was sufficiently established, A having been long dead, and the controversy not being between persons claiming under conflicting claims of heirship. *Rogers v. Park*, 4 Humph. (Tenn.) 480.

Proof that the parents emigrated to *Texas*, and lived together as man and wife, is sufficient to establish the heirship of the children of the parties until the contrary is proven. *Kaise v. Lawson*, 38 Tex. 160.

M., a sister of a decedent, living in *Pennsylvania*, married one G. and moved to Natchez. There was evidence that one G. and his wife M. lived in Natchez, and there was no other family named G. there. This was held sufficient to prove that the widow of G. in Natchez was the sister of decedent. *McCloskey v. Barr*, 47 Fed. Rep. 154.

A person owning real estate died without issue. It appeared that he originally came from a certain locality in *Ireland*, and that he had frequently spoken among his friends of his father and brothers, half-brothers and a sister, naming some of them, still residing where he came from. Parties claiming to be heirs of the deceased proved that their father lived in the same locality; that it was common report in their family that they had an uncle in America of the same name of deceased; that their father had brothers and half-brothers and a sister, and that the names of their father and his brothers, half-brothers and sister corresponded with the names of those of deceased, so far as he had given their names, and

tives exist to impede the descent to him, *i. e.*, the exhaustion of any line entitled to claim before him.¹

that the name of their paternal grandfather corresponded with the name of the father of deceased, as given by himself. It further appeared that the claimants were the sole surviving descendants of their father, and that all of his brothers, sisters, and half-brothers were dead and had no descendants surviving. It was held that this was satisfactory evidence of the heirship of the claimants. *Cuddy v. Brown*, 78 Ill. 415.

The officers of a mining association gave to an Indian, in 1846, a certificate which entitled him to an interest in consideration of his services in finding the location. The Indian died in 1862. He left a daughter born of one woman with whom he had lived, and there was some evidence tending to show the existence of a son of another daughter born of a woman with whom the Indian had sustained earlier relations. There was no marriage except according to the custom of the tribe. In 1879 the first daughter assigned the certificate. On bill by the assignee it was held that the daughter's claim by descent was not satisfactorily made out, and that, moreover, the claim should be deemed barred by laches. *Compo v. Jackson Iron Co.*, 50 Mich. 578.

Where upon a petition for partition, certain of the respondents claimed title, not as legitimate children of the decedent, but as illegitimate, adopted, and made his heirs, by virtue of *Maine* Rev. Stat., ch. 75, § 3, it was held that it must first appear that they were illegitimate, and the question is one for the jury. *Grant v. Mitchell*, 83 Me. 23.

1. *Anson v. Stein*, 6 Iowa 150; *Bates v. Shraeder*, 13 Johns. (N. Y.) 261; *Payne v. Payne*, 29 Vt. 172; 70 Am. Dec. 402. See *Chandler v. Bailey*, 89 Mo. 641. To prove heirship in a collateral line, a party must show the descent of himself and of the person last seised from a common ancestor, and the exhaustion of all the lines of descent which would have a right to claim before him. *Emerson v. White*, 29 N. H. 482. Where title is claimed to be in the father because of the son's death, it must be shown that the son died without issue. *Stinchfield v. Emerson*, 52 Me. 465; 83 Am. Dec. 524. Proof that certain children are the only ones that survive their father does not establish their claim to be his only heirs, unless

it is also shown that none of those who died before their father left children or husbands or wives. *Skinner v. Fulton*, 39 Ill. 484. Where one sues as heir he must show that the widow of the ancestor, if she is by law a co-heir, has either received the share to which she is entitled or has waived her right to it, so as to make him the only claimant. *Schneider v. Piessner*, 54 Ind. 525. It was held that where the statute enabled an illegitimate child to inherit in cases where the father dies intestate without heirs in the *United States*, such child claiming title to real estate of his father must prove that he died intestate without heirs resident in the *United States*. *Cox v. Rush*, 82 Ind. 519.

It seems that after a long lapse of time since the death of one who might have been entitled, it may, in the absence of any adverse claim, be presumed that he died without issue. *Doe v. Wolley*, 8 B. & C. 22; 3 C. & P. 402; 15 E. C. L. 150; 14 E. C. L. 369. In ejectment, where it was incumbent on the lessor of the plaintiff to prove that a younger brother of the person last seised, from whom he deduced his title, had died without issue, the testimony of an elderly lady, a member of the family, that the younger brother had many years before gone abroad when a young man, and according to repute in the family had died abroad, and that she never had heard in the family of his having been married, was held *prima facie* evidence of his having died without issue. *Doe v. Griffin*, 15 East 293. But where the death only is proved in such a case without some negative proof of the existence of issue, it is not sufficient; the plaintiff being bound to remove every possibility of title in another before he can recover against the person in possession. *Richards v. Richards*, 15 East 293, n.

Before distribution of an intestate's estate will be made, due proof must be made of the persons entitled at the death of the intestate, and also proof of the devolution of rights of such persons upon the claimants at the time the distribution is sought. *In re Clement's Estate*, 13 Pa. Co. Ct. Rep. 129.

Under the *Pennsylvania* statute which requires the descent of an ancestral estate to be traced from the perquisitor, where it was alleged in a case

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I. DEFINITION.—A succession tax, or collateral inheritance tax, or tax on transfers, as the tax is variously called,¹ is a tax imposed in some jurisdictions upon the transmission of an estate by reason of the death of the owner.²

stated in an action of ejectment that the lineal and collateral heirs of a remote ancestor from whom the estate came, became extinct, so far as the parties knew, it was held sufficient evidence from which the jury might find that there were no such heirs, and to find in favor of persons claiming as being the next of kin of the intestate, without regard to the ancestor, or other relation from whom the estate came. *Dowell v. Thomas*, 13 Pa. St. 41. But the only son of a deceased daughter, who left neither child, father, mother nor maternal grandmother living at the time of his death, being one of the heirs at law of the decedent, it cannot be assumed that his four maternal aunts are his only heirs and next of kin, when the fact is not averred, and it is not shown that he left no grandfather nor paternal grandmother, nor paternal uncles or aunts. *Gardner v. Kelso*, 80 Ala. 497.

Sufficiency of Evidence in Charging One as Heir.—In charging one as heir, general evidence of heirship will be sufficient to be adduced on the part of the plaintiff, it being a matter more peculiarly within the defendant's own knowledge. 1 Greenl. Ev., § 79. Thus, if the defendant is in possession of property of the deceased, or has received rent from his tenants, it is to be presumed that he claims them as heir. *Densley v. Custance*, 4 T. R. 75.

1. The term collateral inheritance tax is that which is perhaps more frequently used, but, since the tax may be imposed upon the transmission of an estate to lineals as well as to collaterals, and also to strangers to the blood, the term succession tax seems to be the more logical and comprehensive term. In *New York*, the term tax on transfers has acquired recognition. See *New York Act of April 30, 1892*.

2. See *Eyre v. Jacob*, 14 Gratt. (Va.)

II. HISTORY ; PRESENT STATUS.—Succession taxes were known to the Roman law.¹ They were adopted in *England* in 1780, by a statute taxing legacies,² and have since been extended.³ The policy involved has been approved by eminent political economists,⁴ prevails in most of the countries of *Europe*,⁵ and is gaining ground in the *United States*.⁶

430; 73 Am. Dec. 367; *Strode v. Com.*, 52 Pa. St. 182.

United States Tax.—The federal statutes which, for the purpose of raising revenue for the conduct of the late war, required the payment of a tax on certain successions, included successions at death of others than the owner. Though a testator had died before the taxing act took effect, yet if the enjoyment of real estate under his will came into possession upon the death of a life tenant after the passage of the said act, the tax was due. *Wright v. Blakeslee*, 101 U. S. 174. And see *U. S. v. Hazard*, 8 Fed. Rep. 380; *U. S. v. Brice*, 8 Fed. Rep. 381. See also *Atty. Gen'l v. Gell*, 3 H. & C. 628; *Atty. Gen'l v. Middleton*, 3 H. & N. 134; *Atty. Gen'l v. Fitzjohn*, 2 H. & N. 465; *Wilcox v. Smith*, 4 Drew 40. But this feature of the *United States* statutes is not found in the statutes of those states which have adopted the succession or collateral inheritance tax.

1. *Gibbon's Decline and Fall*, vol. 1, ch. 6, pp. 133, 134. And see *Williams' Case*, 3 Bland's Ch. (Md.) 259.

2. 3 Dowell's *History of Taxation*, etc., in *England*, 148; *Hanson's Probate, Legacy and Succession Duties Acts* (London, 1870), p. 10; Act 20 Geo. III, ch. 28.

3. In 1805 by the act of 45 Geo. III, ch. 28, the taxation was extended to gifts by will charged upon or taking effect out of real estate; and also to the proceeds of real estate directed by the testator to be sold. See also the *Succession Duty Act* of 16 & 17 Vict., ch. 51. See as to the English statutes, *Green v. Croft*, 2 H. Bl. 30; *Hill v. Atkinson*, 2 Meriv. 45.

4. *Smith's Wealth of Nations*, p. 683; *Mills' Polit. Econ.*, bk. 5, ch. 2, § 3. See *Encyclopædia Britannica*, art. *Taxation*; *Matter of McPherson*, 104 N. Y. 317; 58 Am. Rep. 502.

5. See The "Review of Reviews" Feb. 1893.

6. The tax was adopted in *Pennsylvania* in 1826; in *Maryland* in 1844. In *Maryland*, besides the tax on inheritances, there is a tax upon commissions

allowed executors and administrators, and upon legacies to executors in lieu of commissions. See *State v. Dorsey*, 6 Gill (Md.) 388; *Tyson v. State*, 28 Md. 587. It was introduced into *Delaware* in 1869, into *West Virginia* in 1887, and more recently into *Connecticut*, *New Jersey*, *Ohio*, and *Maine*.

Pennsylvania.—The existing law of *Pennsylvania* is that of May 6, 1887. For a collation and explanation of the *Pennsylvania* statutes, see *Del Busto's Estate*, 45 Leg. Int. (Pa.) 474; 23 W. N. C. (Pa.) 111. The *Pennsylvania* Act of 1850, making the words "being within this commonwealth" in the act of 1826, apply to persons as well as to estates, was prospective as well as retrospective. *In re Line's Estate*, 155 Pa. St. 378.

North Carolina.—In 1846, a law was passed introducing the system into this state; but it seems to have been repealed. See *North Carolina Code*, 1883, § 3867.

Virginia.—The collateral inheritance tax law of this state formed a part of the annual, "perfect" tax laws, beginning in 1844. It was continued until the session of 1855-6, when it was omitted. This omission was declared to effect its repeal. *Fox v. Com.*, 16 Gratt. (Va.) 1. The law was re-enacted in 1863, and again omitted until 1867. *Miller v. Com.*, 27 Gratt. (Va.) 110. It was repealed once more in 1884, and has not been revived.

In *New Hampshire*, a collateral inheritance tax law exempting direct heirs was held to violate the constitutional requirement of equality in taxation. *Curry v. Spencer*, 61 N. H. 631; 60 Am. Rep. 337.

In *Wisconsin* and in *Minnesota* laws much in the nature of collateral inheritance tax laws were attempted; but, by reason of unconstitutional features, failed. See *State v. Mann*, 76 Wis. 469; *State v. Gorman*, 40 Minn. 232.

In *Vermont*, an attempt was made recently to introduce the tax, but without success.

See the *California*, *Michigan*, and

III. NATURE AND CONSTITUTIONALITY.—As the right to succeed to property, upon the death of an owner, is the creation of the law, the state which creates it may regulate it, indicating how and to what extent the succession may go; and may subject it to burdens or

Tennessee Acts of 1893, and the Massachusetts Acts of 1891.

Louisiana.—By the law of March 25, 1828, the succession of foreigners was taxed ten per cent. Acts 1828, No. 95, p. 178. In 1877, the tax was repealed. Acts of 1877, No. 86, p. 125. The sections imposing it are given a place in the edition of the Revised Civil Code of 1888, arts. 1221, 1222, 1223. In Marr's Index of *Louisiana Acts* from 1870 to 1888, inclusive, the repealing law of 1877 is given without mention of any renewal. The tax would appear, therefore, to be no longer in force.

New York.—There has been much legislation upon succession taxes, or taxes on transfers, in the State of *New York*, beginning with the year 1885. The act passed in that year was displaced by the act of 1887. Various amendments and certain additional provisions were made in 1889, 1890, 1891. In 1892 three more amendatory acts were passed, and then nearly the whole legislation was gathered up into one statute, that of April 30, 1892, which went into force the next day. One of the older statutes possibly survived, namely, the act of June 7, 1890, ch. 553, conferring exemption on religious, charitable and such "corporations." Since the present law of April 30, 1892, there was added another statute, that of May 3, 1892, respecting certain matters of appraisement, etc. This act (laws of 1892, ch. 443) purports to amend chapter 483, Laws of 1885, which statute was repealed by the law of April 30, 1892. The provisions of the law of May 3, 1892, must be given effect. It will not be understood, however, as reviving the repealed law mentioned. See on this *Endlich on Statutes*, § 372; *South Ottawa v. Perkins*, 94 U. S. 260; *Stingle v. Nevel*, 9 Oregon 62.

Under the *New York* act of 1885 there was no exemption in the case of a legacy to a person who stood in the mutually recognized relation of child to testator for ten years. The act of 1887 extended exemption to such persons; but it did not, either in "express terms or legal effect, grant exemption from the operation of the act of 1885,

in the limited number of cases in which the tax had accrued under the original act, and was uncollected at the time of the passage of the amendment." *Matter of Thomas*, 3 Misc. (N. Y.) 390; *Matter of Cayuga County*, 46 Hun (N. Y.) 659; 111 N. Y. 343; *Matter of Kemeys*, 56 Hun (N. Y.) 118. The said amendatory act, in section 25 read as follows: "All acts or parts of acts inconsistent with this act are hereby repealed;" and this section was amended by chapter 479, Laws of 1889, so as to read, "All acts and parts of acts inconsistent with the provisions of this act are hereby repealed; but this act shall apply to all estates of deceased persons where no assessment of tax has been made, to which such estate or estates are liable under the provisions of the foregoing act." Where a child of the class indicated died while the act of 1885 taxing legacies to him was in force, but the assessment was not made until after the amendment just recited from the act of 1889, he became released by such amendment, and the after-made assessment was ineffectual. *Matter of Thomas*, 3 Misc. (N. Y.) 388.

The act of 1892, ch. 399, repealed the law of 1889, and contention was thereupon made before the surrogate of Cattaraugus county that the release from liability granted by the act repealed was destroyed. The act of 1892, however, provided in its "saving clause:" "The repeal of a law, or any part of it, specified in the annexed schedule, shall not affect or impair any act done or right accruing, accrued, or acquired . . . prior to May 1, 1892; but the same may be asserted, enforced . . . as fully and to the same extent as if such law had not been repealed." The contention that the release from the operation of the act of 1885 had been lost and destroyed was accordingly prevented by such "saving clause." The exemption in the case of those whose legacies had not been assessed until after the act of 1892 released them still continues. *Matter of Thomas*, 3 Misc. (N. Y.) 388.

Where assessment had been made previously to the act of 1889, the liabil-

conditions.¹ Among these burdens, we find, in many jurisdictions, the collateral inheritance or succession tax. It is upon the succession and not upon the property itself that the succession tax is imposed.² Accordingly, the inability of a state to tax or burden *United States securities*³ has been held not to extend to a tax upon the transmission of such securities to distributees or beneficiaries.⁴ For the same reason, exemption of property from taxation does not protect against legislation of this character.⁵ This is in harmony also with the theory of an administration account, which supposes the balance for distribution to be cash, rather than the specific articles or properties whose values enter

ity remained a charge upon the legacy. *Matter of Kemeys*, 56 Hun (N. Y.) 118; *Matter of Thomas*, 3 Misc. (N. Y.) 391.

1. *Miller v. Com.*, 27 Gratt. (Va.) 117; *Eyre v. Jacob*, 14 Gratt. (Va.) 430. And see *State v. Dalrymple*, 70 Md. 294; *Pullen v. Wake County*, 66 N. Car. 361. See generally *SUCCESSION*, vol. 24.

Since the vesting of the estate is dependent on the permission of the commonwealth, the succession tax cannot be regarded as an appropriation of private property for public use without consideration. *Clymer v. Com.*, 52 Pa. St. 187. And see *Schoolfield v. Lynchburg*, 78 Va. 366.

2. What is called a collateral inheritance or succession tax "is a bonus, exacted from the collateral kindred and others, as the condition on which they may be admitted to take the estate left by a deceased relative or testator." *Strode v. Com.*, 52 Pa. St. 182; *Eyre v. Jacob*, 14 Gratt. (Va.) 431; 73 Am. Dec. 367; *Peters v. Lynchburg*, 76 Va. 929; *Schoolfield v. Lynchburg*, 78 Va. 366. See also *Clymer v. Com.*, 52 Pa. St. 189; *Com. v. Herman*, 16 W. N. C. (Pa.) 210; *Orcutt's Appeal*, 97 Pa. St. 185; *Mager v. Grima*, 8 How. (U. S.) 493; *Carpenter v. Pennsylvania*, 17 How. (U. S.) 463; *Frederickson v. Louisiana*, 23 How. (U. S.) 447; *Wallace v. Myers*, 38 Fed. Rep. 184; *Tyson v. State*, 28 Md. 577; *State v. Dalrymple*, 70 Md. 298; *Pullen v. Wake County*, 66 N. Car. 363; *Matter of Howard*, 5 Dem. (N. Y.) 487; 2 Bl. Com., ch. 1. And see *State v. Mann*, 76 Wis. 469. Although in *Bittinger's Appeal*, 129 Pa. St. 338, we find a *dictum* that the tax is on the property. See next note.

"Collateral inheritance tax, so called, is not a tax in the ordinary sense of the word, or the meaning of the constitution. It is rather in the nature of a taking or retention of a part of that which the state, if it saw proper, might

claim and keep *in toto*. *Strode v. Com.*, 52 Pa. St. 181." *Per Wickham, P. J.*, *Orphans' Court*, Beaver County, Pa., in *Mixter's Estate*, 10 Pa. Co. Ct. Rep. 409.

In *New York*, the court of appeals said that it was unnecessary to determine whether the tax was on the transmission or on the property. Acquisitions of property, business, sales, and the like, have been taxed extensively. As imposing a tax on property, on the other hand, the legislation is constitutional if equally imposed and properly apportioned upon all the property of the class to which it belongs. *In re McPherson*, 104 N. Y. 318; 58 Am. Rep. 502. In the later case of *Matter of Swift's Estate*, 137 N. Y. 77, the court of appeals said that the tax is not on the property, but on the succession. *Gray, J., dissenting*. See also *Matter of Thomas*, 3 Misc. (N. Y.) 392; *Cooley on Taxation* (2d ed.), § 30. See "Review of Reviews," February, 1893.

3. *Strode v. Com.*, 52 Pa. St. 182; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316.

4. *Strode v. Com.*, 52 Pa. St. 189; *Wallace v. Myers*, 38 Fed. Rep. 184; *Matter of Howard*, 5 Dem. (N. Y.) 483.

This is so, though the legatees accept the specific securities. *Clymer v. Com.*, 52 Pa. St. 189. *Contra*, in *Tyson v. State*, 28 Md. 578, the court said that the transmission from a decedent of federal securities was not taxable; although the question seems to have been disposed of without much consideration.

5. Thus, exemption of a state loan is not an exemption from this taxation. *Com. v. Herman*, 16 W. N. C. (Pa.) 210. Nor is the exemption of the property of an educational institution. *Barringer v. Cowan*, 2 Jones Eq. (N. Car.) 436. And see *Miller v. Com.*, 27 Gratt. (Va.) 110; *In re Keith's Estate*, 5 N. Y. Supp. 201.

into such balance.¹ It is essential, of course, that the state have jurisdiction over the property or over the transmission.² Accordingly, successions to lands situate in foreign states are not affected by these taxes.³ Certain questions as to the effect of conversion arise in the case of foreign lands, and are considered elsewhere herein.⁴ The requisite jurisdiction appears not to exist in the case of personalty *in transitu* belonging to non-residents.⁵

The ordinary succession tax legislation is not usually thought to be in violation of a requirement in constitutional law that taxes on property shall be equal and uniform.⁶ Nor is such a requirement disobeyed by a repeal releasing those taxes of this character which have not accrued, although other taxes imposed by the taxing statute have been paid.⁷ Laws much in the nature of succession tax laws have failed in certain states because of arbitrary and disproportionate provisions.⁸ In *New Hampshire* the court

1. *Strode v. Com.*, 52 Pa. St. 181. Yet the tax is in some respects given a practical effect upon the specific property, as where it is secured by lien on land.

2. *Hood's Estate*, 21 Pa. St. 106; *Hare's Am. Const. Law*, p. 317.

3. *Bittinger's Appeal*, 129 Pa. St. 338; *Com. v. Coleman*, 52 Pa. St. 468; *Wolfe's Estate*, 19 N. Y. St. Rep. 263; *Lorillard v. People*, 6 Dem. (N. Y.) 268; *Hood's Estate*, 21 Pa. St. 106; *Drayton's Appeal*, 61 Pa. St. 172.

4. See *infra*, this title, *Real Estate*.

5. See *Hare's Am. Const. Law*, p. 321; *People v. Com'rs of Taxes*, 23 N. Y. 240; *Kintzing v. Hutchinson*, 34 Leg. Int. (Pa.) 365.

6. *Tyson v. State*, 28 Md. 577; *Debates Maryland Constl. Conv.*, vol. 1, p. 186; *State v. Dalrymple*, 70 Md. 294; *Eyre v. Jacob*, 14 Gratt. (Va.) 436; 73 Am. Dec. 367. See also *Pullen v. Wake County*, 66 N. Car. 361; *Miller v. Com.*, 27 Gratt. (Va.) 110; *Peters v. Lynchburg*, 76 Va. 928; *Schoolfield v. Lynchburg*, 78 Va. 366; *Mager v. Grima*, 8 How. (U. S.) 494.

7. *Montague v. State*, 54 Md. 487. And see *Van Kleeck's Estate*, 121 N. Y. 701; *Reynolds v. Furlong*, 10 Md. 318; *Atwell v. Grant*, 11 Md. 101; *State v. Norwood*, 12 Md. 195.

The state is entitled to the tax which accrued before the repeal. *Arnaud v. Executor*, 3 La. 336; *Quessart v. Canonge*, 3 La. 560; *Van Kleeck's Estate*, 121 N. Y. 701. See also *Matter of Miller*, 110 N. Y. 216; *Butler v. Palmer*, 1 Hill (N. Y.) 335; *In re Kemey's Estate*, 56 Hun (N. Y.) 117; *In re Wolfe*, 66 Hun (N. Y.) 389.

8. In *Minnesota* a statute was declared unconstitutional because it fixed an arbitrary scale of amounts payable as probate fees. The scale was as follows:

Estates under \$2,000 were not to be taxed.	
Where inventory exceeded \$2,000 and did not exceed \$5,000.....	\$10
Where inventory exceeded \$5,000 and did not exceed \$10,000.....	25
Where inventory exceeded \$10,000 and did not exceed \$15,000.....	35
Where inventory exceeded \$15,000 and did not exceed \$20,000.....	50
Where inventory exceeded \$20,000 and did not exceed \$35,000.....	75
Where inventory exceeded \$35,000 and did not exceed \$50,000.....	100
Where inventory exceeded \$50,000 and did not exceed \$75,000.....	200
Where inventory exceeded \$75,000 and did not exceed \$100,000.....	300
Where inventory exceeded \$100,000 and did not exceed \$150,000.....	500
Where inventory exceeded \$150,000 and did not exceed \$200,000.....	800
Where inventory exceeded \$200,000 and did not exceed \$500,000.....	1,000
Where inventory exceeded \$500,000.....	5,000

This was held to be unequal taxation and the setting up of a system of sale of justice contrary to the constitution. *State v. Gorman*, 40 Minn. 232.

See Statute 55 Geo. III, ch. 184 (1 Williams on Executors 665), a statute not dissimilar to the *Minnesota* one, in the proportions specified as bases for tax.

The *New York* law of 1892 and the prior law of 1891, impose a tax of one per cent. on successions by the nearer relatives, etc., to personal estate, etc., over \$10,000 in value.

A *Wisconsin* statute required the payment of a percentage upon the appraised valuation on all estates over \$3,000 in counties of over 150,000 inhabitants, as a condition precedent to their

conceded the power of the legislature to tax successions, but held that exemption of near relatives rendered the *New Hampshire* statute unconstitutional.¹

If a constitutional command of equality of taxation is to be regarded as applying to succession tax laws,² it must be considered as exacting proper means of securing the equality, and as rendering essential provision for notice to parties to be affected, and for hearing.³ Certainly a constitutional right to due process of law requires some kind of judicial action for the ascertainment of the

settlement in probate proceedings. The court held that the statute was void because in violation of the state constitution. The constitution required uniformity of taxation, and prohibited taxation by special or private laws. The court passed by the question whether a tax on successions could be lawfully imposed; for they must regard the tax as on the property or estate and not as on the succession. The tax was a property tax because it was not upon the clear value transmitted, but upon the appraised valuation before deduction of debts, etc. Now as a property tax it was unequal; unequal because for the year of a decedent's death it was already liable under the ordinary annual tax laws, and to collect another tax would be double taxation. The effect of exemption of such estates as did not exceed \$3,000 in value the court did not determine. Also, in its limitation to certain counties the act attempted to overreach the prohibition of special or private legislation. *State v. Mann*, 76 Wis. 469.

Exemption of small estates is customary despite the doubt or hesitation in *State v. Mann*, 76 Wis. 469. See *infra*, this title, *Amount of Estate*. And see *Mixer's Estate*, 28 W. N. C. (Pa.) 182. In *Minnesota*, under a constitution requiring taxation of all property, certain exemptions being specified, such distinction was said to be unconstitutional. *Obiter dicta*, in *State v. Gorman*, 40 Minn. 232.

In non-legal magazines there is to be observed quite an effort to create a feeling in favor of heavy taxation of large estates with the alleged object of preserving equality among men. The following references to discussions upon the subject are given in Ely's *Taxation in American States and Cities*, at page 320; pt. 1. Judge Thomas's article "About Wills and Testaments," in the "Forum" for December, 1886; Mills' *Political Economy* (unabridged ed.), bk.

2, ch. 2; "Erb-schafts-steuer und Erb-schafts-reform," by Prof. Von Scheel, Jena, 1877; Jacobson's "Higher Ground," Chicago, 1888. See also the literature mentioned in the article in the "Forum," pt. 1. And see pt. 4, containing the report of the law reform committee of the *Illinois* Bar Association. And see Ely, ch. 8. Some extreme views have been entertained in this direction. Jeremy Bentham would have confined inheritances to immediate relatives, and would have restricted the testamentary power. John Stuart Mill would have raised a bar forbidding succession beyond a certain limit. Mr. Bellamy and Mr. Carnegie would tax heavily the millionaire's estate. See "Review of Reviews," February, 1893, p. 46.

1. *Curry v. Spencer*, 61 N. H. 624; 60 Am. Rep. 337. In this the *New Hampshire* court disagrees with other courts. See *infra*, this title, *Relatives and Connections*. See *State v. Mann*, 76 Wis. 469.

2. In *Matter of McPherson*, 104 N. Y. 320; 58 Am. Rep. 502, Earl, J., used this language: "It has been held in several states where constitutional provisions required that property taxes should be equal and uniform, that such provisions had reference only to general, annual recurring taxes upon property generally, and not to special taxes upon privileges or special or limited kinds of property." Citing *Sun Mut. Ins. Co. v. New York*, 5 Sandf. (N. Y.) 10; *People v. Moring*, 3 Abb. App. Dec. (N. Y.) 539. But by reference to *Curry v. Spencer*, 61 N. H. 624; 60 Am. Rep. 337, we find that the *New Hampshire* court considered that collateral inheritance taxes were within such a requirement.

3. See *Hagar v. Reclamation Dist.* No. 108, 111 U. S. 701; *Wallace v. Myers*, 38 Fed. Rep. 184; *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Cooley on Taxation* (2d ed.) 362, 363; *Cooley Const. Lim.* 617; *Hare's Am. Const.*

value upon which to base the tax, with notice and opportunity to be heard.¹ It does not invalidate a tax that it may cause a double taxation of the succession, by reason of imposition in the state of the late owner's domicile and like imposition in the state of the *situs* of the property.² It has been said that construction leading to such result will not be readily adopted;³ but in actual adjudication we will not find this observation regarded.⁴

In the note will be found some miscellaneous decisions respecting requirements governing legislation and upon interpretation of certain statutes.⁵ Treaties between the *United States* and for-

Law 871; 1 Smith's Lead. Cas. (8th Am. ed.), pp. 1136-1140; Dos Passos on Coll. Inh., etc., Taxes 28.

1. Matter of McPherson, 104 N. Y. 321; 58 Am. Rep. 502; Stuart v. Palmer, 74 N. Y. 183; 30 Am. Rep. 289; San Mateo County v. Southern Pac. R. Co., 8 Sawy. (U. S.) 238; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701.

In *Re Wolfe*, 66 Hun (N. Y.) 389, the question arose as to the effect of a decree of a surrogate that a certain legacy was exempt. It was contended that the question was *res adjudicata*, and that the state could not demand the tax. The proceedings in which said decree was rendered had been under the old act of 1885. That act provided that after assessment the surrogate should notify such parties as he should select; and that should parties neglect to pay, the county treasurer or comptroller should notify the district attorney, who should proceed, etc., if he had reasonable cause to believe that a tax was withheld. The court held that the original decree of exemption could not prevent a claim by the state; that the assessment proceedings were not proceedings to obtain a decree of exemption, which could not be obtained unless perhaps in the proceeding instituted by the district attorney; that notice to him of the fact of assessment could not avail to give jurisdiction to the surrogate in a matter of recognizing an exemption; that a decree so recognizing exemption could not therefore render the question *res adjudicata*. For the state, like any other party, must have opportunity to be heard; and while the legislature may, in its discretion, yield a right which otherwise would be asserted, yet the law of 1885 had not yielded the state's right to be heard. And non-exemption being found to be the case touching the legacy before the court, tax against it was ordered to be paid.

The surrogate has no power, in pro-

ceedings to fix the collateral inheritance tax, to declare void of his own motion the provisions of a will. *In re Ullman's Estate* (Supreme Ct.), 21 N. Y. Supp. 758.

2. *Com. v. Sharpless*, 2 Ches. Co. (Pa.) 246.

3. Matter of Euston, 113 N. Y. 183.

4. See *infra*, this title, *Personality*.

5. **Object of Taxation.**—A provision that every law imposing a tax "shall distinctly state the tax and the object to which it is to be applied" relates to the annual recurring taxes, and does not apply to taxes on successions. *In re McPherson*, 104 N. Y. 306; 58 Am. Rep. 502. See also *Wallace v. Myers*, 38 Fed. Rep. 184.

Due Process of Law.—The XIVth Amendment, prohibiting the states from depriving any person of property without due process of law, or from denying equal protection, is not violated by an impartial collateral inheritance tax law which provides for due notice and opportunity to be heard. *Wallace v. Myers*, 38 Fed. Rep. 184.

Retrospective Legislation.—A will made before the act, but coming into operation by testator's death after the act, is within the effect of the statute. *In re Lovelace*, 4 De G. & J. 340.

A repeal of a tax law on successions does not deprive the state treasury of its right to a tax which became due before the repeal, unless the contrary is provided in the repealing statute. *Arnaud v. His Executor*, 3 La. 336. Nor will a treaty stipulating against discrimination against citizens of the countries parties to the treaty divest the state of its right already accrued, irrespective of any doubt as to the application of the treaty. *Prevost v. Greenaux*, 19 How. (U. S.) 1, *affirming* 12 La. Ann. 577.

The ordinary collateral inheritance tax act is not retrospective, and where a grantor, by deed executed before the

eign nations must be observed. Succession tax laws in conflict

passage of the act, had assigned to trustees irrevocably in trust to pay the profits to grantor during her lifetime, and at her death to distribute among persons specified, it was held that the transmission was not subject to the tax, although the grantor died after the enactment. *Matter of Hendricks*, 1 Conn. (N. Y.) 301. And see *U. S. v. Leverich*, 9 Fed. Rep. 586; *Matter of Cogswell*, 4 Dem. (N. Y.) 248.

Retrospective legislation imposing a collateral inheritance tax on the undistributed estates of persons who had died in the interval between such enactment and a prior imposition, was upheld by the *Pennsylvania* court and by the Supreme Court of the *United States*. *Short's Estate*, 16 Pa. St. 63; *Carpenter v. Pennsylvania*, 4 De G. & J. 340. But in *North Carolina*, legislation of this character appears to have been forbidden by a constitution of that state. *Pullen v. Wake County*, 66 N. Car. 362. Taxation of successions in *North Carolina* is apparently abandoned.

The rights of the donee are subordinate to the conditions, formalities and administrative control, prescribed by the state in the interests of public order, and are only irrevocably established upon its abdication of this control at the period of distribution. If the state, during this period of administration and control by its tribunals and their appointees, thinks fit to impose a tax upon the property, there is no obstacle in the constitution and laws of the *United States* to prevent it. *Ennis v. Smith*, 14 How. (U. S.) 400; *In re Ewin*, 1 C. & J. 151; 1 Barb. Ch. (N. Y.) 180; 6 W. H. & G. Cy. R. 217; *Lawrence v. Kittridge*, 21 Conn. 577; 56 Am. Dec. 385; *Carpenter v. Pennsylvania*, 17 How. (U. S.) 463. And see *Atty. Gen'l v. Fitzjohn*, 2 H. & N. 465; *Atty. Gen'l v. Middleton*, 3 H. & N. 125.

The *New York* law of 1887, ch. 713, amending the law of 1885, ch. 483, was not retroactive so as to govern respecting a will of a decedent who died before its passage. *Matter of Brooks*, 6 Dem. (N. Y.) 165; *Warrimer v. People*, 6 Dem. (N. Y.) 211. See also *Ely v. Holton*, 15 N. Y. 595; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477; *Sanford v. Bennett*, 24 N. Y. 20; *People v.*

Columbia County, 43 N. Y. 130; *Moore v. Mausert*, 49 N. Y. 332; *Benton v. Wickwire*, 54 N. Y. 226; *Colman v. Shattuck*, 2 Hun (N. Y.) 497; *Cook v. New York Cent., etc., R. Co.*, 10 Hun (N. Y.) 426; *Moran v. Lydecker*, 27 Hun (N. Y.) 582; *Calhoun v. Delhi, etc., R. Co.*, 28 Hun (N. Y.) 379; *Nash v. White's Bank*, 37 Hun (N. Y.) 57; *Bacon's Abr. Statute, C*; *Broom's Leg. Max.* 14; 1 *Kent's Com.* 455; *Matter of Miller*, 18 N. Y. St. Rep. 226.

One who stood in the mutually recognized relation of child to decedent, but who took from a decedent who died before exemption was conferred on such children by the act of 1887, was not allowed such exemption, although no steps had been taken to collect the tax prior to the creation of exemptions of this character. *Estate of Ryan*, 18 N. Y. St. Rep. 992. *Dictionum* in *Matter of Cager*, 13 N. Y. St. Rep. 45, to the contrary disapproved.

Death on Day of Enactment.—The *New York* law of 1891, ch. 215, providing that legacies to testator's widows, or to other near relatives indicated in the act, should be subject to a tax of one per cent. if exceeding \$10,000 in value, and that such provision should take effect "immediately," was held not to apply to a legacy made by a testator who died on the same day that the act was approved, but shortly before such approval. *In re Dreyfous*, 18 N. Y. Supp. 767; 28 Abb. N. C. (N. Y.) 27—by Ransom, surrogate.

Direct Tax.—A succession tax on devolution of real estate is not a "direct tax" within the meaning of the federal constitution. *Scholey v. Rew*, 23 Wall. (U. S.) 331.

Delegation to Counties, etc.—The power to impose the tax may, perhaps, be delegated to counties and to municipalities; but the authority should be in plain, unmistakable language. See *Peters v. Lynchburg*, 76 Va. 927; *Schoolfield v. Lynchburg*, 78 Va. 366. See *Dupuy's Succession*, 33 La. Ann. 258. See the system of probate fees in Cook County, *Illinois*.

Aliens cannot set up their foreign citizenship in avoidance of the tax. They cannot maintain that as to them it is a regulation of commerce with foreign nations; nor that it is a tax on imports. *Mager v. Grima*, 8 How. (U. S.) 490. And see *Quessart v. Canonge*,

with any such treaty are to that extent void.¹ Treaty privileges in respect to successions are not to be construed with a jealous, restrictive care, but with liberality.²

IV. A VIEW OF THE STATUTES; EXEMPTIONS—1. Exemptions in Favor of Certain Classes—*a.* IN GENERAL.—Intention to confer exemption should be expressed in clear and unambiguous terms.³ Taxation of the transmission of property is a thing distinct from taxation of the property itself;⁴ accordingly, exemption of the property does not include exemption of its transmission.⁵ An

3 La. 560; *Prevost v. Greenaux*, 19 How. (U. S.) 1.

1. **Treaties.**—Cooley on Taxation (2d ed.) 100; *Hauenstein v. Lynham*, 100 U. S. 483; *Ware v. Hylton*, 3 Dall. (U. S.) 199; *Chirac v. Chirac*, 2 Wheat. (U. S.) 259; *Orr v. Hodgson*, 4 Wheat. (U. S.) 453; *State v. Prevost*, 12 La. Ann. 577; *Dufour's Succession*, 10 La. Ann. 391. See *Mager's Succession*, 12 Rob. (La.) 588.

2. *Shanks v. Dupont*, 3 Pet. (U. S.) 242; *Hauenstein v. Lynham*, 100 U. S. 487.

A treaty which, with resulting legislation, removes distinctions between aliens and citizens, does not relieve from succession tax already accrued. *Prevost v. Greenaux*, 19 How. (U. S.) 1; *affirming State v. Prevost*, 12 La. Ann. 577.

Treaties more or less prohibitory of distinctions against foreigners have been entered into with several nations or states. With *France*, in 1853, art. 7; *Treaties and Conventions*, p. 352. See *Prevost v. Greenaux*, 19 How. (U. S.) 1. With *Wurtemberg*, in 1844. See *Frederickson v. Louisiana*, 23 How. (U. S.) 445. With *Bavaria*, in 1845, 9 U. S. Stats. at L. 826. See *Crusius' Succession*, 19 La. Ann. 369. And see the treaty with *Switzerland* of 1850; touching which see *Hauenstein v. Lynham*, 100 U. S. 483; *Treaties and Conventions* 1074. See also the treaty with *Great Britain* of 1794, 8 Op. Atty. Gen'l 417; *Fairfax v. Hunter*, 7 Cranch (U. S.) 627; *Ware v. Hylton*, 3 Dall. (U. S.) 242; *Hauenstein v. Lynham*, 100 U. S. 489.

Concerning the effect of a treaty upon the state law, see *Succession of Prevost*, 12 La. Ann. 577; *Dufour's Succession*, 10 La. Ann. 391; *Mager's Succession*, 12 Rob. (La.) 588; *Prevost v. Greenaux*, 19 How. (U. S.) 7; *Frederickson v. Louisiana*, 23 How. (U. S.) 445; *Schaffer's Succession*, 13 La. Ann. 113; *U. S. v. Reynes*, 9 How. (U. S.) 148; 1 Kent's Com. 169; Suc-

cession of *Amat*, 18 La. Ann. 403; *Succession of Crusius*, 19 La. Ann. 369; *Hauenstein v. Lynham*, 100 U. S. 483; *Chirac v. Chirac*, 2 Wheat. (U. S.) 259; *Ware v. Hylton*, 3 Dall. (U. S.) 199; *Carneal v. Banks*, 10 Wheat. (U. S.) 181; *Hughes v. Edwards*, 9 Wheat. (U. S.) 489; *Orr v. Hodgson*, 4 Wheat. (U. S.) 453; *Fairfax v. Hunter*, 7 Cranch (U. S.) 627; *Calhoun on Const. and Gov. of the U. S.* 204; *Shanks v. Dupont*, 3 Pet. (U. S.) 242; *Foster v. Neilson*, 2 Pet. (U. S.) 253; *Cherokee Tobacco*, 11 Wall. (U. S.) 616; *Mr. Pinkney's Speech*, 3 Elliott's Constitutional Debates 231; *People v. Gerke*, 5 Cal. 381.

3. See **TAXATION—Exemptions.**

4. *Eyre v. Jacob*, 14 Gratt. (Va.) 422; 73 Am. Dec. 367; *Miller v. Com.*, 27 Gratt. (Va.) 117; *Keith's Estate*, 22 N. Y. St. Rep. 337; *In re Vanderbilt's Estate*, 10 N. Y. Supp. 240; *Wallace v. Myera*, 38 Fed. Rep. 184; *Strode v. Com.*, 52 Pa. St. 181.

5. See *Com. v. Herman*, 16 W. N. C. (Pa.) 210; *Barringer v. Cowan*, 2 Jones Eq. (N. Car.) 436; *Miller v. Com.*, 27 Gratt. (Va.) 110.

Foreign Corporation.—The exemption of a foreign corporation under the laws of the jurisdiction of its origin, does not withdraw it from the operation of collateral inheritance tax laws in other jurisdictions. *Catlin v. Trinity College*, 113 N. Y. 133. See also *Matter of Coskey*, 6 Dem. (N. Y.) 438.

The fact that domestic corporations of a certain class are exempted is no reason why a foreign corporation of the same character should also be exempt, in the absence of a statutory provision to that effect. *In re Prime's Estate*, 136 N. Y. 347.

New York Laws, 1890, ch. 553, which extends the limit of property capable of being owned by charitable and religious corporations, and which exempts the personal property of such corporations from general taxation and from the col-

exemption introduced by a statute amending the tax system will not act retroactively so as to release taxes already due, unless such appears plainly to be the intent.¹

b. CHARITIES; EDUCATION; RELIGION, ETC.—Where the succession is beyond the amount within which successions are exempt, it shall not escape taxation because for a charitable purpose.² Some difficulty has been experienced in *England* in determining whether a gift to a charitable object is within the exempt amount, where the recipients of the charity receive each a sum so within, but the total fund bequeathed or given is in excess of, the exempt limit. Since the same questions must arise in those states which have adopted the succession-tax policy, the English decisions are presented in the notes.³ The rule which finally received apparent approval in *England* is thus stated: "Where no trust is created, but there is merely a direction to divide a gross sum of money among a certain number of persons of a specified description, to be ascertained by the executors, the result is the same, so soon as the recipients are thus ascertained, as if they had been actually named in the will as the objects of the testator's bounty, so that in the case, for instance, of a bequest of

lateral inheritance tax, is a grant of corporate powers and privileges applicable solely to domestic corporations, and a foreign charitable corporation cannot claim exemption from the collateral inheritance tax by virtue of this statute. *In re Prime's Estate*, 136 N. Y. 347. The law itself seems to have been repealed. See law of 1892, ch. 399.

1. *Sherritt v. Christ Church*, 121 N. Y. 701.

Exemption of United States.—The *United States* cannot claim exemption from the state succession tax laws. The *United States* Supreme Court has recognized that the power which the several states possess to regulate the tenure of real property within their respective limits, the modes of its acquisition and transfer, the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is not a power subject to federal control, *U. S. v. Fox*, 94 U. S. 315; *McCormick v. Sullivan*, 10 Wheat. (U. S.) 202; excepting that the *United States* may acquire and hold real property through its power of eminent domain. *Van Brocklin v. Tennessee*, 117 U. S. 154; *U. S. v. Fox*, 94 U. S. 320; *Kohl v. U. S.*, 91 U. S. 367; or in order to collect its demands against creditors. *U. S. v. Bradley*, 10 Pet. (U. S.) 359; *U. S. v. Lynn*, 15 Pet. (U. S.) 311; *U. S. v. Fox*, 94 U. S. 316; *Metropolitan Bank v. Van Dyck*, 27 N. Y. 437.

It has been held, accordingly, under a statute of *New York* by which devises of lands in that state can only be made to natural persons and to such corporations as are created under the laws of the state and are authorized to take by devise, that a devise to the government of the *United States* of lands in that state is void. *U. S. v. Fox*, 94 U. S. 315. The power by which the state can deny acquisition *in toto* seems clearly to extend to a power to withhold a portion, should it see fit, by means of a collateral inheritance tax law. Such reasoning has in fact been adopted by a *New York* surrogate, in the case of a legacy of personality.

A bequest to the government of the *United States* is liable to taxation under the *New York* statute taxing transfers. *Estate of Cullom*, 5 Misc. (N. Y.) 173.

2. *Matter of Prime's Estate*, 136 N. Y. 347; *In re Griffiths*, 14 M. & W. 516; *Miller v. Com.*, 27 Gratt. (Va.) 110; *Barringer v. Cowan*, 2 Jones Eq. (N. Car.) 436.

3. In *Franklin's Charity*, 3 Sim. 147, a legacy of £50 a year to be laid out in bread for the poor of a parish was held liable to legacy duty, being beyond the exempt limit of £20 allowed by 55 Geo. III, ch. 184; although the poor were so numerous that no one received more than the value of 2s. per annum. The gift was in effect a gift for charitable purposes which the exec-

£100 to be divided in equal shares among ten poor men and women resident in a particular parish, this amounts to ten legacies of £10 each, and not to one gross legacy of £100. . . . But where the gift is of such a nature as to create a charitable trust, and to entitle the trustees as legatees to call for payment of the money at once to them *in solido*, for the purpose of being applied by them in the manner directed by the will, it is subject to duty as a charitable legacy." ¹

Under 9 Geo. II, ch. 36, a deed with two witnesses, enrolled within six months, and void if the grantor should die within twelve months, is necessary either to a gift of land or a charge upon

utors were bound to retain and appropriate at once *in solido* for the purpose of being applied in perpetuity in the manner directed by the will. See Hanson on Succession Duties 246. And see *Atty. Gen'l v. Fitzgerald*, 13 Sim. 89.

In 1834, a ruling which it is difficult to reconcile with the case of *Francklin's Charity*, 3 Sim. 147, was made in *In re Wilkinson*, 1 C. M. & R. 142. There the testator had directed his executors to receive the interest of certain property and to "divide it among poor pious persons, male or female, old or infirm, in £10 or £15, as they see fit, not omitting large and sick families, if of good character." The court of exchequer, not without some difficulty and doubt, came to the conclusion that the executors could not be called upon to pay the duty on the whole of the residue in the first instance; but that if any of the objects of the bounty should have received to the amount of £20 or upwards, by having been selected to receive such bounty on more than one occasion, legacy duty would attach on such amount, and the duty would be calculated according to the nearness of blood of such individual, and in that case the executors would be accountable for and bound to return the duty chargeable on such amount. This decision was affirmed on appeal by the exchequer chamber. *Atty. Gen'l v. Nash*, 1 M. & W. 237; the latter court considering apparently that the case was within section 11 of 36 Geo. III, ch. 52, providing that duty on legacies whose value can only be ascertained by application of the allotted fund, should be charged on the money as applied. In 1843, vice-chancellor Shadwell adhered to his ruling in the *Francklin* case. *Atty. Gen'l v. Fitzgerald*, 13 Sim. 83. In this case, testator gave his residuary estate to his executors, to be by

them appropriated to the education of the children of the poor in *Ireland*. The vice-chancellor held that the legacy duty was payable; that the legacy was given, substantially, in the same manner as if there were now existing a school for the education of the children of the poor . . . and the legacy were given to that school. "It seems to me," the vice-chancellor said, "the same thing, whether the aggregate sum is at once given for the foundation of a school *de novo*, or for the continuance of a school actually in existence." He was of opinion that the case was distinguishable plainly from that of *Re Wilkinson*, 1 C. M. & R. 142, because there "the judges seem to have considered that there was a gift of a sum in gross which was at once to be disposed of by the executors, apparently as if it was not a charity;" whereas, in the case before him, "the poor scholars are not to have anything in the shape of money—a certain quantity of education is to be purchased and infused into their minds, but there is to be no actual payment of the money to them. The money must be considered as paid *in solido* for the purpose of creating the institution."

1. Hanson on Probate, Legacy and Succession Duties 247. A testator bequeathed to trustees a sum in the £3 per cent. consols, in trust, as to £1,700, part thereof, to pay and apply the dividends in establishing and supporting a daily school at N. for the instruction of twenty boys on the principle of a national school, the dividends to be retained by R. B., Sr., and R. B., Jr. (two of the trustees), to be so applied; and he directed that R. B., Jr., should be the schoolmaster, and that the management of the school should always remain in the family of R. B. And as to £400, other part of the said stock, the testator directed that the dividends should be paid by the trustees to and

land, or money to be laid out in land, where the gift is for charities. This statute cannot be evaded in a partial manner by direction that the legacy duty upon personalty given for charity shall be paid out of proceeds of realty.¹ It has been held by the House of Lords, construing certain statutes exempting Irish trusts for charities, that the legacy duty is payable unless the charitable purpose be expressed in the will; that proof of a secret charitable trust will not avail to secure the exemption.²

The statutes of some of the states have dealt with exemptions more or less liberally.³ In *New York* the grant of exemption to charitable, educational, and religious institutions is not fully ascer-

applied by the schoolmaster for the time being of the said school, in providing the boys with pinafores, caps, and shoes, and also with books and slates; such clothes, books and slates to be left behind them on leaving the school. *Held*, that these bequests were subject to legacy duty. *In re Griffiths*, 14 M. & W. 510. So where there was a bequest to trustees of £2,000, consols, to divide the income yearly between twelve poor persons, but no person to be eligible two years in succession, Lord Romilly, M. R., held that legacy duty was payable, and said of the *Wilkinson* case: "I have no doubt that the case in the exchequer would not now be followed." *In re Pearce*, 24 Beav. 491. See also *Harris v. Earl Howe*, 29 Beav. 261.

Since these decisions, the statute of 16 and 17 Vict., ch. 51, § 16, has provided that "where property shall become subject to a trust for any charitable or public purposes, under any past or future disposition, which, if made in favor of an individual, would confer on him a succession, there shall be payable in respect of such property, upon its becoming subject to such trusts, a duty at the rate of ten pounds per centum upon the amount of principal value of such property; and it shall be lawful for the trustee of any such property to raise the amount of any duty due in respect thereof, with all reasonable expenses, upon the security of the charity property, at interest, with power for him to give effectual discharges for the money so raised."

A trust for building and endowing a church is unquestionably a public, if not a charitable, purpose, and a legacy therefor is liable to duty under the above section, unless considered as a legacy and subject to legacy duty, which latter was the court's opinion. *In re Parker*, 4 H. & N. 666.

In order to bring a trust within the section recited, it must be such as a court of equity can execute. *Nash v. Morley*, 5 Beav. 177. Instances of invalid gifts will be found in *Williams v. Kershaw*, cited in 1 Keen 227, 232; *Vezy v. Jamson*, 1 Sim. & S. 69; *Ellis v. Selby*, 7 Sim. 352; 1 Myl. & C. 286; *Rickard v. Robson*, 31 Beav. 246; *Fowler v. Fowler*, 33 Beav. 616. See *Hoare v. Osborne*, L. R., 1 Eq. 585.

1. *Wilkinson v. Barber*, L. R., 14 Eq. 96; *Page v. Leapingwell*, 18 Ves. 463; *British Museum v. White*, 2 Sim. & S. 595; *Thornber v. Wilson*, 3 Drew 245; *Arnold v. Chapman*, 1 Ves. 108.

2. *Cullen v. Atty. Gen'l*, L. R., 1 H. L. 190. In *New York*, however, the tax was not sustained in a case where a will was drawn on the promise by the proposed executor that he would hold in trust for a specified person who was exempt under the *New York* law. The trust was valid, and being so must be recognized. *In re Farley's Estate*, 15 N. Y. St. Rep. 727; *Ransom, S., citing* 2 Story, § 972; *Meek v. Kettlewell*, 1 Hare 469; *Wheatley v. Purr*, 1 Keen 553; *Malin v. Malin*, 1 Wend. (N. Y.) 625; *Tracy v. Tracy*, 3 Bradf. (N. Y.) 57; *Day v. Roth*, 18 N. Y. 448; *Dos Passos on Coll. Inh., etc., Taxes*, p. 50.

3. *Connecticut*.—Exemption exists as to transmission to "some charitable purpose, or purpose strictly public within this state." *Connecticut Laws*, 1889, ch. 180, § 1. The words "charitable purpose," are to be construed to include gifts to any educational, benevolent, ecclesiastical, or missionary corporation, association or object. § 17.

Massachusetts.—The statute exempts property passing "to or for charitable, educational or religious societies or institutions, the property of which is exempt by law from taxation." Act June 11, 1891.

New Jersey.—Exemption here exists

tainable, except by reference to statutes relating to general taxation, so that generally such statutes must be looked to, as well as the succession tax acts.¹

c. RELATIVES AND CONNECTIONS.—Exemptions in the case of successions by relatives, are allowed in the various statutes main-

in the case of transmission to "churches, hospitals, and orphan asylums." Laws 1893, p. 367.

California.—Exemption exists in case of the passing of property to "the societies, corporations, and institutions now exempted by law from taxation." *California Laws* 1893, p. 193.

1. *New York*.—Catlin v. Trinity College, 113 N. Y. 133.

The *New York* law of June 10, 1885, ch. 483, § 1, contained exemption in favor of "the societies, corporations and institutions now exempted by law from taxation."

The provision indicated was repeated in the law of June 25, 1887, ch. 713, § 1. It was repeated again in the law of April 20, 1891, ch. 215, with the addition of the words, "or from collateral inheritance tax." It was repeated still again, and with the same addition, in the law of March 19, 1892, ch. 169. Its substance is contained in the present law of April 30, 1892, taking effect May 1, 1892. This statute taxes transfers "to persons or corporations not exempt."

The exemption under laws other than collateral inheritance tax laws thus referred to as the test of exemption does not appear to be necessarily a total exemption from every kind of tax, but one of a general character, arising either from some general law or from charter or special statute. See *Dos Passos* 59; *In re Herr*, 27 N. Y. St. Rep. 591. *Contra*, *In re Herr*, 22 N. Y. St. Rep. 905; *reversed*, however, 55 Hun (N. Y.) 167. See also *Kavanagh's Estate*, 24 N. Y. St. Rep. 404; *Catlin v. Trinity College*, 22 N. Y. St. Rep. 189.

Where a church building was exempt, but the church had not a general exemption from taxation, it was held that the legacy tax should be assessed. *In re Müller*, 5 Dem. (N. Y.) 132.

New York Laws 1881, ch. 546, as amended by laws 1888, ch. 523, § 7, exempting the Christian Home for Intemperate Men from "local taxation or other purposes," does not exempt it from state taxation; and hence a bequest to it is subject to the legacy tax. *In re Vanderbilt's Estate*, 2 Conn. (N. Y.) 319.

Exemption of a portion of the prop-

erty does not signify. *Keith's Estate*, 22 N. Y. St. Rep. 337; *In re Vanderbilt's Estate*, 2 Conn. (N. Y.) 319.

Exemption of so much real estate as is occupied for the hospital concerned, and all the personality, was held enough. *Vassar's Estate*, 127 N. Y. 1.

The provision of the general statute exempting the "personal property of every incorporated company not made liable to taxation on its capital in the fourth title" of the chapter containing it, relates only to such business and stock corporations as the chapter exempts under special circumstances. It does not embrace corporations for religious, literary, or charitable purposes not having a capital. It does not afford exemption to a college, or to a religious society, so as to bring these within the benefit of the provision in the collateral inheritance law of 1887, exempting societies, etc., now exempted by law from taxation. A legacy, therefore, to a college, was held to be taxable under the act of 1887. *Catlin v. Trinity College*, 113 N. Y. 133.

The court of appeals used this language: "It has never been the general policy of the state to wholly exempt the property, either real or personal, of incorporated churches, colleges, or charitable institutions from taxation."

Complete exemption, where adopted, has been accomplished through special acts applicable to particular and specified corporations. We know of no general statute exempting the personal property of religious societies or colleges from taxation." The court held that a legacy to the missionary congregation known as the "Paulist Fathers," and a legacy to Trinity College, were subject to collateral inheritance tax. Exemption under a charter or by special legislative enactment is therefore necessary to sustain such a claim. *In re Kavanagh's Estate*, 6 N. Y. Supp. 669; *Matter of Wolfe*, 66 Hun (N. Y.) 389. The law of 1890 did indeed confer exemption on these institutions; but the law of 1892, ch. 399, appears to have repealed the law of 1890. But almshouses are within the exemption conferred by the exception in the act im-

posing the collateral inheritance tax. *In re Curtis' Estate*, 7 N. Y. Supp. 207.

The Board of Foreign Missions of the Presbyterian church is not within the exemptions, and legacies to it are subject to collateral inheritance tax. *In re Board of Foreign Missions*, 11 N. Y. Supp. 310. So with the board of home missions of that church. *In re Board of Home Missions*, 11 N. Y. Supp. 311.

The opinion of Barnard, J., in *Matter of Herr*, 55 Hun (N. Y.) 167, was that if money bequeathed, after it is obtained and while it is in the possession of the institution to which it is given, is free from taxation, it is also exempt from the collateral inheritance tax; and that since the personal property of a house of industry is to be regarded as exempt from general annual taxation, a bequest of personalty to it is free from liability to inheritance tax.

An institution which under the general statutes has been exempt from taxation was held to have lost that privilege by reason of a special statute enlarging its power to acquire property, which statute contained a provision exempting its real estate from taxation. A legacy to it was therefore held to be taxable. *In re Forrester*, 12 N. Y. Supp. 774; 58 Hun (N. Y.) 611. And see *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 426.

The expression "societies, etc., now exempted by law from taxation," means immunity expressly conferred, and not mere omission to tax. *Church Charity Foundation v. People*, 6 Dem. (N. Y.) 154.

Incidental Work.—A farm on which a college building was situated was used for the maintenance of the college and in support of its efficiency in aid of education, and was wholly devoted to the purposes of the institution. It was held to come within the exemption clause in favor of colleges. *People v. Barber*, 42 Hun (N. Y.) 27; *affirmed* 106 N. Y. 669. See also *People v. Com'rs of Taxes*, 6 Hun (N. Y.) 109; *affirmed* 64 N. Y. 656; *People v. Com'rs of Taxes*, 10 Hun (N. Y.) 246; *Wesleyan Academy v. Wilbraham*, 99 Mass. 599.

Religious Society.—The term "religious society," referring to those in New York City, as used in *New York Laws* 1852, ch. 282 (*New York City Consolidation Act*, ch. 16, § 827), does not refer exclusively to religious societies organized as an incorporated church, but to societies whose organization and objects are of a benevolent,

charitable or missionary character, falling within the general sense of the term "religious" as contradistinguished from private and secular institutions. *Hebrew Free School Assoc. v. New York*, 4 Hun (N. Y.) 446.

A religious society located in New York City must, under the act with its modification, in order to enjoy exemption, have the exclusive use of the property. *Y. M. C. A. of New York v. New York*, 113 N. Y. 187; *reversing Y. M. C. A. of New York v. New York*, 44 Hun (N. Y.) 102. And see *Northwestern University v. People*, 86 Ill. 141, where it was held that application by the society of the profits received by it from strangers using its property, to the proper purposes of the society, did not enable the society to claim exemption. But a Young Men's Christian Association which held meetings for worship and maintained courses of instruction in various arts and pursuits, and which received slight dues not exceeding four dollars per year, applying the moneys to the current expenses of the building, was held to be within the benefit of the exemption clause in the act of 1852, *afforesaid*. *Y. M. C. A. of New York v. New York*, 44 Hun (N. Y.) 102. And see *Association for Colored Orphans v. New York*, 38 Hun (N. Y.) 594.

The words "religious society," in the act in respect to the exemption of societies in New York City, refer to incorporated societies. *Church of St. Monica v. New York*, 119 N. Y. 91.

Leaseholds may be regarded as "exclusively the property" of the corporation. *Hebrew Free School Assoc. v. New York*, 4 Hun (N. Y.) 446.

Building for Public Worship.—Under section 827 of the *New York Consolidated Act*, L. 1852, above quoted, exclusive possession of real property for the purposes of public worship is required in New York City; and a synagogue, the first floor whereof was used for living apartments by the janitor, and for bathing apartments accessible to all persons of the Jewish race upon payment of a fee covering expenses, the bathing not being connected with any religious worship, was held not to be within the exemption allowed by the act. *Congregation K. I. A. P. v. New York*, 52 Hun (N. Y.) 507.

Legacies to Religious Societies.—However it may be as to devises of lands for church edifices, etc., etc., under the foregoing enactments and provisions,

legacies of personal property to religious societies are subject to collateral inheritance tax. *Matter of Wolfe*, 66 Hun (N. Y.) 389; *Catlin v. Trinity College*, 113 N. Y. 133. The act of 1890 did indeed exempt such institutions; and if the act remains in force the decisions cited are now inapplicable. It is believed, however, by the writer, that the act of 1890 is repealed by the law of 1892, ch. 399.

House of Industry.—See *Hebrew Ben. etc.*, *Asylum v. New York*, 11 Hun (N. Y.) 116; *Estate of Noyes*, N. Y. L. Jour., July 5, 1890; *Matter of Herr*, 55 Hun (N. Y.) 167, *reversing* 5 N. Y. Supp. 48.

Public Library.—A geographical society incorporated to advance geographical science, and to collect and classify "geographical and scientific works, voyages . . . having especial reference to that kind of information which should be collected, preserved, and be at all times accessible for public uses in a great maritime and commercial city," which such society has maintained at all times a free and open public library, is a "public library," within the exemption allowed to such by virtue of 1 Rev. St. 388, § 4, subd. 5. *People v. Tax Com'rs*, 11 Hun (N. Y.) 505.

Seminary of Learning.—Property in New York City used as a medical college, hospital, and free dispensary for women, is not exempt, as it is not used exclusively as a seminary of learning. *People v. Campbell*, 93 N. Y. 196.

"Corporation."—The *New York* legislation, describing the literary, religious and like associations which may take free from the succession or "transfer" tax, uses the word "corporation." In the act of 1892, the new words, "any person who is a bishop, or any religious corporation" are employed. It may be that the word "corporation" will not be construed as referring exclusively to corporations. See in this connection the *Pennsylvania* cases of *Pickering v. Shotwell*, 10 Pa. St. 23; *Domestic, etc., Missionary Soc.'s Appeal*, 30 Pa. St. 425; *Yard's Appeal*, 64 Pa. St. 95. But in the interpretation of the provision exempting "religious societies" in New York City, in the cases indicated, it has been held that the societies intended are only those incorporated. *Hebrew Free School Assoc. v. New York*, 4 Hun (N. Y.) 446.

Schoolhouse.—The schoolhouses referred to in the section from the Re-

vised Statutes are those of the public common school. *Chegaray v. New York*, 13 N. Y. 220, *overruling dictum* in *Chegaray v. Jenkins*, 5 N. Y. 376. The court said of the exemption afforded by the statute cited by counsel: "It is evident that it was intended to exempt only property used by the public for the purposes of education, or which belonged to a corporation created for the advancement of learning, and thereby devoted to educational purposes;" and held that a private school was not entitled to exemption. See also *Association for Colored Orphans v. New York*, 104 N. Y. 581; *aff'd* 38 Hun (N. Y.) 593. A parochial school under the management of the pastor of a Roman Catholic church is not such a "schoolhouse." *Church of St. Monica v. New York*, 119 N. Y. 91; *reversing* 55 N. Y. Super. Ct. 160. And before a schoolhouse in New York City can be exempted, it must belong to the public school system of the city or be exclusively the property of an incorporated religious society. *Church of St. Monica v. New York*, 119 N. Y. 91.

(As to collateral inheritance tax, it will be remembered that there is exemption in case of disposition to any one who is a "bishop," or to "any religious corporation." The precise meaning of these terms remains to be ascertained. Parochial schools of the Roman Catholic church are doubtless in the names of the bishops of that church.)

Alms-house.—The exemption of almshouses is not confined to such as are under the public authorities. *People v. Com'rs of Taxes*, 36 Hun (N. Y.) 311. A building used either as a hospital for indigent sick or as a dispensary for the relief of the poor who called there, the work in which was entirely gratuitous, was held to be an almshouse, within subd. 4, § 4, tit. 1, ch. 13, pt. 1 of the Revised Statutes, and as such, exempt from taxation. *Western Dispensary v. New York*, 56 N. Y. Super. Ct. 361. See *Association for Colored Orphans v. New York*, 104 N. Y. 581; *People v. Com'rs of Taxes*, 36 Hun (N. Y.) 311; *New York Infant Asylum v. Westchester County*, 31 Hun (N. Y.) 116; *Church Charity Foundation v. People*, 6 Dem. (N. Y.) 154; *Hebrew Ben., etc., Asylum v. New York*, 11 Hun (N. Y.) 116.

In *Association for Colored Orphans v. New York*, 38 Hun (N. Y.) 593, it was held that almshouses are exempt from collateral inheritance tax. Like ruling

taining the system.¹ The term, "widow," in these statutes, means a woman within the favored class who was a widow at the time of the decedent's death. Her remarriage afterwards does not destroy a privilege once vested.² The "husband of a daughter" does not fall out of that class by reason of

was made by the supreme court in *In re Neale's Estate*, 10 N. Y. Supp. 713; 57 Hun (N. Y.) 591.

It was held by Ransom, S., that the fact that an association had no house where it lodged poor did not prevent its being an almshouse, where it disbursed money and dispensed its benefits without any charge whatever; but that a home for aged women, which charged board for its inmates, was not an "almshouse" within the exemption provision. *In re Lenox's Estate*, 9 N. Y. Supp. 895.

A charitable institution which requires, as a condition of entrance thereto, the making of a will by the applicant in its favor, and the payment of an admission fee, which the trustees in "exceptional cases," may remit, is not an "almshouse," within 2 R. S. (8th ed.), p. 1083, § 4, so as to exempt a bequest to it from legacy tax. *In re Keech's Estate*, 11 N. Y. Supp. 265, 57 Hun (N. Y.) 588; *affirming* 7 N. Y. Supp. 331.

A distinction has been made between colleges and almshouses. College buildings and the lots whereon the same are situated, have been exempted from annual taxation, irrespective, according to the construction put upon the statute, of the fact whether or not fees are charged, if the fees are not for profit but merely for the expenses of the institution. *People v. Barber*, 42 Hun (N. Y.) 27; *affirmed*, 106 N. Y. 669. Colleges are not for any class, rich or poor, and are encouraged, not because they are open to the poor, but "because they are necessary to the advancement of civilization and to the promotion of the welfare of society. In the case at bar, however, the right to exemption rests upon a different basis, viz., that the association entitled to exemption is performing a work of charity, and is taking upon its own shoulders a portion of the burden that would otherwise fall upon the public." Van Brunt, P. J., in *In re Keech's Estate*, 11 N. Y. Supp. 267. *St Vincent's Hospital v. Mayor*, Supreme Court, July 1, 1889, was mentioned by Van Brunt, J., "without expressing any opinion as to the correctness" of the decision. In that case the court ruled that the fact that

some pay-patients were received at a hospital, whose pay helped to support the indigent sick, could not deprive the institution of its privilege as an "almshouse," no one ever being refused admission by reason of unwillingness or inability to pay. Reported in note, 11 N. Y. Supp. 286.

An institution for the blind which does not receive pay, is an "almshouse" within the exemption allowed by the collateral inheritance tax law. *Matter of Underhill*, 2 Conn. (N. Y.) 262.

1. "Collaterals."—Although the *Pennsylvania* Acts are entitled "collateral" inheritance tax laws, yet that fact affords no basis on which to decide that the absence of the term "grandparents" in the list of exempts is a *casus omissus*; and we cannot hold that in spirit grandparents are included in the list. *Expressio unius, exclusio alterius*. *McDowell v. Addams*, 45 Pa. St. 430.

Trust in Favor of Exempt Person.—Where a bequest was made to an executor individually on his promise to hold the same for the testatrix's brother, the trust being an enforceable one will be recognized as for the said brother, and the partial exemption allowed him under the *New York* laws will be allowed. *Farley's Estate*, 15 N. Y. St. Rep. 727.

In *Tennessee*, "the term children shall not be construed to apply to adopted children" in the list of exempts. *Tennessee Laws* 1893, p. 347, § 1.

Conversion.—If the decedent makes such a testamentary disposition of his real estate as to convert it into personality, the shares of the legatees under such a will are taxable under section 399, *New York Laws* of 1892, as personality. *Matter of Wheeler*, 1 Misc. (N. Y.) 450.

2. *Com v. Powell*, 51 Pa. St. 438.

Election Against Will.—Capacity as widow is not destroyed by the fact that, electing to take against his will, she accepts a less sum than the whole amount the law would have given her. It cannot be maintained that she has abandoned her widow's claim and takes through the legatees. *Commonwealth's Appeal*, 34 Pa. St. 204, Strong, J., *dissenting*. See also *Rubincam's Estate*,

the death of his wife, the decedent's daughter, before the death of the testator.¹

The law of adoption is not intended to relieve from succession taxes. A statute conferring on an adopted son a right to inherit does not make him a son in fact, and he can only take subject to the tax.² Exemption of "children" is not an exemption of adopted children.³ Where the statute exempts adopted children, the adoption, it has been said, must be in conformity to the laws of the state.⁴ The "mutually acknowledged relation" of a parent, for the ten years required under the *New York* provisions, is a matter of evidence, and not of any particular mode or form.⁵

38 Leg. Int. (Pa.) 261. See *infra*, this title, *Interests Derived from Others than Decedent*.

1. *In re McGarvey*, 6 Dem. (N. Y.) 145; *In re Woolsey*, 19 Abb. N. Cas. (N. Y.) 232.

"Heirs."—A legacy to the "heirs" of testator's deceased descendant cannot vest a share in such descendant's surviving husband, except subject to collateral inheritance tax. *Com. v. Schumacher*, 9 Lanc. Bar. (Pa.) 195.

Lineal Descendants.—The term "lineal descendants," in *New York* Laws 1885, ch. 483, § 1, referred only to lineal descendants of the testator or intestate. *In re Miller*, 45 Hun (N. Y.) 244, *affirming* surrogate's decision, 5 Dem. (N. Y.) 132; *In re Smith*, 5 Dem. (N. Y.) 90; *In re Jones*, 5 Dem. (N. Y.) 30. The *New York* Act of 1887 exempts "any lineal descendant of such decedent born in lawful wedlock," where it will be noticed that even lineal descendants and other nearest connections are not altogether free from tax under laws of 1891, 1892, there mentioned. And see *New York* Laws of 1892.

2. *Com. v. Nancrede*, 32 Pa. St. 389; *Schafer v. Eneu*, 54 Pa. St. 304; *Tharp v. Com.*, 58 Pa. St. 500; *Packard's Appeal*, 37 Leg. Int. (Pa.) 135; *Matter of Miller*, 110 N. Y. 216, *affirming* 47 Hun (N. Y.) 394; 6 Dem. (N. Y.) 119.

Equity.—Argument cannot be made upon any supposed equity. *Fordyce v. Bridges*, 1 H. L. Cas. 1; *In re Miller*, 110 N. Y. 222, and cases cited.

3. *In re Miller*, 110 N. Y. 216.

Children of adopted children were not relieved by the *New York* law of 1889. *Bird's Estate*, 11 N. Y. St. Rep. 895.

4. *Dos Passos* 67. See also *Matter of Spencer*, 1 Conn. (N. Y.) 208.

The *New York* act of 1887 exempting adopted children therein indicated does not relieve such children who

take from a decedent who died before its passage. *Warrimer v. People*, 6 Dem. (N. Y.) 211, *disapproving* of dictum in *Matter of Cager*, 27 N. Y. Wkly. Dig. 541.

Expression in Will.—The mere use of the words "my adopted child," in a will, is insufficient to cause a legacy to take effect free from the tax. *Dos Passos* 67.

New York act of 1887, in its exemption of adopted children, did not take effect until the governor's approval. *Kemey's Estate*, 56 Hun (N. Y.) 117. Nor did it act retrospectively. *In re Miller*, 110 N. Y. 216.

5. *In re Spencer*, 1 Conn. (N. Y.) 208. Formal adoption under laws of another state may constitute proof of the relationship indicated in the text. *In re Butler's Estate* (Supreme Ct.), 12 N. Y. Supp. 201. The relationship need not originate during the minority of the child. *In re Spencer*, 1 Conn. (N. Y.) 208.

The relation of parent and child does not necessarily flow from living in the same house and family, even although there be kinship and an active participation in family affairs. See *In re Sweetland's Estate*, 20 N. Y. Supp. 310.

Step-parent.—A step-parent does not necessarily stand in the relation of a parent within the meaning of the *New York* laws on the present subject. Whether he does or not depends on the circumstances of each case. *In re Capron's Estate*, 10 N. Y. Supp. 23. *Coleman, S.*, made the following observation on the statute: "I think, in order to constitute this relation, sometime during the continuance of the intercourse between the persons there should be a period of dependence on the part of the younger; a time when the younger required and received parental care, though not necessarily a dependence for support and maintenance; for this the natural mother [the case before him being that of a step-mother] does not

Where the natural parent inherits from a child whom another has adopted, the succession tax is not due.¹ Property bequeathed to illegitimate children passes subject to the tax.² A statute enabling an illegitimate child to inherit does not thereby relieve from this burden.³ If the legislature intends to confer such exemption, it must say so openly and clearly.⁴ There have been some special statutes in *Pennsylvania* enacted under a former constitution, conferring on persons named therein power to take and inherit "as fully and effectually" as if an "own child born in lawful wedlock." The construction has been that there was no intention on the part of the law-makers to deprive the state of the revenue under consideration, and that the tax was payable on property passing by force of the enabling statutes.⁵

generally provide. This relation must therefore begin in youth, though not of necessity during legal minority. [See also *In re Spencer*, 1 Conn. (N. Y.) 208]; and it should not be confounded with relations which, growing out of mutual needs or wishes, have resulted in warmest friendships and sometimes in forming a household, but one in which the parental element is lacking. . . .

So, too, this relation may continue between persons who have come by force of circumstances to occupy that relation, even after they have discontinued living together." But it was held also that as to an older step-daughter, who had married and left the household before the father's second marriage, said stepmother did not stand in the relation of a parent. The character of the relationship is likewise explained in *Butler's Estate*, 58 Hun (N. Y.) 400; *Wheeler's Estate*, 1 Misc. (N. Y.) 450.

1. *Com. v. Powell*, 1 Mont. Co. L. Rep. (Pa.) 45; *affirmed* 1 Mont. Co. L. Rep. 66.

Concerning the respective rights of the natural and adoptive parents, see *ADOPTION OF CHILDREN*, vol. 1, p. 206; *Hole v. Robbins*, 53 Wis. 514; *Davis v. Krug*, 95 Ind. 1, *correcting* *Barnhizel v. Ferrell*, 47 Ind. 335; *Humphries v. Davis*, 100 Ind. 274; 50 Am. Rep. 788.

2. *Wharton's Estate*, 10 W. N. C. (Pa.) 105. See *In re Miller*, 110 N. Y. 221.

3. *Wharton's Estate*, 10 W. N. C. (Pa.) 105. See *In re Miller*, 110 N. Y. 221.

4. *Physick's Estate*, 2 Brews. (Pa.) 179.

"**Strangers to the Blood.**"—Children legitimated by a subsequent marriage of parents domiciled in *France* were held not to be "strangers to the blood"

under the English Legacy Duty act of 55 Geo. III. *Skottowe v. Young*, L. R., 11 Eq. 474.

5. *Tharp v. Com.*, 58 Pa. St. 500; *Packard's Appeal*, 37 Leg. Int. (Pa.) 135; *Wayne's Estate*, 2 Pa. Co. Ct. Rep. 93. See also *Schafer v. Eneu*, 54 Pa. St. 304.

Com. v. Stump, 53 Pa. St. 137; 91 Am. Dec. 198, in its *dictum* hereon would seem to be overruled by the above cases. See also *Galbraith v. Com.*, 14 Pa. St. 258. But see *Gilmore's Estate*, 14 Pitts. L. J. (Pa.) 113.

Where a man died intestate, unmarried, and without leaving lawful issue, but leaving collateral heirs and an illegitimate son, who was legitimated by an act of the legislature, giving to him "all the benefits and rights of a child born in lawful wedlock, in the same manner and with like effect as if he had been born in lawful wedlock;" which act, however, was not approved till the day after the decease of the intestate, such act was held not to divest the right of the commonwealth to collateral inheritance tax. The right of the state had vested the moment the decedent died, and the act contained nothing yielding up vested rights. *Galbraith v. Com.*, 14 Pa. St. 258. And see *Com. v. Stump*, 53 Pa. St. 132; 91 Am. Dec. 198; *Norman v. Heist*, 5 W. & S. (Pa.) 171; 40 Am. Dec. 493.

Com. v. Stump, 53 Pa. St. 132, 91 Am. Dec. 198, seems to favor the idea that natural children whose parents marry each other after the children's birth, stand in a more favored position, and that language similar to the above would be sufficient to relieve them from the tax. This was, however, but *dictum* only, and in *Tharp v. Com.*, 58 Pa. St. 500, the court declined to discuss the

2. Amount of Estate.—It is provided in the statutes that estates below a certain value shall not be affected by the tax.¹ Some doubt has been expressed as to the constitutionality of such a distinction;² but no authoritative determination against the validity has been rendered. On the contrary, we find the statutes unquestioned in almost every state wherein they prevail.

The word "estate," in such statutes, has received different interpretation in *Pennsylvania* from that given to it in *New York*. In *Pennsylvania*, the uniform practice of the registers of wills and of the orphans' courts, since the first statute in 1826, has been to construe the word as referring to the entire estate, at least so far as it passes collaterally, without regard to the value of any particular legacy. Finally, in 1892, the question came before the supreme court, which on the very day of hearing affirmed a decree of the Philadelphia orphans' court in accord with the unvarying practice mentioned.³ In *New York*, the word "estate"

question, the case then before them not requiring it.

A *Pennsylvania* Act of 1871, "to authorize J. F. to adopt J. A. F. as his heir," provided that "J. A. F. . . . is hereby made the heir at law of J. F." to be capable of inheriting his estate and property "as fully, to all intents and purposes, as if he had been begotten by him in lawful wedlock." J. A. F. was an illegitimate son of J. F. It was held that said act was one of adoption, not of legitimation; and that a devise to J. A. F. by the will of J. F., who died in 1889, was subject to the collateral inheritance tax imposed by the act of May 6, 1887, P. L. 79. Whether, if the act had legitimated the son, the tax would have been payable, not decided. Com. v. Ferguson, 137 Pa. St. 595.

1. *New York*.—Laws 1892, vol. 1, p. 814. A tax is imposed upon transfers of the value of \$500 or over.

Pennsylvania.—Estates less than \$250 are exempt. Laws 1887, p. 79.

Maryland.—Exemption of estates less than \$500. *Maryland* Code, vol. 2, 1888, § 102.

Connecticut.—The tax is payable on the passing of property above the sum of \$1,000 in value. Laws 1889, p. 106.

Ohio.—Payable on property above \$10,000 in value. Laws 1893.

New Jersey.—Estates valued at less than \$500 are exempt. Laws 1892, p. 207; Laws 1893, p. 367.

Delaware.—Exemption in case of estate not exceeding \$500 in value. Laws 1860. *Delaware* Laws, vol. 13, p. 366.

West Virginia.—No estate valued at

less than \$1,000 is liable. *West Virginia* Code 1891, ch. 32, § 51a.

Maine.—Payable, as to property passing, etc., on "its value, above the sum of \$500." *Maine* Acts 1893, p. 168, § 1.

Massachusetts.—"Provided, however, that no estate shall be subject to the provisions of this act, unless the value of the same, after the payment of all debts, shall exceed the sum of ten thousand dollars." *Massachusetts* Laws 1891, p. 1028.

California.—Estates valued at less than \$500 shall not be subject to the tax. *California* Laws 1893, p. 193.

Tennessee.—Estates valued at less than \$250 are not subject to the tax. *Tennessee* Laws 1893, p. 347, § 1.

Michigan.—The statute affects the property transferred, when of the value of \$500 or over. In the case of favored relatives, personal property of the value of \$5,000 or more is taxed one per cent. See *supra*, this title, *Relatives and Connections*.

2. See *State v. Mann*, 76 Wis. 469; *State v. Gorman*, 40 Minn. 232; *Le Duc v. Hastings*, 39 Minn. 110.

In *Minnesota*, the constitution provided that laws should be passed taxing all moneys, credits, investments in bonds, stocks, stock companies, or otherwise, and also all real and personal property, with certain specified exemptions. Dickinson, J., did not seem certain that probate taxes in the nature of collateral inheritance taxes might be imposed at all. See opinion, *State v. Gorman*, 40 Minn. 232.

3. *Howell's Estate*, 29 W. N. C. (Pa.)

has been held to refer to each particular legacy or disposition; so that a transfer in that state below the \$500 limit there prescribed, will pass free from the tax, notwithstanding the fact that the entire estate disposed of in favor of non-exempt persons exceeds the exempt limit.¹ Certain differences in the titles and in the language of the respective laws preclude a decision rendered upon the law in the one state from being a guide to a conclusion upon the law in the other state.² The ascertainment of the amount is not to be affected by any direction of the testator shifting the tax from specific to residuary legatees.³

A bequest of a sum not intended for maintenance, or as drawing interest and payable at a future date, is not subject to the tax, unless at the decedent's death its value reaches the non-exempt limit. If the limit be \$500, a legacy of \$500 payable a year after the decedent's death, is free.⁴ The exemption is usually either as to the whole value or not at all. In *New York*, it has been ruled that there is no exemption as to the portion of a legacy or disposition below the exempt limit; if the value exceed the limit, its whole amount is taxable.⁵ The language of the *Maine* statute indicates a different intention.⁶

3. Rate of Tax.—The rates of taxation of successions at death

297; 1 Pa. Adv. R. 87; 147 Pa. St. 164. See also article in "The Legal Intelligencer," 1892, p. 26; *Mixter's Estate*, 10 Pa. Co. Ct. Rep. 409.

1. *In re Cager*, 111 N. Y. 343; *McVean v. Sheldon*, 48 Hun (N. Y.) 163; *In re Howe*, 112 N. Y. 100. These cases overrule the decisions of the surrogate to the contrary, in *McCreedy's Estate*, 10 N. Y. St. Rep. 696; 6 Dem. (N. Y.) 202; *In re Smith*, 5 Dem. (N. Y.) 90; *In re Miller*, 5 Dem. (N. Y.) 132.

2. These differences are shown in the article in "The Legal Intelligencer" for 1892, p. 26; also in the briefs of counsel in the *Howell Case*. The title of the *Pennsylvania* act of 1826 was, "An act relating to collateral inheritances." On the contrary, the title of the *New York* law of 1887 was, "An act to tax gifts, legacies, and collateral inheritances in certain cases," language looking rather to the particular dispositions than to the entire collateral estate. The *New York* act of 1887 requires valuation of each "estate," etc., "growing out of" the entire estate; while the *Pennsylvania* act of 1887 may be construed as requiring valuation of the entire "estate" passing collaterally. In other respects, indications of similar import run through the respective laws, the one kind supporting a tax on the entire collateral

estate, the other a tax on the particular legacies or dispositions.

It appears entirely reasonable to say, however, that if the entire estate which passes collaterally is below the \$250 limit prescribed in the *Pennsylvania* statute, such transmission to non-exempt classes is free from the tax, notwithstanding the fact that a computation including the portion of the estate going to exempt persons shows a sum above the prescribed limit. This has been the understanding in the counties. See *Com. v. Kerchner*, 24 W. N. C. (Pa.) 260.

Michigan.—The words "estate" and "property" mean the interest of the testator, grantor, or decedent passing to those not specifically exempted, and not the property or interest passing to individual legatees, devisees, heirs, next of kin, grantees, donees or vendees. *Michigan Laws* 1893, p. 344.

3. *Matter of Swift's Estate*, 137 N. Y. 77, affirming 19 N. Y. Supp. 292.

4. *Matter of Underhill's Estate*, 20 N. Y. Supp. 134; 2 Conn. (N. Y.) 262; *Matter of Peck's Estate*, 9 N. Y. Supp. 465; 24 Abb. N. Cas. (N. Y.) 365. See *Thorn v. Garner*, 113 N. Y. 198.

5. *Matter of Sherwell*, 125 N. Y. 376.

6. Payable, as to property indicated, on "its value above the sum of \$500." *Maine Acts*, 1893, p. 168, § 1.

are stated in the note.¹ The exemption limits are indicated elsewhere in this article.

V. SUCCESSIONS AFFECTED—1. Domicile and Situs—*a.* EFFECT OF DOMICILE; RECITALS OF STATUTES.—Where a man dies domiciled in one state but owning property in another state, the questions may arise whether the succession to such property is taxable in one or both of the states; and whether the power of taxation has in fact been exercised. Pertinent provisions of statutes are quoted in the note.²

b. REAL ESTATE.—It has been stated that succession to lands situate in another than the taxing state, cannot be subjected to

1. Rates.—*Pennsylvania*, 5 per cent., Act 1887, § 1; *New York*, 5 per cent., excepting as to favored classes. Such favored classes pay 1 per cent. on personal property of the value of \$10,000 or more. *New York Laws* 1892, p. 815; *Maryland*, 2½ per cent., Pub. Gen. Laws, vol. 2, p. 1242; *Delaware*, 3 per cent., *Delaware Laws*, vol. 13, p. 366; *Connecticut*, 5 per cent., *Laws*, 1889, p. 106; *West Virginia*, 2½ per cent., Code 1891, p. 243; *Massachusetts*, 5 per cent., *Laws* 1891, p. 1028; *New Jersey*, 5 per cent., *Laws* 1892, p. 206; *Ohio*, 3½ per cent., Act of Jan'y 27, 1893; *Maine*, 2½ per cent., *Laws* 1893, p. 168; *California*, 5 per cent., *Laws* 1893, p. 193; *Tennessee*, 5 per cent., *Laws* 1893, p. 347; *Michigan*, 5 per cent., *Laws* 1893, p. 344.

2. New York.—"All property which shall pass by will or by the intestate laws of this state, from any person who may die seised or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state, or any interest therein, or income therefrom which shall be transferred by deed, grant, . . ." *Laws New York* 1887, ch. 713.

The earlier law of 1885 read as follows, in the first section: . . . "All property which shall pass by will or by the intestate laws of this state from any person who may die seised or possessed of the same while being a resident of the state, or which property shall be within this state, or any part of such property, or any interest therein, or income therefrom, transferred by deed, grant, sale or gift. . . ."

New York Act of 1892, ch. 399, approved April 30, 1892. The present law of *New York* provides for the tax in the following language: "(1.) When the transfer is by will or by the intestate

laws of this state from any person dying seised or possessed of the property while a resident of the state. (2.) When the transfer is by will or intestate law, of property within the state, and the decedent was a non-resident of the state at the time of his death. (3.) When the transfer is of property made by a resident or by a non-resident, when such non-resident's property is within this state, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment, at or after such death. Such tax shall also be imposed, when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act."

Maryland.—All estates, real, personal and mixed, money, public and private securities for money of every kind, passing from any person who may die seised and possessed thereof, being in this state, or any part of such estate or estates, money or securities, or interest therein, transferred by deed, will, grant, bargain, gift, or sale, etc., etc., shall be subject to a tax of two and a half per centum on every hundred dollars of the clear value of such estates, money or securities, etc., etc. *Maryland Code* 1888, p. 1242, § 102.

Pennsylvania.—All estates, real, personal and mixed, of every kind whatsoever, situated within this state, whether the person or persons dying seised thereof be domiciled within or out of this state, and all such estates situated in another state, territory or country, when the person or persons dying seised thereof, shall have their domicile within this commonwealth, passing from any person who may die seised or possessed of such estates,

the tax.¹ A conflict of authority has arisen as to the effect of a conversion of such lands. The *Pennsylvania* court has held that a direction to sell, contained in a will, the direction being absolute in character, brought the proceeds within the transmission laws of the state; and, as a consequence, made the succession liable to the tax power of the commonwealth.² The decision was followed in a case decided in April, 1893,³ but not without some protest.⁴ The court holds, however, that a mere authority to sell, not amounting to a positive direction, does not, when exercised, subject the proceeds of the foreign land to a tax imposed by a law relating to the status at the time of the decedent's death.⁵ A permission to satisfy legacies by conveyance of the foreign lands to the legatees was not regarded as relieving from the tax;⁶ nor could the choice of a beneficiary to take land instead of money have such effect.⁷ A result of this conversion rule will be double taxation in many cases.

A different view was taken by the *New York* Court of Appeals, in January, 1893. The court said: "Neither the doctrine of

either by will or under the intestate laws of this state, or any part of such estate, or estates, or interest therein, transferred by deed, grant, bargain, or sale, etc., etc. Act of 1887.

1. See *supra*, this title, *Nature and Constitutionality*.

2. *Miller v. Com.*, 111 Pa. St. 321. Certain English cases have been cited as sustaining this ruling. *Williamson v. Advocate Gen'l*, 10 C. & F. 1; *Atty. Gen'l v. Holford*, 1 Price 426. The lands there were not foreign. See *Matter of Howard*, 5 Dem. (N. Y.) 486. The English legacy duty was held payable on the share of a deceased partner, a domiciled Englishman, in the proceeds of freehold property, used abroad for the purpose of a partnership. *Forbes v. Steven*, L. R., 10 Eq. 178; *Custance v. Bradshaw*, 4 Hare 315.

"Legacies Arising Out of Personality."—A tax on legacies arising from personal property, under a former act of Congress, was held not to affect proceeds of lands sold by direction of will in order to pay debts and legacies. *U. S. v. Watts*, 1 Bond (U. S.) 581.

3. *Williamson's Estate*, 153 Pa. St. 508.

4. See opinion of Mitchell, J., in *Williamson's Estate*, 153 Pa. St. 508.

5. *Drayton's Appeal*, 61 Pa. St. 172. And see *Com. v. Gordon* (Pa. 1886), 7 Atl. Rep. 229. See also *In re Evans*, 2 C. M. R. 206, 224, n.; *Williamson v. Advocate Gen'l*, 10 C. & F. 16; *Anewalt's Appeal*, 42 Pa. St. 414. But see *Atty. Gen'l v. Mangies*, 5 M. & W. 120.

6. *Miller v. Com.*, 111 Pa. St. 321.

7. *Williamson v. Advocate Gen'l*, 10 C. & F. 1; *Atty. Gen'l v. Holford*, 1 Price 426, holding that the tax imposed in case of personality must be collected.

Real estate purchased with partnership assets was in one case, on the death of a partner, held not to be subject to the English probate duty. *Custance v. Bradshaw*, 4 Hare 315. The vice-chancellor said (p. 325): "Equity would not alter the nature of the property for the purpose only of subjecting it to fiscal claims, to which at law it was not liable in its existing state." But this case can no longer be regarded as authority. See *Atty. Gen'l v. Ailesbury*, 12 App. Cas. 672, reversing 16 Q. B. Div. 408. "*Matson v. Swift*, 8 Beav. 368, must be taken as now overruled." *Lindley on Partnership*, *348, note a (ed. of 1888).

Rent charge is real estate, and therefore within the operation of a succession tax statute, notwithstanding the deceased owner had a foreign domicile. Nor will a statute directing that a rent charge shall go in the same manner as personal estate in the contingency of lack of a special occupant at the termination of an estate *pur autre vie*, make the rent personality, nor cause it to be affected as personality by the succession duty statute. *Chatfield v. Berchtoldt*, L. R., 7 Ch. 192.

Legacies Charged on Land.—From a remark of the lord chancellor in *Thompson v. Advocate Gen'l*, 12 C. &

equitable conversion of lands nor any fiction of *situs* of movables can have any bearing upon the question under advisement. The question of the jurisdiction of the state to tax is one of fact, and cannot turn upon theories or fictions, which, as it has been observed, have no place in a well-adjusted system of taxation."¹

c. PERSONALTY—(1) *In the State of Domicile*.—The regulation of the succession to personalty is by the law of the decedent's

F. 22, it would appear that the House of Lords and judges regarded a legacy charged on land as locally situate in the country where the land was; and therefore subject to succession duty there, although the testator was domiciled abroad.

1. *In re Swift's Estate*, 137 N. Y. 77; *affirming* same case on this point, 16 N. Y. Supp. 193; 19 N. Y. Supp. 292. In this case, a resident of *New York* died leaving real estate situated in *New Jersey*. The executors were given a power of sale, which power they exercised. The court declined to consider the question whether the fact that the sale was pursuant to a power merely, instead of being directed in positive terms, made any difference. They rested their decision upon the broad principle indicated by the quotation in the text, that a technical conversion cannot bring foreign land into a jurisdiction where it is not, in fact, located.

The question has been discussed in an able annotation in 32 Am. Law Reg. 472, May 1893.

The view entertained at first in *England*, was that expressed by Vice-Chancellor Wigram, in 1845, in *Custance v. Bradshaw*, 4 Hare 315. He said that equity would not alter the nature of property for the purpose only of subjecting it to fiscal claims, to which at law it was not liable in its existing state. See also *Matson v. Swift*, 8 Beav. 368. And see opinion of Kelly, C. B., in *In re DeLancey's Succession*, L. R., 4 Ex. 345, 1869. These decisions or opinions are overborne, however. See *Atty. Gen'l v. Holford*, 1 Price 426; *Williamson v. Advocate Gen'l*, 10 C. & F. 1; *Atty. Gen'l v. Lomas*, L. R., 9 Ex. 29; *Forbes v. Steven*, L. R., 10 Eq. 178; *Stokes v. Dacroz*, 62 L. T. N. S. 176; *Atty. Gen'l v. Hubbuck*, 10 Q. B. Div. 488; *Atty. Gen'l v. Brunning*, 8 H. L. Cas. 243; *Atty. Gen'l v. Ailesbury*, 12 App. Cas. 672. But the conversion must be out and out. *Williamson v. Advocate Gen'l*, 10 C. & F. 15, 16, Lord Brougham, applying the doctrine of *Ackroyd v. Smithson*, 1 Lead. Cas.

Eq. 690. *James, L. J.*, in *Forbes v. Steven*, L. R., 10 Eq. 192, said: "It would take a good deal more than I have yet heard to satisfy me that a man can with the same breath say effectually in this court, 'Give me the money because it is residuary personal estate,' and declare it is not taxable because it is not residuary personal estate."

Examination of these English cases shows that they were all cases of lands situate either in *England* or under the British Sovereignty in *India* or in *New Zealand*. A tax jurisdiction, therefore, existed, to be exercised at the pleasure of Parliament. It may be, then, that they will not be regarded as of great weight where the question relates to the taxation of the transmission of the proceeds of lands under another governmental jurisdiction. If a tax jurisdiction does not exist, there cannot be taxation. The federal constitution provides, "nor shall any state deprive any person of life, liberty, or property, without due process of law." Amendment 14. The design of this provision is "to exclude arbitrary power from every branch of the government; and there would be no exclusion if such rescripts or decrees were to take effect in the form of a statute." *Gibson, C. J.*, in *Norman v. Heist*, 5 W. & S. (Pa.) 173; 40 Am. Dec. 493. See also opinion of Mr. Justice Johnson, in *Bank of Columbia v. Okely*, 4 Wheat. (U. S.) 244; *Cooley's Const. Lim.* (6th ed.), p. 432 *et seq.*

The taxation of the proceeds of domestic real estate, by probate or by succession tax laws, we can readily uphold. At the death of the late owner, his property, both real and personal, passed to the commonwealth. This has been shown clearly, in opinions rendered in *Virginia*, where this system of "taxation" prevailed for a long period, and in *Pennsylvania*. *Eyre v. Jacob*, 14 Gratt. (Va.) 430; 73 Am. Dec. 367; *Strode v. Com.*, 52 Pa. St. 182; *infra*, this title, *Nature and Constitutionality*. For the state to withhold a part, in the shape of a collateral inheritance

domicile.¹ Accordingly, the state of the domicile may tax the transmission at death of the personalty situate within or without the state.²

(2) *In the State of Situs of Property*—(a) *Effect of Situs*.—In *England*, the *situs* of personal property has been deemed immaterial, the question of liability being determined by the regulation of the succession. If the English law governed the succession, duty was payable; where the succession was not governed by that law, then no duty was payable, even although the property was situate in *England*. The latter conclusion was only arrived at after a contest lasting upwards of thirty years.³ The apparent reason of the rule finally adopted was, the impracticable nature of any

or succession "tax," is therefore for it to keep a portion of its own. That withholding we have gotten into the way of calling a tax, collateral inheritance tax, succession tax. In *New York*, the new act of 1892 calls it a transfer tax. The tax is not on the property itself. The remark of Parsons, C. J., in *Bittinger's Estate*, 129 Pa. St. 344, is but *obiter dicta*. As a property tax, it would be prohibited in many cases where we find it in fact exercised. Of these, we may mention collateral inheritance tax on succession to the value of federal securities. *Strode v. Com.*, 52 Pa. St. 182; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316. Property taxes are collected independently of legislation of this character—to wit, by virtue of the ordinary annual tax laws; so that the very property which may pass subject to a collateral inheritance "tax" may be already yielding a share of governmental expenses as a subject of private ownership.

1. Story on Conflict of Laws, § 481 *et seq.* See also *Parsons v. Lyman*, 20 N. Y. 112; *Cross v. Trust Co.*, 131 N. Y. 339.

2. *Orcutt's Appeal*, 97 Pa. St. 184; *Matter of Short's Estate*, 16 Pa. St. 63; *Bittinger's Estate*, 129 Pa. St. 338; *State v. Dalrymple*, 70 Md. 298; *Thomson v. Advocate Gen'l*, 12 C. & F. 1. Compare *State v. St. Louis County Ct.*, 47 Mo. 594.

A resident of *Pennsylvania* transferred securities to a corporation in *New York* in trust to pay him the income during his life, and over to beneficiaries named after his death, reserving the right to alter, revoke, etc.; but without having exercised that right, he died in *Pennsylvania*, where he had continued to reside. There were neither debts, administration, nor beneficiaries

in *New York*. Held, that the transmission at his death was subject to the *Pennsylvania* collateral inheritance tax law. *In re Lines' Estate*, 155 Pa. St. 378.

Notes secured by mortgages of land in another state, and owned by a resident of *New York* at his death, are within *New York* Laws 1885, ch. 483, as amended by Laws 1891, ch. 215, declaring subject to the legacy tax all property of decedents who may die possessed of the same while a resident of *New York*; and it is immaterial that the notes are in the hands of the owner's agent in the state where the land is situated. *In re Corning's Estate*, 23 N. Y. Supp. 285; 3 Misc. (N. Y.) 160.

3. *English Law*.—The struggle now going on in *Pennsylvania* and in other states of the Union between the doctrines based, respectively, on domicile and *situs*, has had what may fairly be deemed a counterpart in *England*. The rule dependent on domicile, or rather on the regulation of succession, has there been triumphant. Little is to be found in the law in regard to domicile until comparatively recent times. In 1744, Lord Hardwicke held that a decedent's personal estate was distributable according to the law of his domicile. *Pipon v. Pipon*, Amb. 25. It took some time to quiet the contention on that question, Lord Hardwicke repeating his ruling in 1750 (*Thorne v. Watkins*, 2 Ves. Sr. 35), which was followed again in 1787 by Sir Lloyd (afterward Lord) Kenyon. *Kilpatrick v. Kilpatrick*, unreported, cited in *Bruce v. Bruce*, 5 Ves. Jr. 750, and in *Hog v. Lashley*, Jones on Domicile (ed. of 1887), p. 19, § 18. In regard, however, to legacy duties, domicile was at first disregarded. It was held that

rule not based on domicile, or, more accurately speaking, on the existence of control of succession.¹

the duties were payable, if there were an English administration, irrespective of the decedent's domicile. *Atty. Gen'l v. Cockerill*, 1 Price 165; *Atty. Gen'l v. Beetson*, 7 Price 560. And Sir John Leach held further that proceedings in chancery to recover remittances from the foreign country were to be likened to administration proceedings, provided any question as to interests under the foreign will demanded determination. *Logan v. Fairlie*, 2 Sim. & Stu. 284. Remittances specifying the parties who were to receive, were considered as not calling for any actual or *quasi* administration in *England*, and therefore as not burdened by the legacy duty, even although in fact there were administration. *Logan v. Fairlie*, 2 Sim. & Stu. 284; *Atty. Gen'l v. Jackson*, 8 Bligh N. R. 15; *Logan v. Fairlie*, 1 M. & C. 59; *Jackson v. Forbes*, 2 C. & J. 382; *Arnold v. Arnold*, 2 M. & C. 256. And this although it was necessary to examine the English accounts. *Atty. Gen'l v. Forbes*, 2 C. & F. 48. In 1830, however, the effect of domicile was given prominence, in *In re Ewin*, 1 C. & J. 151. Baron Bayley, one of the exchequer court, opposed earlier cases in their theory attributing control of the question to the fact of administration, and his intimation received authoritative confirmation in the House of Lords in 1845. *Thompson v. Advocate Gen'l*, 12 C. & F. 1, *overruling* the cases of *Atty. Gen'l v. Cockerill*, 1 Price 165, and *Atty. Gen'l v. Beetson*, 7 Price 560—decided in 1814 and 1819. See also *Arnold v. Arnold*, 2 M. & C. 256; *Forbes v. Steven*, L. R., 10 Eq. 178. The long controversy in *England*, then, in regard to legacies, culminated in the doctrine that the question of liability was to be determined by the domicile of the testator. The language of the statute was "will of any person." The courts after an experience of many years, perceived that to attribute any other sense to these words would involve them in great difficulty; that the ancillary jurisdiction was unable to determine how far debts or expenses might affect the legacy; that some limit had to be drawn, and that it was best drawn by confining the words to wills of persons of English domicile.

Another English statute, called the

Succession Duty Act, and supplementary to the Legacy Duty Act, was passed in 16 and 17 Vict. Its language was of a wide character. Instead of saying, "will of any person," it said, "every disposition," and expressly included both immediate and mediate dispositions, contingent and certain, original and substitutive; and in effect included successions to realty. Even under such provisions, some limit was necessary. Legacies by a testator domiciled abroad were therefore held not thereby subjected to succession duty. *Wallace v. Atty. Gen'l*, L. R., 1 Ch. 1. Yet where the testator or grantor had given an English character to the property, by creating an English trust, which trusts were to be vindicated by English law, and explained by English law, the words, "every disposition," properly included such a settlement, regardless of domicile. *In re Lovelace*, 4 De G. & J. 340; *In re Smith's Will*, 12 W. R. 933; *In re Badart's Trusts*, L. R., 10 Eq. 288; *Lyall v. Lyall*, L. R., 15 Eq. 1; *Atty. Gen'l v. Campbell*, L. R., 5 H. L. 524; *In re Cigala's Settlement*, 7 Ch. Div. 351. And see *In re Capdevielle*, 2 H. & C. 985; *In re Wallop's Trusts*, 12 W. R. 587.

1. *Thompson v. Advocate Gen'l*, 12 C. & F. 28. Lord Campbell said in this case: "The truth is, my lords, that the question of domicile has sprung up in this country very recently. . . . But now, my lords, when we do understand this doctrine better than it was understood formerly, I think that it gives a clew which will help us to a right solution."

The difficulty was alluded to in the *Pennsylvania* court in 1881, in the case of *Orcutt's Appeal*, 97 Pa. St. 185. The difficulty has been ignored in the later case of *Small's Estate*, 151 Pa. St. 1; but as the question will doubtless yet receive considerable attention in various courts, the language may very well be quoted. *Sterrett, J.*, said: "The tax does not attach to the very articles of property of which the deceased died possessed. It is imposed only on what remains for distribution after expenses of administration, debts, and rightful claims of third parties are paid or provided for. It is on the net succession to the beneficiaries and not on the securities in which the

The federal statute of 1864 relating to successions to personalty, either "by will, or by the intestate laws of any state or territory," was held to affect the estates of those persons only whose domicile was in the *United States*.¹

In the *United States*, the courts have thus far adopted the earlier English rule to the extent of holding that the *situs* of personalty of non-resident decedents shall determine the liability to succession tax. Succession to land situate in another than the taxing state cannot be taxed, unless perhaps in certain cases of conversion.² The lack of jurisdiction in the case of land beyond the state forbids ordinarily any other than the one rule, namely, that dependent on *situs*. Personal property, however, presents an additional feature to that in the case of land. Like land, it has in many instances a *situs* of its own. This is where the property is of a tangible nature;³ so also in the case of property used in carrying on a business in a community;⁴ or settled upon trustees for investment and reinvestment within the state.⁵ Tangible property casually brought into the state for a temporary purpose,

estate of the decedent was invested. Commonwealth's Appeal, 34 Pa. St. 204; Strode v. Com., 52 Pa. St. 181. How, then, is it possible to impose a tax on this fund when it has never been ascertained judicially how much, or whether any of it will go to the collateral legatees? When the executrix charges herself with the fund received from the ancillary administrator and settles her account in *New Jersey*, who can tell how much of it may be successfully claimed by creditors and others as against the legatees? The court of the testator's domicile is the only one that can properly determine how much of it will ultimately go to the collateral legatees."

A *de facto* domicile governing the succession to personal property of which he dies intestate may be acquired in *France* by a foreigner who has not obtained the government authorization imposed by the Code Napoléon, art. 13, as the condition for enjoyment by a foreigner resident in that country of full civil rights. Hamilton v. Dallas, 1 Ch. Div. 257.

"The political status may depend on different laws in different countries, whereas the civil status is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party—that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy—must depend."

Lord Westbury, in Udny v. Udny, L. R., 1 H. L. Sc. 441, 457, cited in Hamilton v. Dallas, 1 Ch. Div. 271. See also Spech's Case, Dalloz Rec. Pér. 1872, pt. 2, 235; Sussman's Case, Dalloz Rec. Pér. 1872, pt. 2, 65. Forgo's Case, Court of Cassation, May 4, 1875, was disapproved in Hamilton v. Dallas, 1 Ch. Div. 272.

Departure from *England* with intent to acquire a new domicile will not relieve from legacy duty, unless the new domicile is actually obtained. See Atty. Gen'l v. Dunn, 6 M. & W. 526; Atty. Gen'l v. Napier, 6 Exch. 217; Hodgson v. De Beauchesne, 12 Moore P. Cl. 285; Atty. Gen'l v. Blucher de Wahlstatt, 3 H. & C. 374; *In re Tootal's Trusts*, 23 Ch. Div. 532; *In re Capdevielle*, 2 H. & C. 985.

1. U. S. v. Hunnewell, 13 Fed. Rep. 617. Abandonment by the testator of his American domicile and acquisition of a new one will prevent the application of the statute. U. S. v. Morris, 27 Fed. Rep. 341. And see San Francisco v. Mackey, 22 Fed. Rep. 602; San Francisco v. Fry, 11 Pac. C. L. J. 393; State Tax on Foreign Bonds Case, 15 Wall. (U. S.) 300; 18 Am. L. Reg. (N. S.) 1, 1879, and cases there cited; People v. Eastman, 25 Cal. 603; People v. Whartenby, 38 Cal. 466, 467.

2. See *supra*, this title, *Real Estate*.

3. See Hoyt v. Com'rs of Taxes, 23 N. Y. 228; Small's Estate, 151 Pa. St. 14.

4. Small's Estate, 151 Pa. St. 15.

5. See *In re Cigala's Settlement*, 7 Ch. Div. 351.

as by a visitor or traveler, would scarcely be regarded as "within" the taxing state.¹

Intangible property, not remaining with agents or trustees for investment, reinvestment, etc., has not been regarded by the *Pennsylvania* court as having such a *situs* of its own that it may be regarded as "within the state."² Unlike land, however, the succession to personalty of a decedent is regulated, not by the law of its *situs* but by the law of the domicile of its late owner. Jurisdiction therefore may exist in the taxing state in either of two ways. It may arise by virtue of the existence of the personalty within the territory; or it may arise by virtue of the fact that for purposes of distribution of decedent's estates the maxim prevails *mobilia sequuntur personam*.

Where the decedent was domiciled in the state imposing the succession tax, the statutes generally provide that the tax shall be paid, irrespective of the *situs* of the property. An examination, however, of the statutes will show that they usually tax succession to personalty by all non-exempt persons, irrespective of *situs*, where the decedent was domiciled within the taxing state;³ but that they do regard the *situs* of the property in the case of non-resident decedents. In the case of succession to estates of such non-residents the statutes generally specify as subject to taxation property "within," or "being within," or "situate within" the taxing state. Such has been the conclusion arrived at thus far. The statutes frequently contain language which might be taken to indicate a different intention. *New York* and *Pennsylvania* laws referred to property or estates "passing by will or under the intestate laws of this" state or commonwealth. This language created difficulty.⁴ Indeed, it has led to intimation by the court itself that only where the property "passed by will or under the intestate laws of this commonwealth," could the tax be assessed.⁵ These difficulties and intimations have given way, however, to positive decision to the effect that personal property is

1. See *Herron v. Keeran*, 59 Ind. 476; 26 Am. Rep. 87; *Romaine's Estate*, 127 N. Y. 88; *Strong, J.*, U. S. C. C., in *Kintzing v. Hutchinson*, 34 Leg. Int. (Pa.) 365.

2. *Orcutt's Appeal*, 97 Pa. St. 179; *Commonwealth's Appeal*, 11 W. N. C. (Pa.) 492; *Del Busto's Estate*, 23 W. N. C. (Pa.) 116.

3. Reference must be made here, however, to a decision by one of the surrogates. It has been held by the surrogate of Cattaraugus county, *New York*, that the act of 1885 taxing "all property which shall pass by will or by the intestate laws of this state from any person who may die seised or possessed of the same while being a resident of the state, or which property shall be

within this state," did not operate, and that neither did the later amendatory acts operate so as to tax legacy by a *New York* testatrix of her undistributed interest in the estate of a deceased sister who had resided in *Ohio*, no part of the same having reached the testatrix before her death; and that said acts did not affect certificates of stock of corporations of other states. Such undistributed interest and shares of stock were not "property within this state." *Matter of Thomas*, 3 Misc. (N.Y.) 388.

4. See dissenting opinion of Haight, J., in *Romaine's Estate*, 127 N. Y. 89.

5. See the language of the court in *Orcutt's Appeal*, 97 Pa. St. 179. (The reader will remember that the language about to be quoted was not recognized

transmitted subject to the tax whenever it can be regarded as "within" or "situate within" the state.¹

in *Small's Estate*, 151 Pa. St. 1.) It was as follows: "Again, by the very words of the act, the tax is not only limited to such estates as have a *situs* within the commonwealth, and also pass to collateral heirs or legatees, but it is further restricted by defining the mode in which they shall pass, viz., estates 'being within this commonwealth,' and 'passing from any person,' etc., 'either by will or under the intestate laws thereof,' etc. It is clear, therefore, that estates not passing by a will that is operative within the state, or under the intestate laws thereof, or by deed or grant intended to take effect after the death of the decedent, are not within the purview of the act. Devolution, either under the intestate laws of the commonwealth or under a properly executed will, is clearly made a condition of liability to the tax. To render estates liable to the tax, therefore, they must, in the first place, have a *situs* within the commonwealth, and in the second place, they must pass in one or other of the modes prescribed to the collateral heirs or distributees intended by the act."

1. *Small's Appeal*, 151 Pa. St. 1; *Romaine's Estate*, 127 N. Y. 80; *State v. Dalrymple*, 70 Md. 297. The great importance of the question will warrant a statement of these cases.

Small's Estate, 151 Pa. St. 1. In this case a limited partnership association consisted of three members, two of whom were residents of *Pennsylvania*, and one of *Maryland*. The capital of the association was made up of land in *Pennsylvania* valued at \$190,500 and personal property valued at \$240,300, consisting of merchandise, flour, grain, and other personal property which had a visible and tangible existence in *Pennsylvania*. The business consisted largely of buying and selling grain, flour, etc., in *Pennsylvania* and elsewhere. The non-resident member, by his will bequeathed to his partners, who were also his brothers, all his interest in the association, including "all the property real and personal, notes, stocks, bonds and accounts." Held, that the interest of the deceased member was liable to the collateral inheritance tax. In delivering the opinion of the court, Sterrett, J., observed as follows: "As was said by Comstock, C. J., in *People v. Com'rs of*

Taxes, 23 N. Y. 228, 'the fiction or maxim, *mobilia personam sequuntur* is by no means of universal application. Like other fictions it has its special uses. It may be resorted to when convenience and justice require. In other circumstances, the truth and not the fiction affords, as it plainly ought to afford, the rule of action. . . . I can think of no more just and appropriate exercise of the sovereignty of a state or nation over property situated within it and protected by its laws than to compel it to contribute toward the maintenance of government and law.' 'A nation within whose territory any personal property is actually situated, has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there.' Story's *Conf. of Laws*, § 550. As a general rule, intangible personal property of a non-resident, such as bonds, mortgages and other choses in action, is governed as to its *situs* by the fiction of law above noticed, and hence such property is not subject to collateral inheritance taxation under our laws, because it is not 'situated within this state.' In *Orcutt's Appeal*, 97 Pa. St. 179, the fund under consideration was proceeds of *United States* bonds deposited temporarily for safekeeping in Philadelphia, by the testator, a citizen of *New Jersey*. Recognizing the general rule that the *situs* of personal property follows the domicile of its owner, and conceding the well-defined exceptions thereto, that when used in carrying on business and for other particular purposes, some species of personal property may have an actual *situs* distinct from the legal one, it was held that there was no reason in that case why either the bonds or their proceeds should, for any purpose, have a *situs* different from the owner's domicile. The bonds were simply evidences of indebtedness, not by any person or corporation within the commonwealth, but by the general government. The facts of this case, however, are different, and bring it within the exceptions to the fictitious rule. In the formation, location, etc., of their partnership association, the testator and his brothers evidently established the *situs* of the personal property which constituted its capital. They organized the association under

(b) **What Property May be Regarded as "Within" a State.**—Assuming that the actual *situs* of property in a state is of itself sufficient to create liability,¹ the question arises, what kind of property may be regarded as "within" a state. Tangibles present little or no doubt. Ordinarily, they are clearly "within" the state where they are physically located. Certain exceptions doubtless exist. Doubtless, property *in transitu*² is not to be regarded as "within" the jurisdiction; and so with property brought into the state merely for temporary safekeeping.³ Intangibles present greater difficulty. Securities have received different treatment in differ-

the laws of this state; located its principal office and conducted its business therein, and thus enjoyed the benefit of the law and protection of the state and local government. In such circumstances, as remarked in *Hoyt v. Com'rs of Taxes*, 23 N. Y. 228, the truth and not the fiction plainly affords the rule of action. Neither convenience nor justice requires us to resort to the fictitious rule."

Romaine's Estate, 127 N. Y. 80. In this case, decedent, "at the time of his death, and for about three years prior thereto, was the lessee of a box in a safe-deposit company in the city of New York, in which he kept certain securities, consisting of stocks and bonds of different corporations, and a mortgage upon real estate in said city, as well as several pass-books showing deposits by him in various savings banks in the same place to a considerable amount. It did not appear whether said stocks and bonds were issued by foreign or domestic corporations." It was held that the succession was subject to the *New York Act of 1887*, ch. 713, Haight, J., *dissenting*. The precise value of this decision as a guide in other states is not altogether clear. The act of 1885, as interpreted in *In re Enston*, 113 N. Y. 183, and in *Hall's Estate*, 8 N. Y. Supp. 556, had applied only to resident decedents. The act of 1887, after speaking of resident decedents, went on to say that if such decedent was not a resident, then succession to any of his property within the state should be taxed. This further provision, the court thought, being a new one, must be taken as added in order to change the law as it had stood under the act of 1885. Quotations from these acts have been given, *supra*, this title, *Recitals of Statutes*.

State v. Dalrymple, 70 Md. 297. In this case, the property still remained for distribution in the hands of the

personal representative, in *Maryland*, of an earlier decedent from whom the immediate decedent's interests were derived. Whether or not that will be considered by the *Maryland* court as a material circumstance, may admit, possibly, of argument. McSherry, J., said: "No reason has been assigned or can be suggested why the broad language of the statute and the evident design of the legislature should be so narrowed and restricted as to exempt from this tax the estate of a non-resident actually here, notwithstanding that same property may, for other purposes, be treated as constructively elsewhere. If we adopt the view insisted on by the appellees it will result in a discrimination in favor of non-residents and against our own citizens, a discrimination, too, which the legislature certainly never intended to make, and for which no warrant can be found in the plain letter of the statute. In permitting property within the state on the death of its owner to pass by devise or descent or distribution, the legislature has seen fit, where strangers or collateral kindred received it, to exact as the condition upon which that privilege is granted the tax in question. The imposition and collection of the tax, therefore, cannot depend upon the mere accidental residence of the owner."

1. See *supra*, this title, *Effect of Domicile*.

2. **Transits.**—Property of a non-resident in course of transportation through the state is not subject to tax. *People v. Com'rs of Taxes*, 23 N. Y. 240; *Kintzing v. Hutchinson*, 34 Leg. Int. (Pa.) 365, U. S. C. C., per Strong, J., *Romaine's Estate*, 127 N. Y. 88. And see *Herron v. Keeran*, 59 Ind. 476; 26 Am. Rep. 87.

Property Invested, or Settled with Agents or Trustees.—See *supra*, this title, *Effect of Situs*.

3. *Orcutt's Appeal*, 97 Pa. St. 179.

ent states; *Pennsylvania* adopting the principle that intangibles have ordinarily no *situs* excepting at the owner's domicile;¹

And see *State v. Dalrymple*, 70 Md. 304; *Romaine's Estate*, 127 N. Y. 88.

1. **The Pennsylvania Doctrine.**—We find the position taken in *Orcutt's Appeal*, 97 Pa. St. 179, that *United States* bonds, evidencing the indebtedness not of any particular person or corporation but of the general government, could not be regarded as "being within" the commonwealth, so as to bring successions to them within the collateral inheritance tax law. The doctrine of the case was subsequently developed and applied to varieties of securities. Thus, in *Commonwealth's Appeal*, 11 W. N. C. (Pa.) 492, the court said of the legislation in question: "It was intended to embrace only personal property of a tangible nature, and not mere evidences of indebtedness which have no *situs*, but follow the owner's domicile."

In *Orcutt's Appeal*, 97 Pa. St. 179, *Sterrett, J.*, observed as follows: "The general rule undoubtedly is, that the *situs* of personal property follows the domicile of the owner; but for particular purposes some species of personal property may have an actual *situs* distinct from the legal one. This qualification of the rule, however, cannot apply to the kind of property from which the fund in this case was realized. The bonds were simply evidences of indebtedness, not by any person or corporation within the commonwealth, but by the general government. There is no reason why such property should, for any purpose, have a *situs* different from the domicile of its owner. The testator intrusted the bonds temporarily for safekeeping to the Fidelity Company, but they were, constructively at least, in his possession at the time of his decease. There were no creditors, legatees, nor distributees in this state claiming them or any portion of the proceeds thereof; and in the absence of creditors or other interested parties in this state claiming administration here, I can see no good reason for refusing to deliver the bonds to the executrix. As it is, however, the fund here is in the hands of a purely ancillary administrator, whose sole function was to receive from the *United States* treasury the amount called for by the bonds, and transmit the same, less costs and charges, to the executrix in *New Jersey* for administration ac-

cording to the laws of that state and the directions of the testator. It is true that if creditors or distributees residing here had intervened and demanded distribution or payment directly from the accountant, the orphans' court in its discretion might have heard them, and might also have permitted foreign creditors to present their claims; but that is a matter of judicial discretion, not of right. *Dent's Appeal*, 22 Pa. St. 514. It is also clear from the act itself, as well as from the construction it has heretofore received, that the property taxable is such only as passes to volunteers, persons not excepted by the terms of the act. The tax does not attach to the very articles of property of which the deceased died possessed. It is imposed only on what remains for distribution after expenses of administration, debts, and rightful claims of third parties are paid or provided for. It is on the net succession to the beneficiaries and not on the securities in which the estate of the decedent was invested. *Commonwealth's Appeal*, 34 Pa. St. 204; *Strode v. Com.*, 52 Pa. St. 181. . . . The act of April 10th, 1849, provides in general terms that if any non-resident of the state shall die leaving real or personal estate within this commonwealth, the same shall be subject to the payment of collateral inheritance tax. It is contended that this act was repealed by the act of April 22d, 1858. Without passing on that question, we are of opinion that the act was never intended to apply to the kind of personal property from which the fund in this case was realized. It was doubtless intended to embrace only personal property of a tangible nature, actually situated or used for business purposes within the commonwealth, and not to mere certificates of indebtedness, such as government bonds, whose *situs* necessarily follows the owner's domicile. The *Pennsylvania* doctrine has been applied in favor of the exemption of federal bonds, and also of bonds of municipalities and of railroad corporations, including domestic railroads and municipalities as well as those of other states.

The following securities, found in *Pennsylvania*, were declared as not within the *Pennsylvania* act: Louisville coupon bonds; Philadelphia reg-

with this doctrine the court of *Maryland*¹ differs, and also that

istered bonds; North Penn. R. Co. coupon bonds; Delano Land Co. bonds; *United States* coupon bonds; *United States* registered bonds. Commonwealth's Appeal, 11 W. N. C. (Pa.) 492.

And of the cases generally, it may be said that the declarations in the *Pennsylvania* opinions do, in principle, include stocks of corporations, whether of *Pennsylvania* or elsewhere. See Orcutt's Appeal, 97 Pa. St. 179; Commonwealth's Appeal, 11 W. N. C. (Pa.) 492; Del Busto's Estate, 23 W. N. C. (Pa.) 116; Bennett's Appeal, 37 Pitts. L. J. (Pa.) 316. *McKeen v. Northampton County*, 49 Pa. St. 519; 88 Am. Dec. 515. And in fact we find the county courts applying Orcutt's Appeal to stocks of both domestic and other corporations. Philadelphia, Del Busto's Estate, 23 W. N. C. (Pa.) 115; 45 Leg. Int. (Pa.) 474. *U. S. C. C., Strong, J., Kintzing v. Hutchinson*, 34 Leg. Int. (Pa.) 365. Commonwealth's Appeal, 11 W. N. C. (Pa.) 492, already mentioned, was a supreme court case.

The bonds in Orcutt's Appeal, 97 Pa. St. 179, were in the state merely temporarily for safekeeping. Permanent investments, reinvestments, etc., would probably be classed with tangibles; but, subject to a probable exception in cases of such or similar nature, the reasoning of the court was sufficient to cover any choses in action.

A bond and mortgage debt, in which the fund is realized from the bond and not from the mortgage, is not within the *Pennsylvania* Act. *Pittsburgh Orphan's Court, Bennett's Estate*, 37 Pitts. L. J. (Pa.) 316.

Interest in Partnership.—It has been held in *Pennsylvania* that an interest in a partnership must be classed with interests in tangibles. *Small's Appeal*, 151 Pa. St. 1. The court held further, that it could make no difference that the partnership happened to be a limited partnership association. *Sterrett, J.*, said: "There is, of course, some difference in the two forms of partnership. In the one, the liability of members is general; in the other it is limited to the capital subscribed, and provision is made for selection of managers by whom the business is conducted in the name adopted by the association, etc., but there appears to be nothing in the mode of organization under the law nor in the

manner of conducting the business that requires exemption of the tangible property of the one from payment of collateral inheritance tax, while that of the other is liable thereto." Argument had been made by counsel that the interests in the association were represented by stock therein.

1. The *Maryland* decision, *State v. Dalrymple*, 70 Md. 294, determined that there was liability, in the case of certificates of national bank stock and Baltimore City stock, and *Missouri* state bonds. The *dictum* in *Citizens' Nat. Bank v. Sharp*, 53 Md. 521, that a legacy by a testator domiciled in *Indiana* of shares of a national bank located in Baltimore, was not subject to collateral inheritance tax, was disapproved. Apropos of some of this, we would refer to Amendment XIV, prohibiting any state from depriving any person of property without due process of law. This, if nothing else, would seem to protect the *Missouri* state bonds from the operation of the act, since there cannot be due process without jurisdiction. The *United States* Supreme Court declared that in accurate language it is not correct to consider mere debts or choses in action property in the hands of the debtors. They have no being of their own. In contemplation of law, they are with the owner, or in such place as by his conduct he locates them. The court accordingly declared the general rule to be that a debt, or a mere security for a debt or promise, has no locality independent of the party in whom the debt resides, and that it cannot be within the jurisdiction of the annual tax power of the state in which the debtor or promisor resides, unless the creditor resides there. *State Tax on Foreign-held Bonds*, 15 Wall. (U. S.) 300. This decision is not presented as expressing the view held by all of the courts, and it is to be remarked that four of the judges dissented—Justices Davis, Clifford, Miller and Hunt. It is believed, however, that it declares the prevailing opinion; and one of the most important decisions following its principle was made by the very court whose decision it overruled, namely, the *Pennsylvania* court, which followed it in Orcutt's Appeal, 97 Pa. St. 179. See also *Kirtland v. Hotchkiss*, 100 U. S. 491; *Grant v. Jones*, 39 Ohio St. 506; *State v. Ross*, 23 N. J. L. 517; *Goldcart v. People*, 106

of *New York*,¹ holding, apparently, that even intangibles, at least when represented by documents, such as bonds, stocks, or mortgages, are to be regarded as having a *situs* of their own, so as to be "within" the state where the documents are, irrespective of the owner's domicile.

(c) *Effect of Administration.*—The earlier opinion of the English courts was that if there was an English administration of a will, the fact of administration made it a "will of any decedent," under the English Legacy Duty Act of 1780. This position was finally abandoned, it being stated in the House of Lords that the only practicable policy was one which looked to domicile as the test of liability in those cases where domicile controlled the succession.*

Ill. 25; *Latrobe v. Baltimore*, 19 Md. 13; *People v. Eastman*, 25 Cal. 603; *Bacon's Estate*, 3 Del. Co. Rep. (Pa.) 603; *Com. v. Chesapeake, etc.*, R. Co., 27 Gratt. (Va.) 354, a case of stock.

Debts owing to foreign creditors are not "property" and are not taxable. *Cooley on Taxation* (2d ed.), p. 22. See *San Francisco v. Mackey*, 22 Fed. Rep. 602. Nor will attachment against the debtor by a creditor of his own creditor be regarded in the latter's domicile, especially in case of the latter's insolvency. *Osgood v. Maguire*, 61 N.Y. 529.

Investments by residents in bonds of foreign corporations, on the other hand, were held to be subject to the annual tax power of the state. *Worthington v. Sebastian*, 25 Ohio St. 1.

Debts owing residents of taxing state are taxable. *Kirtland v. Hotchkiss*, 100 U. S. 498. As to dividends due non-residents, see *Michigan Cent. R. Co. v. Collector*, 100 U. S. 595; *U. S. v. Erie R. Co.*, 106 U. S. 327; *Com. v. Chesapeake, etc.*, R. Co., 27 Gratt. (Va.) 344.

Contra.—The cases denying any separate *situs* to property of the character indicated are not without opposition; as in *Catlin v. Hull*, 21 Vt. 152; *State v. St. Louis County Ct.*, 47 Mo. 594.

The principle, *mobilia personam sequuntur*, "is by no means of universal application." *Graham v. First Nat. Bank*, 84 N. Y. 401; *People v. Coleman*, 119 N. Y. 139; *People v. Smith*, 88 N. Y. 576.

But of *Catlin v. Hull*, 21 Vt. 152, it will be observed that the separate *situs* attributed to personality had respect to property left with an agent to manage and to invest. Even in *England*, investments managed by trustees have been regarded as within the succession duty act, as has been pointed out. And see *People v. Gardner*, 51 Barb.

(N. Y.) 352; *People v. Coleman*, 119 N. Y. 137.

Respecting the power existing in a state to tax domestic stock of non-residents, see *TAXATION*, vol. 24; *Cook on Stock and Stockholders*, § 566; *Cooley on Taxation* (2d ed.) 23, 57. *American Coal Co. v. Allegany County*, 59 Md. 185; *Baltimore v. Baltimore City Pass. R. Co.*, 57 Md. 31; *Catlin v. Hull*, 21 Vt. 158; *State v. Dairymple*, 70 Md. 294.

1. *New York.*—The *New York* Court of Appeals has followed what appears to be the meaning of the *Maryland* decision, and applied it to a non-resident's stocks and bonds kept habitually in the state for safekeeping, and also to mortgages there kept and being upon *New York* real estate. *Romaine's Estate*, 127 N. Y. 80. The property is thus described by the Reporter: "At the time of his death, and for about three years prior thereto, he was the lessee of a box in a safe-deposit company in the city of *New York*, in which he kept certain securities, consisting of stocks and bonds of different corporations and a mortgage upon real estate in said city, as well as several pass-books showing deposits by him in various savings banks in the same place to a considerable amount. It did not appear whether said stocks and bonds were issued by foreign or domestic corporations."

2. See *supra*, this title, *Effect of Situs*.

Under the treaty of peace between *Great Britain and France* in 1815, a large sum of French stock was set apart by the French government to compensate British subjects whose property had been confiscated by the revolutionary government, and part of that sum was awarded, by commissioners appointed by the British government, to the tes-

In the *United States*, the earlier English authorities seem to have received some approval, although this has not been of any decided character.¹ Where an administration was purely ancillary, the proceeds not being distributed but being awarded to the official of the domicile, the property was held not to be "within" the jurisdiction by virtue merely of the administration.²

(a) *Residence of Agent*.—The mere residence of an agent, or registry of stock in his name, does not seem to be material.³ Securities separated from the person and domicile of the owner, and actually with the agent for collection, investment, and reinvestment, have been regarded as within the state of the agent, under ordinary annual tax laws.⁴ If being "within" a state subjects property to

tator's executors. The commissioners, under the powers of an act of Parliament, sold the stock so awarded, and paid the proceeds into chancery. The domicile of the testator at his death was found to have been in *France*. It was held, that the fund in court was not subject to legacy duty. *Com'rs of Charitable Donations v. Devereux*, 13 Sim. 14.

1. See *State v. Dalrymple*, 70 Md. 294; *Alexander's Estate*, 3 Clark (Pa.) 87; *Orphans' Court of Philadelphia*, 1845; *Com. v. Smith*, 5 Pa. St. 142. See also *Alvany v. Powell*, 2 Jones Eq. (N. Car.) 59; *Kintzing v. Hutchinson*, 34 Leg. Int. (Pa.) 365. See *State v. St. Louis Ct.*, 47 Mo. 602. It may be well to observe that the American courts have not given the same regard to domicile as was shown in the House of Lords. See *supra*, this title, *Effect of Situs*.

2. *Orcutt's Appeal*, 97 Pa. St. 179; *Commonwealth's Appeal*, 11 W. N. C. (Pa.) 492; *In re Alexander's Estate*, 3 Clark (Pa.) 89.

A person living in the State of *Ohio* became entitled by inheritance from a resident of *Pennsylvania* to personal estate, which inheritance remained with his guardian in *Pennsylvania* at his own death. He left a sister, to whom such personalty was awarded by the *Pennsylvania* orphans' court. It was held by the orphans' court, that such estate was liable in *Pennsylvania* for collateral inheritance tax. *Com. v. Brenner*, decided in 1870, 2 Pa. Leg. Gaz. 413.

Land in another state was sold by the executors, under a mere power which did not work a conversion in law. The proceeds were deposited in a bank in *Pennsylvania*, the state of the domicile, in the general account of the executors as such officials, with money arising

from personalty. The executors drew on the whole fund for the purposes of the estate and charged the proceeds in their general account as executors. It was held that the proceeds of the foreign realty were not subject to the collateral inheritance tax. They did not of necessity enter into the administration account. "Surely, the bringing them into this state and depositing them in the bank account of the executor along with other funds of the estate, can make no difference." *Drayton's Appeal*, 61 Pa. St. 172. See *supra*, this title, *Real Estate*.

Voluntary payment to foreign executor by a *Maryland* debtor, before any *Maryland* administration, seems to have been regarded as relieving one from the *Maryland* collateral inheritance tax. *Citizens' Nat. Bank v. Sharp*, 53 Md. 521. But in *State v. Dalrymple*, 70 Md. 303, the court remarked of the *Sharp* Case that the question of the tax was not involved. See FOREIGN EXECUTORS, vol. 8, p. 424.

3. *Commonwealth's Appeal*, 11 W. N. C. (Pa.) 492; *In re Enston*, 113 N. Y. 181, construing a former law.

Property held by a mere temporary custodian is not taxable. *Cooley on Taxation* (2d ed.) 79. See *Williams v. Wayne County*, 78 N. Y. 561; *Carlisle v. Marshall*, 36 Pa. St. 397; *People v. Com'rs of Taxes*, 23 N. Y. 240; *State v. St. Louis Court*, 47 Mo. 594; *People v. Home Ins. Co.*, 29 Cal. 534; *Cook on Stockholders* (2d ed.), § 566 *et seq.*

Of course, if the statute does not intend the taxation, the question does not arise, as with some earlier *New York* laws. *In re Enston*, 113 N. Y. 179; *In re Tulane*, 51 Hun (N. Y.) 213. And see *Williams v. Wayne County*, 78 N. Y. 561.

4. See *State v. St. Louis Court*, 47

the burden of collateral inheritance tax law, then a consequence seems to be that the property held in the manner spoken of is within the law.¹ An English trust, to be vindicated by English law, but created by a foreigner, was held to be a "disposition" under the English succession duty law.²

(e) *Residence of Legatee or Donee.*—The residence of the legatee, donee, or devisee is immaterial.³

2. Character of the Disposition—*a. FRAUDULENT TRANSFERS; SALES; POWERS OF APPOINTMENT; TRANSFERS IN DISCHARGE OF OBLIGATIONS.*—The policy of the law will not permit the owner of an estate to defeat the plain provisions of the collateral inheritance law by any device which secures to him, for life, the income, profits, and enjoyment thereof; it must be by such a conveyance as parts with the possession, the title, and the enjoyment in the grantor's lifetime.⁴ The fact that the motive for

Mo. 600; *People v. Com'rs of Taxes*, 23 N. Y. 240; *Catlin v. Hull*, 21 Vt. 152; *People v. Smith*, 88 N. Y. 576; *Goldcart v. People*, 106 Ill. 25.

1. *Romaine's Estate*, 127 N. Y. 80.

Personal property held in trust is usually assessable under the annual tax laws to the trustee at his domicile, but is sometimes assessed to the beneficial owner if a resident. *Cooley* 375. See page 377, as to property held by guardians.

By *New York Laws* 1883, ch. 392, respecting ordinary annual taxation, debts and obligations were made taxable when due to residents, irrespective of the residence of trustees. See *People v. Coleman*, 119 N. Y. 137; *People v. Smith*, 88 N. Y. 576.

2. *In re Cigala's Settlement*, 7 Ch. Div. 351. See *supra*, this title, *Effect of Situs*.

3. *Com. v. Duffield*, 12 Pa. St. 277. But in *Louisiana*, non-residents living in foreign countries could only take subject to the *Louisiana* tax. *Mager v. Grima*, 8 How. (U. S.) 490. Apparently this legislation is not now in force. See *supra*, this title, *History; Present Status*. It applied only to successions becoming open after the passage of the law. *Oyon's Succession*, 6 Rob. (La.) 504; *Deyraud's Succession*, 9 Rob. (La.) 357. It did not apply to non-residents who were domiciled in any other state of the Union. *State v. Poydras*, 9 La. Ann. 165; 18 How. (U. S.) 192.

Treaties.—See *supra*, this title, *Nature and Constitutionality*, with respect to treaties.

A non-resident's property not "with-

in" the commonwealth at the time of his death, is not made subject to the succession tax by being brought into the state for the purpose of paying legatees. *State v. Brevard*, Phil. Eq. (N. Car.) 141; *Alvany v. Powell*, 2 Jones' Eq. (N. Car.) 51; *State v. Brim*, 4 Jones' Eq. (N. Car.) 301; *Com. v. Duffield*, 12 Pa. St. 277; *Hood's Estate*, 21 Pa. St. 106; *Orcutt's Appeal*, 97 Pa. St. 184; *Drayton's Appeal*, 61 Pa. St. 172; *In re Tootall's Trusts*, 23 Ch. Div. 532. See *supra*, this title, *Effect of Administration*.

4. *Clark, J.*, in *Reish v. Com.*, 106 Pa. St. 526.

A testator by his will bequeathed his property to certain collateral relatives and for religious and charitable purposes; subsequently he transferred all his property, by deed duly acknowledged, to the persons named as executors in his will, they to receive the income of the same to their own proper use during the life of the testator and at his death to hold the same for the uses and purposes set forth in his said will. *Held*, that the estate was liable for collateral inheritance tax. The deed did not change the time of payment and was an evident attempt to evade the collateral inheritance tax. *Seibert's Appeal*, 110 Pa. St. 329. And see *Wright's Appeal*, 38 Pa. St. 507; *Du Bois' Appeal*, 121 Pa. St. 368; *Davenport's Appeal*, 3 Pa. S. C. Dig. 236; *Baker v. Williamson*, 4 Pa. St. 456; *Com. v. Kuhn*, 2 Pa. Co. Ct. Rep. 248; *Riddle's Estate*, 45 Leg. Int. (Pa.) 394; *Thomson's Estate*, 5 W. N. C. (Pa.) 14; *Leche's Estate*, 1 Lanc. (Pa.) 65. See also U. S. v. Banks, 17 Fed. Rep. 322;

executing a trust deed was in part to evade the collateral inheritance tax law has been held not to prevent the trust from being enforced in other respects.¹

A covenant by a settlor for payment of money during his life or after his death, being unfulfilled in his lifetime, is a "disposition at death," within a succession-tax act.²

Some of the statutes use the word, "sale,"³ in enumerating the transfers within the effect of this statute. Their intent in the use of the word remains to be determined. In the case of a sale, before a county court in *Pennsylvania*, it was said that if the transfer was intended to take effect at the grantor's death, the property transferred is liable; and that, on the other hand, if the transfer was a sale by which the vendor parted with the possession, title, and enjoyment of a portion of his property, in consideration of an annual sum to be paid him as long as he should live, the tax would not be due in respect of the property so transferred.⁴

concerning deed of advancement under the *United States Succession Tax Law*, now repealed.

A, during his last sickness conveyed his property in fee to his brother and only heir, B, for the consideration of \$1. At the same time B executed a bond conditioned for the faithful payment to A, his executors, administrators or assigns, of the net income of said property, without fraud or delay. It was held that under this bond the ownership of the property conveyed to B did not take effect in enjoyment until A's death, and, therefore, that upon the happening of this event, said property was subject to collateral inheritance tax. *Reish v. Com.*, 106 Pa. St. 521.

The testator bequeathed his residuary estate to the appellant, a religious corporation. Long prior to his death he advanced to the beneficiaries on account of their legacy, at different times, sums which aggregated \$4,000, and took from them their bonds in corresponding amounts conditioned for the payment during his life, of an annuity or yearly sum equal to interest at six per cent. on the advancements. Held, that the moneys so advanced were subject to the collateral inheritance tax. *Conwell's Estate*, 45 Leg. Int. (Pa.) 266. And see *Provenchere's Appeal*, 67 Pa. St. 468, referred to by the court in *Conwell's Estate*, on the principle that a gift of the income of a fund for life was equivalent to a gift of the principal during that period. See also *Riddle's Estate*, 45 Leg. Int. (Pa.) 394.

A deed conveying to trustees, re-

serving to grantor enjoyment during his life, the trustees to pay over to certain specified beneficiaries at grantor's death, the latter having power to revoke, alter, etc., the disposition of the property after his death, is, as to the beneficiaries after his death, subject to collateral inheritance. *Lines' Estate*, 155 Pa. St. 378.

Gift Inter Vivos.—A disposition by way of gift when *bona fide* and *inter vivos*, and not taking effect after the death of the grantor, is not within the scope of inheritance tax legislation; and it is immaterial that the grantor devises the same property to the grantee. *Stinger v. Com.*, 26 Pa. St. 422.

1. *Baker v. Williamson*, 4 Pa. St. 456; *Tritt v. Crotzer*, 13 Pa. St. 458.

2. *Atty. Gen'l v. Montefiore*, 21 Q. B. Div. 461. Doubt had been expressed in 1885. *In re Higgins*, 29 Ch. Div. 697.

3. *New York Laws*, 1892, ch. 399, p. 815; *New York Laws*, 1887, ch. 713; *Pennsylvania Act*, 1887, § 1; *Maryland Code*, vol. 2, 1888; *Connecticut Stat.* 1889, p. 106; *Ohio Laws*, 1893, § 1; *New Jersey Laws*, 1892, p. 207; *Delaware Laws*, 1869, § 12 (*Laws of Delaware*, vol. 13, p. 366); *West Virginia Code* 1891, p. 243.

4. *Garman's Estate*, 3 Pa. Co. Ct. Rep. 550, decided by McPherson, J. In that case, a promissory note of uncertain value as to principal and interest had been transferred by a decedent, the vendee alone taking all risk of collection and future profit, in consideration of an annual sum to be paid to the decedent as long as he should

In the absence of legislative provision otherwise, if the beneficiaries would have been exempt if the transmission had been directly to them without the interposition of a power, they are exempt as appointees.¹ The fiction of law that a deed granting a power and the will executed thereunder are to be construed as one instrument, is not allowed, however, to prevent the operation of the succession tax statute, wherever the instruments, taken together, are to be regarded as having the effect of a deed to take effect in enjoyment upon the decedent's death.²

A legacy in payment of a debt or in discharge of an obligation

live. The interest of the grantee was held not to be subject to collateral inheritance tax. The case is distinguishable from *Riddle's Estate*, 45 Leg. Int. (Pa.) 394. There a transfer of shares of railroad stock to legatees by the testatrix in her lifetime, reserving to herself the dividends and income for her support, was held to be subject to the tax. See *Reish v. Com.*, 106 Pa. St. 526; *Seibert's Appeal*, 110 Pa. St. 329.

1. *Com. v. Duffield*, 12 Pa. St. 277; *Com. v. Sharpless*, 2 Ches. Co. Rep. (Pa.) 246; *Com. v. Schumacher*, 9 Lanc. Bar (Pa.) 199; *Com. v. Williams*, 13 Pa. St. 29; *In re Stewart*, 30 N. Y. St. Rep. 738; Sugden on Powers, ch. 8, § 111; § 1, vol. 2, p. 22 (7th Eng. ed.); 4 Kent's Com. 337. And see *In re Lovelace*, 4 De G. & J. 340. The English acts imposing legacy and succession duties have altered the law in the manner shown in Farwell on Powers, p. 220 *et seq.* See *In re Cholmondeley*, 1 C. & M. 149; *Platt v. Routh*, 3 Beav. 257; *In re Lovelace*, 4 De G. & J. 340; Hanson (English) on the Legacy and Succession Duty Acts (2d ed.) 91; *Com. v. Brenner*, 18 Pitts. L. J. (Pa.) 147; 2 Leg. Gaz. (Pa.) 413; *Alexander's Estate*, 3 Clark (Pa.) 87.

The fact that the exercise of the power is in the jurisdiction of the forum, is immaterial. *Com. v. Duffield*, 12 Pa. St. 277.

Powers of appointment created by wills receive, when exercised, a different interpretation in *England* according to whether the duty is claimed by the crown under the legacy duty act or under the succession duty act. The former statute relates to dispositions and of powers. Powers being specified thus by themselves, receive a treatment independent of the original will; so that if the donee, exercising the power by will, be domiciled abroad, *dictum* has it that legacy duty is not payable,

although the donor of the power was domiciled in *England*. The succession duty statute provides that persons taking a "succession" under a power shall be deemed to take from the person creating the power. Hence the appointee under a power exercised by a Jersey lady whose power was derived from a parent domiciled in *England*, was held subject to the succession duty. *In re Wallop's Trust*, 1 De G. J. & S. 656.

Where a trustee makes an appointment, under a power contained in the will, among certain legatees not included in the exemption clause of the collateral inheritance tax act, the tax may be assessed upon their shares, although at the death of the decedent there was no property subject to the tax. *In re Stewart*, 30 N. Y. St. Rep. 738. See also *Wallace's Estate*, 18 N. Y. St. Rep. 387; *In re Clark*, 1 Conn. (N. Y.) 431; and cases cited by Mr. Dos Passos, on page 170 of his work. But see criticism of these cases in *In re Enston*, 113 N. Y. 174; *infra*, this title, *Appraisement*.

2. *Seibert's Appeal*, 110 Pa. St. 329; *In re Johnson's Estate*, 19 N. Y. Supp. 963. See *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61; 2 Sugd. on Powers, 23; *Jackson v. Davenport*, 20 Johns. (N. Y.) 550; *Partlet v. Ramsden*, 1 Keb. 570; *Menvil's Case*, 6 Co. Rep. 416.

Where a person, after making his will, conveys his property in trust to apply the income to the support of himself and family, and on his death to distribute the property in accordance with his will, the legatees do not take as of the date of the deed granting the power to distribute to them, but take at testator's death, when the will gives effect to the power. *In re Johnson's Estate*, 19 N. Y. Supp. 963. The case in the *Pennsylvania* supreme court, viz., *Seibert's Appeal*, 110 Pa. St. 329, has been stated already in this section. Reference may be made also to New York

is not subject to succession tax.¹ The obligation must, however, have the debt nature, or else the legacy is in law a pure bounty and is taxable.² Where the debt nature of the obligation has remained, inability to enforce payment of the debt does not draw within reach of this taxation a legacy given in satisfaction; although suit on a debt is barred by limitation, yet the debt remains, and a legacy in its discharge is not taxable.³ Legacies for

L. Ins., etc., Co. v. Livingston, 133 N. Y. 125; Provenchere's Appeal, 67 Pa. St. 468.

1. Quinn's Estate, 8 W. N. C. (Pa.) 312; *In re* Gibbons, 13 W. N. C. (Pa.) 99; 16 Phila. (Pa.) 218; *In re* Vanderbilt's Estate, 20 N. Y. Supp. 134; *In re* Rogers' Estate, 30 N. Y. St. Rep. 943; 10 N. Y. Supp. 22.

A legacy in consideration of agreement to give testatrix a home for life, is in payment of a valid claim, and is not subject to legacy tax. Hulse's Estate, 15 N. Y. Supp. 770.

A legacy in consideration of an obligation created by the will was held by a county court to be subject to the tax notwithstanding the obligation. Futhy, J., in Walters' Estate, 3 Pa. Co. Ct. Rep. 447. But in another case a legacy, the interest of which was to be used in the preservation of testator's cemetery lot, was held not subject to the tax. Hurst v. Cemetery Assoc., 1 Lanc. (Pa.) 60. *Contra*, Walter's Estate, 3 Pa. Co. Ct. Rep. 447.

In Quinn's Estate, 8 W. N. C. (Pa.) 312, Penrose, J., said: "A gift by a testator to a creditor and in satisfaction of his claim of the precise sum due, with interest, falls neither within the letter nor spirit of these acts. The right of such creditor is not dependent upon the bounty of the testator. What is paid to him forms no part of the 'clear value' of the estate, nor can it be said to pass to him under the will any more than in case of a general testamentary direction to pay debts. As was said by Judge Butler in Com. v. Strode (*affirmed* in 52 Pa. St. 182), 'what is called a collateral inheritance tax is a bonus exacted from the collateral kindred and others as the condition on which they may be admitted to take the estate left by a deceased relative or testator.' But the claim of a creditor exists before as well as at the death of the testator, and, so far as he is concerned, is subject to no condition whatever; and the provision for it in the will is to be regarded not as a legacy or mere gratuity, but simply as a direction to

discharge a recognized liquidated obligation." And see *Grimston v. Bruce*, 1 Salk. 156; *Rawlins v. Powell*, 1 P. Wms. 298.

A legacy to a creditor of a sum below the amount of his just claim, upon condition that he accept the same as payment in full, is not subject to collateral inheritance tax. Matter of Underhill, 2 Conn. (N. Y.) 262.

2. See Tyson's Appeal, 10 Pa. St. 220. Here there were relationships springing out of family ties and financial aids which precluded the idea that the services constituting the "debt" were rendered on a money basis.

In *Re* Gibbons' Estate, 13 W. N. C. (Pa.) 99; 16 Phila. (Pa.) 218, the orphans' court of Philadelphia said: "But this principle cannot apply where, as in the present case, no claim such as could have been enforced by suit exists, and where the legacy is a pure gratuity based upon a faithful performance of services which, if not already compensated, must have been rendered without expectation of reward, and without liability on the part of the person receiving them." See also Walter's Estate, 3 Pa. Co. Ct. Rep. 448; *Stinger v. Com.*, 26 Pa. St. 422.

"Where property was given by will by a wife to her husband, a succession tax is due, notwithstanding the property was bought and paid for by the husband and deeded to the wife under an understanding that she was to devise the same at her death to her husband." Note to 13 Fed. Rep. 621, *citing* *Ransom v. U. S.*, 8 Rep. 164.

3. *Williamson v. Naylor*, 3 Y. & C. 208. In this case, in the court below, Lord Lyndhurst used the following language: "This case is clearly distinguishable from *Coppin v. Coppin*, 2 P. Wms. 291, for there the creditors had accepted a composition in satisfaction of their demands; they had released their debts, and the debts were, consequently, extinguished. But here there was no release, no extinguishment of debts, no obstacle to the recovery of them, except the bar to the remedy raised by the statute,

masses are subject to collateral inheritance tax,¹ except where the mass forms part of the funeral expenses.²

In *England*, where executors are not entitled to compensation unless the will of their testator provides therefor, they cannot take a bequest in compensation except subject to legacy duty; for, although the legacy may in truth be to compensate them for their services, the fact remains that they take under the will.³ The same is so of testamentary trustees.⁴ If, however, the effect of the will is merely to authorize the executor to make professional charges for services rendered to the estate by himself in the character of, for instance, a solicitor, or an accountant, or a land agent, or to receive a salary or commission for doing what he might otherwise employ an agent to do—as, for instance, getting in the testator's outstanding debts, or collecting the rents of houses let to weekly tenants—this does not amount to a legacy.⁵

In the *United States*, however, like other expenses of administration, compensation to the executor or administrator is payable before debts, legacies, or distributive shares. Legislatures have enacted in almost every state provisions for remuneration.⁶ Upon a just remuneration, recognized and even

which bar the testator has removed. The statute bars the remedy, but does not extinguish the debt. The debtor may, at any time pay the debt, and even his executor may pay it in spite of the statute," etc. The question in *Coppin v. Coppin*, 2 P. Wms. 291, alluded to by Lord Lyndhurst, did not have respect to legacy duty but to preferences under the wills, as, between creditors who had released and those who had not released their claims.

1. *Matter of Black*, 1 Conn. (N. Y.) 477; 5 N. Y. Supp. 452; *Seibert's Appeal*, 18 W. N. C. (Pa.) 278. Such bequests are valid. *Matter of Black*, 1 Conn. (N. Y.) 477; 5 N. Y. Supp. 452; *Rhymer's Appeal*, 93 Pa. St. 142; *Seibert's Appeal*, 18 W. N. C. (Pa.) 276; *Read v. Hodgins*, 7 Ir. Eq. 17; *Com'rs of Charitable Conations v. Walsh*, 7 Ir. Eq. 24, note; *Holland v. Smyth*, 40 Hun (N. Y.) 372. There must be some definite mention of a beneficiary. *Holland v. Alcock*, 108 N. Y. 312; *Levy v. Levy*, 33 N. Y. 107; *Power v. Cassidy*, 79 N. Y. 602; *Prichard v. Thompson*, 95 N. Y. 76.

2. A bequest for maintenance of decedent's burial plot has been held exempt as funeral expenses in *New York*. "It should, so to speak, be looked upon as a personal expenditure for the benefit of the decedent and as part of the funeral expenses, and therefore exempt." *Ransom*, surrogate, in *In re*

Vinot's Estate, 7 N. Y. Supp. 517. See *PERPETUITIES*, vol. 18, p. 335.

3. *In re Thorley* (1891), 2 Ch. 613. In *Lord Henniker v. Atty. Gen'l*, 7 Exch. 331, a testator by his will gave power to A B to appoint to his wife by will an annuity chargeable to the testator's land, and A B accordingly made an appointment by will to his wife, but provided that the annuity was to be in lieu and satisfaction of her dower. It was held that legacy duty was payable in respect of the whole of the annuity. *Sweeting v. Sweeting*, 1 Drew 331, is to the same effect.

A testator bequeathed all his interest in a limited partnership association to his brothers. His widow elected to take against his will, whereupon the executors and legatees paid to her a certain sum in full of all her claims against the estate. Held, that the full value of the testator's interest in the limited partnership association, so passing to the brothers, was subject to the payment of the collateral inheritance tax. *Small's Estate*, 151 Pa. St. 1. See comment on this case, *infra*, this title, *Interests Derived from Others than Decedent*.

4. *In re Thorley* (1891), 2 Ch. 613.

5. *Hanson* on the Probate, Legacy and Succession Duty Acts (3d ed.), p. 63; *Willis v. Kibble*, 1 Beav. 559.

6. 2 *Woerner's American Law of Administration*, § 524.

provided for by statute, it is not the intention of American succession-tax laws to intrench. These laws, frequently provide, however, that executors, accepting bequests, etc., in lieu of commissions, in excess of what would be a fair compensation for their services, shall take such excess subject to the payment of the collateral inheritance tax.¹ It has been held in *England* that the discharge of a debt by bankruptcy proceedings so completely destroyed the debt nature of the obligation that a legacy given in its payment came under the taxation in question.² A legacy to pay the debts of a third person passes to the creditors subject to legacy duty;³ and this applies to a legacy by a wife in payment of her husband's debts.⁴ A legacy releasing an enforceable debt is taxable.⁵

b. INTERESTS DERIVED FROM OTHERS THAN DECEDENT.—Property or claims which never formed part of the decedent's estate are not subject to succession tax. Thus, increase or interest, not a part of the estate at the decedent's death, is not taxable;⁶

1. **Taxation of Excess Over Reasonable Compensation to Executors.**—*New York Laws*, 1885, § 3; *New York Laws*, 1887, § 3; *New York Laws*, 1892, § 8 (*Laws*, 1892, p. 817); *Pennsylvania Act*, 1887, § 2; *Connecticut Laws*, 1889, § 3; *Ohio Laws*, 1893, § 3; *New Jersey Laws*, 1892, § 3; *New Jersey Laws*, 1893, § 3; *Massachusetts Laws*, 1891, § 3; *Maine Acts*, 1893, § 3; *Michigan Acts*, 1893, § 8; *California Acts*, 1893, § 3; *Tennessee Acts*, 1893, § 2.

In *Maryland*, *Delaware*, and *West Virginia*, the statutes upon taxes on inheritances, etc., do not seem to have made such express provisions.

In *Matter of Underhill*, 2 Conn. (N. Y.) 262; 20 N. Y. St. Rep. 134, it was held that a legacy to executors in addition to their "legal commissions and expenses," was not in lieu thereof, and that such "addition," being of the sum of \$500 to each executor payable at a time several years distant, had not a cash value of \$500, and was therefore exempt.

2. *Turner v. Martin*, 7 De G. M. & G. 429, Lord Chancellor Cranworth.

3. *Foster v. Ley*, 2 Bing. N. Cas. 269; 29 E. C. L. 231; which case holds further, that the duty having been overlooked in an order by the court of chancery for payment of debts, the executors, who paid the debts in full and then paid the legacy duty, might recover the amount of the creditors, respectively, in an action for money paid to the use of the creditors.

Insurance of Debtor.—A debtor who

had entered into an insurance association in order to secure his creditor, by his will bequeathed his insurance interest to the creditor to the extent of the debt. As the legacy depended on the debt, there was no collateral inheritance tax payable. *In re Rogers' Estate*, 2 Conn. (N. Y.) 198.

4. *Foster v. Ley*, 2 Scott 438.

5. *Trigg's Estate*, 15 N. Y. St. Rep. 548; *Tyson's Appeal*, 10 Pa. St. 220; *Atty. Gen'l v. Holbrook*, 3 Y. & J. 114. But such portion of the interest upon the debt as accrues after the testator's death, is free from the tax. *Atty. Gen'l v. Holbrook*, 3 Y. & J. 114. That duty is imposed on interest accrued at death. See *Atty. Gen'l v. Cavenish*, *Wightw.* 82, cited by counsel in the case of *Atty. Gen'l v. Holbrook*, 3 Y. & J. 118.

Outlawed Debt.—A legacy in release of an outlawed debt passes nothing. Tax thereon is not due. *Stinger v. Com.*, 26 Pa. St. 420.

6. **Interest.**—*Matter of Vassar*, 127 N. Y. 1. And see *Miller's Estate*, 22 W. N. C. (Pa.) 11; 5 Pa. Co. Ct. Rep. 522.

Income Added to Principal.—The fact that testator's will directs the income derived from the estate during the first year after his death to be added to the principal, does not cause the income of such year to be subject to the collateral inheritance tax. The income "comes not from the testator or intestate, but from the property held by or for the use of the legatee or other beneficiary, and is not to be distinguished

nor are society benefits which are payable to next of kin.¹ Proceeds of an insurance policy in favor of decedent or his "personal

from income derived by the same persons from any other source." *Williamson's Estate*, 153 Pa. St. 508.

Where a will gives an estate to the testator's widow, upon the express condition that she pay certain legacies to collateral relatives, the gifts to the legatees are direct, and they take subject to collateral inheritance tax. *Lauman's Appeal*, 131 Pa. St. 346.

1. *Vogel's Estate*, 1 Pa. Co. Ct. Rep. 352. That such moneys never formed part of decedent's estate, see *Folmer's Appeal*, 87 Pa. St. 133; *Vollman's Appeal*, 92 Pa. St. 50. And see *Reish v. Com.*, 106 Pa. St. 524.

Arrangement Whereby Decedent's Interest Goes as from Another Decedent.—Tax was demanded on the theory that the decedent from whom the property passed to beneficiaries was an uncle. Originally the property had been left by the grandfather to his two sons, of whom one was the uncle aforesaid. By agreements, there was a release by the father of the beneficiaries to their said uncle, under provision therefor in the grandfather's will. The uncle afterwards released back both his original share and that of his brother, for the benefit of the beneficiaries, his nephews and nieces, they to take at his death. It was held that that share which had been the father's should go to said nephews and nieces free from tax, since the late transaction was really a rescission of the sale by the father and, to the extent of the rescission, returning to the grandfather's will. *Waugh's Appeal*, 78 Pa. St. 436. And see *Hackett v. Com.*, 102 Pa. St. 505.

P. devised his estate to K., but his will was contested. Pending the contest K. also died. A compromise was then effected between the heirs of K. and P.'s heirs, by which the heirs of K. gave up or released a portion of P.'s estate to the heirs of K. It was held that the portion released to the contestants did not form a part of the estate of K., and was not subject to collateral inheritance tax on K.'s estate. *Kerr's Estate*, orphans' court, Philadelphia, 2 Dist. Rep. (Pa.) 535; 50 Leg. Int. (Pa.) 222. This case was followed by the same court, in *Pepper's Estate*, 13 Pa. Co. Ct. Rep. 517. There it was held that the tax was not payable on money of the estate allowed to a disinherited

son by legatees, who were collaterals, whereby the son's claim was compromised, his caveat withdrawn, and the will admitted to probate. *Hanna, P. J.*, quoted the opinion of *Penrose, J.*, in the former case, where it was said that the payment to the caveator "simply reduced the estate afterwards passing to volunteers, with the same effect as if the reduction had been caused by the payment of debts, or if the payment or surrender had been the result of a suit terminating in favor of the claimant."

A compromise whereby persons claiming under a will received a portion of their demand, was held not to sustain a *United States* succession tax on such receipt, the court finding that the will did not legally pass any interest to claimants. Such payment was neither of a "distributive share" nor of a "legacy." *Page v. Rives*, 1 *Hughes* (U. S.) 306.

Widow's Election.—Character as widow is not destroyed by the fact that, electing to take against her husband's will, she accepts a less sum than the whole amount the law would have given her. It cannot be maintained that she has abandoned her widow's claim to take through the legatees. *Commonwealth's Appeal*, 34 Pa. St. 204, *Strong, J., dissenting*. See also *Rubincam's Estate*, 38 Leg. Int. (Pa.) 261.

Widow's Release in Favor of Legatees.—In *Small's Appeal*, 151 Pa. St. 1, a testator bequeathed all his interest in a limited partnership association in *Pennsylvania* to his brothers. His widow elected to take against the will; but finally relinquished her right under the intestate law in consideration of money, securities, and *Maryland* real estate, received by her "from the executor and legatees." The orphans' court held that the interest in the partnership, so far as it exceeded the portion which would have gone to the legatees even had the widow's election been carried out, should be treated as passing to said legatees, not as legatees, but as purchasers from the widow, and that said interest passed therefore free from the collateral inheritance tax. The supreme court reversed and held that the whole of the testator's interest in the partnership passed to the legatees subject to the tax. Some observations may be made on this decision. It ex-

cites doubt. Yet we must recollect, as the supreme court pointed out, that the widow's right against the will was not to any specific property, but only to an undefined one-half of the husband's general personal estate remaining after payment of debts and charges; and hence her release of an undefined and unspecific interest in the estate in general could not be looked on as a conveyance of a specific interest—to wit, in the partnership. Nor does this perhaps technical reasoning appear to be a sole support. The report of the case is not clear as to the fact, but it mentions that the widow received from the “executors and legatees” certain securities, money, and land in *Maryland*, and does not mention any collateral inheritance tax charged against such substituted property. That property which was transposed for it, then, would seem to have the burden which apparently fell from itself. But this is said in the way of suggestion, as the facts hereon are not clear.

Where a will gives an estate to a widow on the express condition that she pay certain legacies contained in the will, the gift to the legatees must be treated as direct from the testator; and if the legatees are collaterals to him, they take subject to the collateral inheritance tax law. *Nieman's Estate*, 131 Pa. St. 346.

French Spoliation Claims.—By act of Congress approved Jan. 20th, 1885, such citizens of the *United States* or their legal representatives as had valid claims to indemnity upon the French government arising out of illegal seizures at sea, etc., prior to July 31, 1801, were authorized to petition the court of claims for determination of the validity of their said claims. By act of Congress of March 3d, 1891, sums were appropriated to pay amounts thus determined out of the fund paid by the French government to the *United States*: “Provided that in all cases where the original sufferers were adjudicated bankrupts, the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy, and the awards in the case of individual claimants shall not be paid until the court of claims shall certify to the Secretary of the Treasury that the personal representatives on whose behalf the award is made represent the next of kin, and the courts which granted the administrations, respectively, shall have certified that the legal represen-

tatives have given adequate security for the legal disbursement of the awards.” It was held by the *Pennsylvania* supreme court that the next of kin intended were not those persons who were next of kin at the date of the appropriation act; and that where the fund was claimed by grandchildren claiming under one child and by great-grandchildren claiming under another child of decedent, it was error to take decedent's grandchildren instead of his children as *stirpes* for the purposes of distribution. The court said that the payment could not be regarded as a mere gratuity, but must be looked on as in discharge of a debt or obligation; and that the money paid could not be said to form a part of the estate of the original sufferer from the French depredations, since the payment must be to his “legal representative.” *Scott's Appeal*, *Clement's Estate*, 150 Pa. St. 85. See also *Leffingwell's Appeal*, 62 Conn. 347. The *Massachusetts* court decided similarly, holding that the administrators should receive the money solely for the next of kin of the original sufferers, and that the next of kin were to be ascertained as of the date of the death of the original sufferer, independently of whether by next of kin Congress meant nearest kindred, or the distributees of personal property who at the time of the death of the original sufferers would take intestate property under the laws of their domicile or legatees under wills when the original sufferers left wills. *Balch v. Blagge*, 157 Mass. 144.

The supreme court of the *District of Columbia* rendered a decision contrary to those just mentioned. It held that Congress intended that the money should go to those who were next of kin to the deceased original claimant at the time of the award; and that one of the next of kin could not be excluded from sharing in the portion which would have gone to a deceased descendant, had the latter survived, by the will of such deceased descendant. *Gardner v. Clarke*, 20 Wash. Law Rep. 2; 20 Dist. of Columbia Rep. 261. The opinion of the orphans' court of Philadelphia agreed with the *District of Columbia* decision. *Clement's Estate*, 48 Leg. Int. (Pa.) 474.

Whether the local statutes will govern in ascertaining the next of kin is not clear. See *Balch v. Blagge*, 157 Mass. 144; *Clement's Estate*, 48 Leg. Int. (Pa.) 474.

representatives," form part of the assets of the deceased, and are subject to the tax.¹ Property passing to an heir within the exempt class, by reason of the rejection of the property by a legatee who released to the person ordinarily exempt, has been held to be subject to the tax; the court evidently fearing that the contrary construction of the act would render it well-nigh nugatory.²

It is not clear whether a sum paid to contestants of a will, by way of compromise, is to be regarded as derived from the estate of the decedent and therefore taxable or not, according to the recipient's relationship to the decedent; or whether it is to be regarded as derived through those who yield the compromise, in which case the liability would depend on the relationship to the parties paying. Some cases are given in the note.³

c. LIFE ESTATES; ANNUITIES; JOINT TENANCIES.—Where a will creates a life estate and a remainder, the two estates are distinct; and in the absence of provision otherwise, by the testator or grantor, each alone bears its own burden.⁴

d. REMAINDERS AND FUTURE ESTATES.—There is a variety of provisions in the different statutes as to the time when the tax

Collateral inheritance tax was held not to be impossible in such successions by the Philadelphia orphans' court, on the theory that the fund never formed part of the original sufferer's estate. *Kingston's Estate*, 28 W. N. C. (Pa.) 284. This theory, we have seen, was afterwards disapproved by the *Pennsylvania* supreme court. *Clement's Estate*, 150 Pa. St. 85.

On the subject of claims against government, see *U. S. v. Ferreira*, 13 How. (U. S.) 40; remarks of Davis, J., in *Gray v. U. S.* (pamphlet), quoted by Ashman, J., in his adjudication, unreported as auditing judge in said *Clement Estate*, 150 Pa. St. 85; *Leffingwell's Appeal*, 62 Conn. 347. See also article in "Harvard Law Review" for November, 1893.

In *Scotland*, a testatrix bequeathed an estate to R. M. and other two persons "equally, share and share alike, and falling all or any of them by their predeceasing me, to their several and respective executors and representatives whomsoever, whom I do hereby appoint to be my residuary legatees." R. M. predeceased testatrix, leaving a will nominating executors and directing them to invest the residue of his estate for the life-rent use of his brother, and thereafter to divide the fee among certain charities. It was held that the executors of R. M. must pay legacy

duty on the one-third share, but that there was not payable to the crown a second duty as on a succession from R. M. *The Lord Advocate v. Bogie*, 30 Scottish Law Rep. 454.

1. *In re Knoedler*, 52 N. Y. St. Rep. 48; citing *In re Van Dermoor*, 42 Hun (N. Y.) 326; *Winterhalter v. Workmen's G. F. Assoc.*, 75 Cal. 245; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. (Va.) 88; *Kelley v. Mann*, 56 Iowa 625.

2. *Frank's Estate*, 9 Pa. Co. Ct. Rep. 662.

3. In *Page v. Rieves*, 1 Hughes (C. C.) 297, it was held that under the federal tax, money received by claimants under a will by reason of a compromise was not subject to the tax. But see *Brune v. Smith*, 13 Int. Rev. Rec. 54. And see as to the English statute, *Atty. Gen'l v. Holford*, 1 Price 426; *Ex p. Stitwell*, 59 L. T. 539.

4. *Christian's Estate*, 2 Pa. Co. Ct. Rep. 91; 18 W. N. C. (Pa.) 88; *In re Johnson*, 6 Dem. (N. Y.) 146; *Commonwealth's Appeal*, 127 Pa. St. 438; *Wharton's Estate*, 10 W. N. C. (Pa.) 105.

Accruing Income.—See *Christian's Estate*, 2 Pa. Co. Ct. Rep. 91, under former *Pennsylvania* statutes.

Annuities are "estates" within the meaning of a statute taxing estates passing collaterally. *Thompson's Estate*, 5 W. N. C. (Pa.) 14; *Williamson's Estate*, 153 Pa. St. 514.

accrues on estates not enjoyable immediately on decedent's death. Some of these provisions are indicated in the note.¹

1. *Pennsylvania*.—Tax on succession to real or personal property which cannot take effect in actual enjoyment until termination of life estate or period of years, is not demandable until that time. Interest does not run until then. But those who wish may pay in anticipation. In such cases, the tax shall be assessed on the estate at the time of payment, after deducting the value of the life estate or estates for years. Act of 1887, § 3.

To secure this postponement of liability until enjoyment the "owner of any personal estate" must observe two conditions: he must make a full return of the same to the register of wills within one year from decedent's death, and within that time enter into security for the payment when the period of enjoyment shall arrive; failure so to do renders the tax immediately payable and collectible. *Pennsylvania* Act, 1887, § 3. See Commonwealth's Appeal, 127 Pa. St. 438; Com. v. Eckert, 53 Pa. St. 102; Com. v. Smith, 20 Pa. St. 100; Willing's Estate, 2 W. N. C. (Pa.) 307; Wharton's Estate, 10 W. N. C. (Pa.) 105; Commonwealth's Appeal, 128 Pa. St. 603; McGeary's Estate, 14 Pa. L. J. N. S. 174; Beatty's Estate, 33 Pa. L. J. 283; Mellon's Appeal, 114 Pa. St. 564.

If the remainder-man elects to pay in advance, he pays merely the tax on the clear value of the remainder, after deducting the then value of the life estate. Cooper's Estate, 127 Pa. St. 435; Com. v. Smith, 20 Pa. St. 100.

The amount of debts of decedent, so far as they affect the remainder, must likewise be deducted. Cooper's Estate, 127 Pa. St. 435.

Where a will gives the testator's widow power to appropriate the residuum to her own use during life, with a disposition over, the amount of the collateral inheritance tax, should there be a surplus remaining at her death, can only be ascertained at that time. An assessment of such residuum, made during the widow's life, was accordingly set aside. Lauman's Appeal, 131 Pa. St. 346.

A testator bequeathed a sum in trust to invest and pay to a collateral relative \$300 per annum during her life, the sum to be paid "without respect to the income from this part, whether it be more or less than \$300, and until the entire

fund be exhausted, if she shall so long live." After her death, the estate was devised to persons within the exempt class. *Held*, that the annual payments, as they were made, alone were subject to tax, and not the trust fund. Crompton's Estate, 29 W. N. C. (Pa.) 36; 10 Pa. Co. Ct. Rep. 443; 48 Leg. Int. (Pa.) 452.

New York Act of 1885.—This act, in section 2, provided that in case of bequest or devise to father, mother, husband, wife, children, brother and sister, the widow of a son, or a lineal descendant, during life or for a term of years, and of the remainder to a collateral heir of the decedent, or to a stranger in blood, or on the expiration of such term, the property so passing should be appraised immediately after the death of the decedent, at what was the fair market value thereof at the time of the death of the decedent, and that after deducting therefrom the value of said life estate or term of years, the tax on the remainder should be immediately payable; providing further for election not to pay until actual enjoyment of the property bond, in case of such election being required. Under this act, it was the duty of the appraiser to report presently the fair market value at decedent's death. Matter of Cager, 111 N. Y. 343; Matter of Clark, 1 Conn. (N. Y.) 431. Bond could then be given by the ulterior devisees, conditioned for the payment of the tax upon possession of the property. Matter of Cager, 111 N. Y. 349.

In Matter of Cager, 111 N. Y. 349, Ruger, Ch. J., used the following language: "When the present value of property, which is devised to one with a limitation over to others, upon the happening of some event which may or may not occur, can be ascertained, then a ground upon which an approximate estimate of the value of the ultimate devise appears, and it may be made; but when the question as to whether any property at all shall pass under the limitation over, and, if so, how much, depends upon the will of the first taker, we are unable to see any rule by which such value can be determined. In the case first mentioned, the act enables a tax to be imposed and collected upon the ulterior devisees, through the medium of a bond to be given by the

respective legatees, payable when they come into the possession of the devised property. In the latter case, however, there is no basis upon which the value of the devise can be appraised, and no foundation for the imposition of any tax, and the provision for the giving of a conditional bond is, therefore, wholly inapplicable. Whether an appraisal of the value of these devises, for the purpose of taxation, may be made when they eventually come to the possession of the devisees, we are not called upon now to determine. It may be that the tax will be altogether lost to the state if an appraisal is not now allowed; but if so, the fault lies in the act itself and not in the construction which its language requires to be put upon it."

It was held by Ransom, surrogate for New York county, in another and later case under the act of 1885, that in any case of contingent legacies, the tax could not be regarded as presently payable; that the appraiser should report the fair market value of the property at the time of decedent's death, and that the matter should then be regarded suspended until, at the death of the first tenant, it could be determined to whom the property should pass, and whether or not it was subject to the tax. *Matter of Clark*, 1 Conn. (N. Y.) 431. See also *Matter of Hopkins*, 6 Dem. (N. Y.) 1. In *Re Wallace's Estate*, 4 N. Y. Supp. 465, Ransom, Surrogate, held that the property should not be appraised and reported for a legacy tax until the contingency should happen. The report does not state under what act the case arose. It was decided October 12th, 1888.

Act of 1887.—This act, also, in section 2, respecting future estates, remainders, etc., directs appraisement immediately after decedent's death, and provides that "the tax prescribed by this act shall be immediately due and payable," and provides for election not to pay until actual enjoyment or possession. Under this act, it was held that a vested remainder limited on a life estate, was subject to the tax. In *re Vinot's Estate*, 7 N. Y. Supp. 517. And see *Matter of Cogswell*, 4 Dem. (N. Y.) 248. It was otherwise held with regard to contingent remainders. The decisions of Ransom, Surrogate, noted under the act of 1885, were followed; for it was ruled that a remainder dependent upon a contingency did not "pass," nor was it to be appraised or taxed, until the defeating contingency had been ren-

dered impossible of occurrence. *Matter of Lefever*, 5 Dem. (N. Y.) 184.

Mention of a Pennsylvania Decision.—The *New York* decisions of Ransom, Surrogate, upon the taxability of contingent legacies, are marked with great vigor. See especially *Matter of Clark*, 1 Conn. (N. Y.) 434. They should, however, be contrasted, for the sake of caution, with a *Pennsylvania* county court decision. In *Willing's Estate*, 33 Leg. Int. (Pa.) 54; 2 W. N. C. (Pa.) 307, under an act not dissimilar to the *New York* ones just recited or indicated, it was held that an estate, contingent on devisee's surviving the first taker was subject to the tax, except that payment could be postponed until possession by giving bond. The supreme court, in *Lauman's Appeal*, 131 Pa. St. 346, in a case decided apparently under the *Pennsylvania* act of 1887, affirmed a decree vacating an assessment of a tax on a legacy of what should remain at a future time—to wit, upon the death of a widow who had power to dispose of same during her life.

Entiretieship.—A wife's interest by entiretieship is taxable during her husband's lifetime, especially as under the law of 1880, ch. 472, she has power to make partition. In *re Higgins*, N. Y. Daily Reg., Dec. 7, 1889, cited in *Dos Passos* 163.

The act of 1892 provides for election not to pay until possession, bond to be given to the state, in case of personalty, in penalty of three times the amount of the tax, and to be renewed every five years. *New York Laws*, 1892, vol. 1, p. 817, § 7. See section 3: "All taxes imposed by this act shall be due and payable at the time of the transfer, provided, however, that taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof."

Where the actual value of a testator's interest in a partnership real estate depends largely upon the manner in which it is controlled, and the executors are clothed with discretionary power regarding the manner and time of its

c. RELATIONS INTER SE OF BENEFICIARIES.—The tax is payable by the legatee or devisee, unless the will directs that it shall be borne by the general estate of the testator.¹ Direction to divert the tax from the particular legacy to the general estate is not to be understood unless the language of the will to that effect be free from ambiguity.² Such intention is to be understood from a provision that legacies shall be paid "without any deduction;"³ or from an appointment by testatrix of so much of trust funds as should be of the clear value indicated;⁴ or where there is a gift of a clear sum or annuity.⁵ But where a testator pro-

disposal, assessment will be controlled until the parties come into actual possession or enjoyment. Matter of Wheeler, 1 Misc. (N. Y.) 450.

Future Estates.—*Tennessee*: Tax on estates after estates for life or years, "shall not be payable, nor interest begin to run thereon, until the person or persons liable for the same shall come into actual possession of such estate by the termination of the estates for life or years; and the tax shall be assessed upon the value of the estate at the time the right of possession accrues to the owner aforesaid:" option being given to the owner to pay the tax at any time prior to his coming into possession, in such cases the tax to be "assessed on the value of the estate at the time of the payment of the tax, after deducting the value of the life estate or estates for years." *Tennessee Laws*, 1893, § 3.

Conditional legacies for life or years. *Tennessee*: If of a sum of money, the tax thereon shall be retained on the whole amount; if not of money, application shall be made to the county court having jurisdiction of the accounts of the executors or administrators to make apportionment, and for such further order as equity may require. Such application shall be made by the executor after at least five days' notice to parties concerned. *Tennessee Laws*, 1893, § 6.

In *California*, the tax is payable immediately, whether the estate is present, future or contingent; option being allowed not to pay until possession; in which case, bond shall be given to the people of the State of *California* for the tax on personalty, with such sureties as the superior court may approve, renewable every five years. *California Laws*, 1893, § 2.

1. Hunter v. Husted, 1 Busb. Eq. (N. Car.) 141; Atty. Gen'l v. Allen, 6 Jones Eq. (N. Car.) 144; King's Estate, 11 Phila. (Pa.) 26; Bispham's Estate, 46 Leg. Int. (Pa.) 98; Shippen v. Burd, 42

Pa. St. 461; Thomson's Estate, 5 W. N. C. (Pa.) 19. And see Foster v. Ley, 2 Scott 438; 2 Bing. N. Cas. 269.

Specific legacies must bear their own burden. Horter's Estate, 1 Pears. (Pa.) 424.

2. Holbrook's Estate, 3 Pa. Co. Ct. Rep. 265; 20 W. N. C. (Pa.) 79.

3. Barksdile v. Gilliat, 1 Swanst. 562. See also Bailely v. Boulton, 21 L. J. Ch. 277.

It has been held in *England* that "legacies given free from deduction, or free from expense, or free from charge or liability, are free from duty" as against the residuary estate. Barksdile v. Gilliat, 1 Swanst. 652; Theobald on Wills 143.

Although the commonwealth may look to the executor of the entire estate, yet as between the various beneficiaries each bears his own tax; accordingly a direction by testator to pay out of a fund provided all legitimate charges against "my estate," is not to be confounded with the decisions just indicated in respect to legacies free of charge, or from incumbrance, etc. Direction by testator to pay, out of a fund provided, all legitimate charges against "my estate," was held not to relieve a devisee. Shippen v. Burd, 42 Pa. St. 461.

After making certain specific legacies, testatrix provided that the residue of her estate, after paying the legacies aforesaid "and other legal demands," should go as directed. It was held, that the phrase, "and other legal demands," did not relieve the specific legatees. Horter's Estate, 1 Pears. (Pa.) 424.

4. In re Currie, 57 L. J. Rep. 743. And see Haynes v. Haynes, 3 De G. M. & G. 590.

5. Gude v. Mumford, 2 Y. & C. 448; Haynes v. Haynes, 3 De G. M. & G. 590; Morris v. Burton, 11 Sim. 161.

A gift of a fund to produce a clear annual sum, which sum is to be paid to the legatee, is to be relieved by the residuary estate. Morris v. Burton, 11

vided that an annuitant should receive "not less than \$1,500 per year," it was held that these words were not sufficiently clear to show an intent to relieve the annuitant.¹ In a case where the word "clear" could be referred to costs of investment, it was held that it did not relieve the legatee.² A codicil does not, by simple alteration of amounts of legacies given by the will, destroy their right to be relieved.³

f. GIFTS.—Gifts *inter vivos*, having effect at once and not awaiting the donor's death, are not within the operation of the succession tax laws of the *United States*.⁴

VI. MATTERS OF PRACTICE—1. Appraisement.—All persons interested have a right to attend before the official and to be heard.⁵

Sim. 161; Cole's Will, 8 Eq. 271. So where there is a gift of "the annual net sum of twelve hundred dollars." *Bispham's Estate*, 46 Leg. Int. (Pa.) 98.

1. *Holbrook's Estate*, 3 Pa. Co. Ct. Rep. 265; 20 W. N. C. (Pa.) 79, orphans' court of Philadelphia.

2. A gift of a sum to produce a clear income named, and to pay the dividends of the stock and not the exact sum to the legatee, is not to be relieved of the tax by the residuary estate. *Banks v. Braithwaite*, 32 L. J. Ch. 35. See also *Sanders v. Kiddell*, 7 Sim. 536; *Pridle v. Field*, 19 Beav. 497. Distinction is to be made between such a gift and a direct bequest of a clear annuity. *Pridle v. Field*, 19 Beav. 497.

As to gifts of annuity to different persons successively, see *Banks v. Braithwaite*, 32 L. J. Ch. 35; *Sanders v. Kiddell*, 7 Sim. 536.

A mere declaration by the will that a devise is "clear of all charges and incumbrances" was held not sufficient to relieve the devisee. *Forbes' Estate*, 16 Phila. (Pa.) 356.

3. *Fisher v. Brierley*, 30 Beav. 267. And see *Cooper v. Day*, 3 Meriv. 154; *Duncan v. Duncan*, 27 Beav. 392; *Johnstone v. Earl of Harrowby*, 1 De G. F. & J. 183.

A compromise of a will contest, whereby a balance should go to one of the parties after certain legacies should be paid, was held to leave the party receiving such balance liable for the tax thereon. *Rubincam's Estate*, 38 Leg. Int. (Pa.) 261.

"In Full."—A testator, "for the many acts of kindness shown me, and in fulfillment of promises heretofore made," bequeathed "sixty shares of *Pennsylvania* railroad stock in full." It was held that the words, "in full," referred to the payment of the testator's obligation, and did not manifest an intent to

cast the tax on the residuary estate rather than on the shares. *Murphey's Estate*, 4 Pa. Co. Ct. Rep. 336.

As Between Executors and Trustees.—There must be observed in *England* a distinction regarding legacy duties and succession duties. *In re Higgins*, 29 Ch. Div. 697.

4. See *supra*, this title, *Fraudulent Transfers*, etc.

Donations mortis causa occupy a middle condition between gifts *inter vivos* and legacies, partaking in some respects of the one nature, in other respects of the other nature. They pass, however, not at the donor's death, but at the time of delivery. The donor's death does not transmit the succession. It simply prevents revocation of the donation. Such it is believed is the better opinion in regard to these donations. Accordingly, they seem to have been treated in *England* as not within a statute taxing "legacies." *Farquharson v. Cave*, 2 Colly. 356.

But by statute in *England* donations *mortis causa* are expressly subjected to legacy duty. 36 George III, ch. 52, § 7; 8 & 9 Vict., ch. 76, § 4. Probate duty also is imposed on donations *mortis causa* in that country; also on voluntary settlements *inter vivos*, unless the settlement has been made *bona fide* three months before the death of the donor. Act of Parliament, 1881; May on *Fraudulent Conveyances* *459.

In view of the wide and general character of those American statutes which tax dispositions—legacies, devises, gifts, grants, sales, etc., taking effect upon death—it has been held by Spring, Surrogate, in Cattaraugus county, *New York*, that a gift *mortis causa* is subject to the *New York* collateral inheritance act of 1887. *Matter of Crosby*, 46 N. Y. St. Rep. 442.

5. *In re Astor*, 6 Dem. (N. Y.) 410.

The appraisement is conclusive, when unappealed from, as to value.¹ There is no inflexible rule whereby to determine upon the amount of the tax. It is to be ascertained after a careful ex-

Oath.—In *Re Astor*, 6 Dem. (N. Y.) 410, it was said that the *New York* appraiser cannot take testimony under oath. In *Pennsylvania* it would seem that he can. See *Kaas' Estate*, 45 Leg. Int. (Pa.) 217.

Appointment in New York.—In the State of *New York*, under the act of 1887—and the language of the acts of 1892, of April 30th and May 3d, respectively, was quite similar in this respect—it has been held that the duty of procuring the appointment of the appraiser is upon the executor. He has the full eighteen months before he can be said to be negligent of such duty. *Frazer v. People*, 6 Dem. (N. Y.) 174; *In re Astor*, 6 Dem. (N. Y.) 402. Costs therefore will not be awarded against him because his delay to procure an appraiser, whom he did not ask for until only four days out of the eighteen months remained, induced the district attorney to institute proceedings to recover the tax. The question being a new one, the surrogate was of opinion that the district attorney had probable cause for bringing suit about a month before the time had expired; and therefore costs were not imposed on either party. *Frazer v. People*, 6 Dem. (N. Y.) 174.

New York—Surrogate.—It seems that the surrogate in *New York*, if he inquires independently of the appraiser, may refer, or may himself hear. See *Matter of Pearsall*, 21 N. Y. St. Rep. 305; *Matter of McPherson*, 104 N. Y. 323; 58 Am. Rep. 502; *Matter of Astor*, 6 Dem. (N. Y.) 416.

The *New York* surrogate must select the persons to whom notice shall be given by the appraisers. The information requisite to designate the persons interested in the estate is ordinarily in his possession. *In re McPherson*, 104 N. Y. 322; 58 Am. Rep. 502. Persons known to have claims or interests, including the county treasurer, or comptroller, must be notified, as well as those whom the surrogate designates. *New York Act*, 1892, § 12. The surrogate cannot, of his own motion, in proceedings to fix the tax, declare void the provisions of a will. The informal proceedings appointed for the assessment of these taxes, cannot have the effect of

making the question as to the validity of the provisions of the will *res adjudicata*. *In re Ullman's Estate* (Supreme Ct.), 21 N. Y. Supp. 758. See also *In re Wolfe*, 66 Hun (N. Y.) 389. Under the act of 1885 the surrogate had no jurisdiction to determine that a party was not liable to tax, except, perhaps, where the district attorney instituted the proceedings. *Matter of Wolfe*, 66 Hun (N. Y.) 389. Cash legacies generally require no appraisal. *In re Jones*, 5 Dem. (N. Y.) 30. Cases may arise, however, where appraisement of such legacies may be necessary, as where a bequest is made of a sum payable in the future. *In re Peck's Estate*, 9 N. Y. Supp. 465.

1. *Com. v. Freedley*, 21 Pa. St. 33; *Stinger v. Com.*, 26 Pa. St. 422; *Commonwealth's Appeal*, 127 Pa. St. 441; *Tyson v. State*, 28 Md. 577; *Strode v. Com.*, 52 Pa. St. 186.

If the inheritance tax on real estate be appraised and paid by the remainder-man, no additional tax is collectible, though the property be subsequently sold for a larger sum. *Russell's Estate*, 19 W. N. C. (Pa.) 256. See *Atty. Gen'l v. Dardier*, 11 Q. B. Div. 16.

Where property deteriorates owing to the neglect of executors, if these be compelled to restore its value to the original amount, the valuation by the appraiser must be put at the full amount. See *State v. Brevard*, Phil. Eq. (N. Car.) 141.

Under the old law of *Pennsylvania*, whereby the tax even on estates enjoyable in the future was payable on decedent's death, it was held that an increase in the rate of taxation subsequent to the death would not affect the estate on its afterwards coming into enjoyment. *Com. v. Eckert*, 53 Pa. St. 102. The present act of 1887 has not altered the period when the tax is payable; it is still due at decedent's death, excepting that the option is now afforded of making payment on coming into possession, provided security so to do be given. Since then the tax is primarily due at the death; and since the lien protecting the commonwealth exists from that time, it would seem that the old rule will still prevail. But this is here said without authority.

amination by the appraiser.¹ Several tracts of land should be separately appraised.² By some statutes the tax is on the clear value receivable,³ although some others neglect so to state. The nature of this system of taxation is doubtless enough of itself to indicate that the tax shall be assessed on but the clear value remaining after payment of charges.⁴ There are, however, statutes which in their wording speak of a tax on the amount shown by the inventory of the estate—a most improper basis, as the transmission can only take effect after payment of expenses, debts, etc.⁵

1. Kaas' Estate, 45 Leg. Int. (Pa.) 217; Goldstein's Estate, 14 W.N.C. (Pa.) 176.

In assessing the tax upon an annuity, or upon a devise for life, the probable net income must be ascertained by proper testimony and proof; and the inquiry may be aided, but not controlled, by recourse to the "Carlisle Tables." Kaas' Estate, 45 Leg. Int. (Pa.) 217.

The *Massachusetts* Act of 1891 (Laws, p. 1031) reads: "In case of an annuity or life estate the value thereof shall be determined by the so-called actuaries' combined experience tables and four per cent. compound interest." § 13.

Cash.—Where legacies are in cash, ordinarily the appointment of an appraiser, according to *New York* practice, is unnecessary. *In re Astor*, 6 Dem. (N. Y.) 402. And see *Matter of Jones*, 5 Dem. (N. Y.) 30. Where, however, the tax is paid in advance, appraisement will be made. *Matter of Peck*, 30 N. Y. St. Rep. 209.

Valuation of land is to be reduced by such debts as personality is insufficient to discharge. *Commonwealth's Appeal*, 127 Pa. St. 435.

2. See *McKean's Estate*, 29 Pa. L. J. N. S. 299; *Beatty's Estate*, 33 Pa. L. J. 283; *Coleman's Estate*, 2 Pears. (Pa.) 525; *Matter of Keenan*, 1 Conn. (N. Y.) 226.

Land in Another County.—In *Pennsylvania*, under the collateral inheritance tax law, the appraisement of lands and the proceedings upon it must be in the county where the letters testamentary or of administration were granted. See *Stinger v. Com.*, 26 Pa. St. 429; *Pennsylvania* Act of 1887, § 8.

In *New York*, the "proper county," in the Collateral Inheritance Tax Act of 1887, § 8, to the treasurer of which the tax should be paid, was the county of the surrogate first properly acquiring jurisdiction, and the surrogate of such county retains jurisdiction even if there be real estate belonging to the same estate in

other counties of the state. *Matter of Keenan*, 1 Conn. (N. Y.) 226.

In *Maryland*, it is provided: "§ 106. In all cases where real estate of any kind is subject to the said tax, the orphans' court of the county in which administration is granted shall appoint the same persons, who may have been appointed to value the personal estate, to appraise and value all the real estate of the deceased within the state."

"§ 108. If the estate or property lies in more than one county, and it is not convenient for the appraisers to visit the other county, the court may appoint two appraisers in said county." *Maryland* Code, vol. 2, 1888, § 109. Section 111 directs the return of the inventory by the appraisers to the executor or administrator, whose duty it shall be to return the same to the office of the register to which the inventory of the personal estate is returnable.

3. *Pennsylvania* Act, 1887, § 1. "Clear market value of such property," *New York* Act, 1887, § 1; *New Jersey* Laws, 1892, p. 206. And see the *New York* Act of 1892, p. 814. "Clear value of such estates, money or securities," *Maryland* Act, 1888, § 102. "Its values," *Connecticut* Act, 1889, § 1.

Where the parties in interest assent to the correctness of an estimate of the expenses of settling the estate, the register must accept such estimate, unless there is ground for the suspicion of fraud. *Cullen's Estate*, 8 Pa. Co. Ct. Rep. 234. And see *Mumma's Appeal*, 127 Pa. St. 474.

The tax is on the clear value and not on the extent of title. *Commonwealth's Appeal*, 127 Pa. St. 441; *Com. v. Eckert*, 53 Pa. St. 102.

4. Expenditures by beneficiaries in procuring aid of counsel should not be deducted from the value of the property. *In re Line's Estate*, 155 Pa. St. 378.

5. See *Strode v. Com.*, 52 Pa. St. 189. Provision in a will directing that all legacies and taxes shall be free of

Total lack of value at the time the tax accrues appears to prevent assessment, and values subsequent to that period will be disregarded.¹

The *New York* law has been in an uncertain state, respecting valuations dependent on future contingencies.² The act of 1892, however, is more explicit than prior laws.³ In some states, the

any succession tax, and that such tax shall be paid out of the residuary estate, as part of the expenses of administration, does not justify the deduction of the amount of the tax from either the specific or residuary legacies, in ascertaining the value of such legacies subject to the tax. *In re Swift's Estate*, 137 N. Y. 77.

The French law taxes the gross value of the property without allowing deduction for debts—an unusual feature, which has caused much dissatisfaction. *Review of Reviews*, February, 1893, p. 46.

1. See *Atty. Gen'l v. Sefton*, 11 H. L. Cas. 269; *Com. v. Freedley*, 21 Pa. St. 36; *Stinger v. Com.*, 26 Pa. St. 425; *Estate of Miller*, 45 Leg. Int. (Pa.) 175.

The estate is not "enjoyed" by one who is holding an interest during a non-productive period, notwithstanding the possibility of sale of the capital or land. Such holder for a term shall not be burdened because another may profit. *Atty. Gen'l v. Dardier*, 11 H. L. Cas. 257.

Under *New York* act of 1887, where the present value of property, which is devised to one with a limitation over to others upon the happening of some event which may or which may not occur, can be ascertained, then a ground for a proximate estimate of the value of the ultimate devise appears, and it may be made. Per Ruger, Ch. J., in *Matter of Cager*, 111 N. Y. 349.

The value shall be determined as of the time when the right to enjoyment and possession passed, and not as of the time when the beneficiaries actually received the property. *In re Lines' Estate*, 155 Pa. St. 378.

2. *Mere Possibilities*.—See *supra*, this title, *Remainders and Future Estates*. Under the *New York* law of 1887, by which the tax accrues on decedent's death, some uncertainty exists in cases of mere possibilities. In *Matter of Cager*, 111 N. Y. 343, the court held that where the question whether any property at all shall pass under the limitations over depends on the pleasure of

the first taker, who may exhaust the property for his own uses, there is no rule whereby the value of the limitations over is ascertainable. It cannot be appraised. The court declined to consider whether the said limitations might be appraised as they should eventually come into possession. See also *Matter of Hopkins*, 6 Dem. (N. Y.)

1. See also opinion of the court below in *In re Cayuga County*, 46 Hun (N. Y.) 657. And see *Fleming's Estate*, N. Y. L. J. Oct. 15th, 1889, as stated in *Dos Passos* 165. No bond is required in such a case from the remainderman. *Matter of Cager*, 111 N. Y. 350.

Prior to the *Cager* Case, the practice had been to suspend appraisement until the events disclosed to whom the property should go. See *Matter of Clark*, 1 Conn. (N. Y.) 431; *Matter of Bruce*, 18 N. Y. St. Rep. 389; *Matter of Stewart*, 30 N. Y. St. Rep. 738; *Matter of Lefever*, 5 Dem. (N. Y.) 185, where there was a limitation over to a collateral relative if he should be living at the death of an annuitant, it was held by the *New York* surrogate "that the appraiser should report the fair market value of the property" at the time of the decedent's death, and that the matter should then be regarded as suspended until the death of the annuitant, when it could be determined to whom the property would pass and whether or not it was taxable. *Matter of Clark*, 1 Conn. (N. Y.) 431. The surrogate said: "The executor cannot diminish the funds which produce the annuities. The contingent annuitants cannot be required to pay for something they may never receive. The act does not say that where property is left to A an exempt person, for life, with a contingent life estate to B, that A shall be taxed to pay for B's prospective enjoyment, even though B may never receive it," etc.

Speculative possibility of recourse to principal shall not prevent appraisement of the annuity. *In re Leavitt's Estate*, 4 N. Y. Supp. 179.

3. The *New York* Act of 1892, § 11 (Laws, 1892, vol. 1, p. 818), provides: "If the property upon the transfer of

law governing valuation of interests not presently enjoyable is quite crude.¹

Under the *Pennsylvania* statute there does not seem to be difficulty. The act of 1887 altering the former law in this respect, provided in section 3 that the tax is not payable on estates coming into enjoyment after the expiration of one or more life estates or a period of years, until actual possession by the termination of the estates for life or years; and that the tax shall be assessed upon the value of the estate at the time the right of possession accrues; leave is given to anticipate.² Certain conditions as to giving security, etc., are, however, prescribed, in order to render the provision effective.

which a tax is imposed shall be an estate, income or interest for a term of years, or for life, or determinable upon any future or contingent estate, or shall be a remainder or reversion or other expectancy, real or personal, the entire property or fund by which such estate, income or interest is supported, or of which it is a part, shall be appraised immediately after such transfer or as soon thereafter as may be practicable, at the fair and clear market value thereof at that time; provided, however, that when such estate, income, or interest shall be of such a nature that its fair and clear market value cannot be ascertained at such time, it shall be appraised in like manner at the time when such value first became ascertainable"—value to be determined as in said section directed.

Maryland.—In *Maryland*, the orphans' court shall determine in its discretion, "and at such time as it shall think proper," what proportion the party entitled to the life estate or interest for a term of years, or contingent interest, shall pay of said tax; and thereafter from time to time the court shall "after the determination of the preceding estate, and as the remainder of the said estate shall vest in the party or parties entitled in remainder or reversion, determine, in its discretion, what proportion of the residue of said tax shall be paid by the party or parties in whom the estate shall so vest," payment to be made in thirty days after the date of such determination. *Maryland Code*, 1888, vol. 2, p. 1242, etc., § 115. As to the conclusiveness of the judgment of the court, see *Tyson v. State*, 28 Md. 577.

1. *Connecticut—New Jersey—Ohio*.—The statutes in these states provide in case of prior interests for life or years in favor of exempt persons, remainder

over to collaterals or to strangers to the blood, that such prior interests shall be valued and the valuation so found deducted from the appraised value of the property; the tax on the remainder to be payable in *Connecticut* one year from the death of said testator; in *New Jersey*, immediately; in *Ohio*, one year from testator's death. In *Connecticut* and in *Ohio* sixty days after decedent's death are allowed in which to have the appraisement made. *Connecticut Laws*, 1889, p. 106, ch. 180; *New Jersey Laws*, 1892, p. 207; *Ohio Laws*, 1893, Jan. 27th.

In *Massachusetts*, the taxes imposed by the act are payable at the expiration of two years from the date when the executors, etc., give bond, excepting that where a distributive share is paid within the two years the tax thereon is payable at the time the same is paid. Act 1891, Laws, p. 1029.

2. *Nieman's Estate*, 131 Pa. St. 346. The old law of *Pennsylvania* was not so just. Under the original collateral inheritance tax statute, that of 1826, the tax on the remainders was due immediately after testator's death. *Mellon's Appeal*, 114 Pa. St. 564.

Remedy was afforded by the acts of 1850 and 1855, and afterwards in more complete provision by act of 1887. Under the 1850 and 1855 acts, the beneficiaries were permitted to elect to postpone payment until enjoyment; but to secure this privilege they were obliged to give bond and to file inventory. This, indeed, they must do, under the act of 1887. The valuation under the said earlier acts was to be as of the date of decedent's death, after deducting for the intervening estates. There was a disposition to value as of the time of enjoyment, in case of election to pay at that time. See *McGeary's Estate*, 14 Pa. L. J., N. S. 174. But *Mellon's Ap-*

It is not the duty of the appraiser to pass on the question of exemption.¹

In treating the points involving constitutional law, the necessity of provision for notice of appraisement was observed.² All persons interested have a right to attend before the official and to be heard.³

peal, 114 Pa. St. 564, held that such mode was illegal.

1. It has been held that a confirmation of the appraiser's report by the surrogate, in *New York*, after due notice to the comptroller, is such an adjudication of the question as will relieve the executors from personal liability for taxes on other legacies which the appraiser had without authority considered as exempt, and which he had not included in his report; and that the state can look only to the omitted legatees. *Ransom, Surrogate, In re Vanderbilt's Estate*, 2 Conn. (N. Y.) 319.

Where an assessment is made upon property not liable to taxation, the owner is not bound to pay the tax, even although he may not have appealed from the assessment; and if he does pay, under protest, upon a warrant for its collection, he may maintain an action to recover it back. *Christ Church Hospital v. Philadelphia*, 24 Pa. St. 229; *Stinger v. Com.*, 26 Pa. St. 422; *Matter of Astor*, 6 Dem. (N. Y.) 415.

In opinions framed by *Ransom, Surrogate*, for the instruction of the *New York* appraisers, it was affirmed that the appraisers should report all property subject to the tax, and that where the fact was doubtful the property involved in the doubt should be reported as liable; that the appraisers were under the duty of examining the will, if any, in order that non-exempt legacies might be reported. *In re Hendricks*, 1 Conn. (N. Y.) 301; *Gowan's Estate*, N. Y. L. J., July 30, 1890; *Dos Passos on Col. Inh.*, etc., Taxes, p. 116, notes. Also *Ransom, Surrogate*, remarked of the appraiser: "... and as certainly his duty to call the attention of the surrogate to any facts that appear to him as constituting sufficient reasons for reporting such legacies as subject to the tax. His duty is to place all the facts before the surrogate. The report is not final. It is to aid the surrogate to decide what property is liable to the tax, and it is subject to the confirmation, revision, or rejection by the surrogate." *McGowan's Estate*, N. Y. L. J., July

30, 1890, as given in *Dos Passos on Col. Inh.*, etc., Taxes 117.

2. See *supra*, this title, *Nature and Constitutionality*.

New York.—The notice should be given by the appraiser to all parties interested: to the executors and beneficiaries on the one hand, and to the proper public officials who may be chargeable with the public rights therein, on the other. *In re Vanderbilt's Estate*, 2 Conn. (N. Y.) 319. And see *In re McPherson*, 104 N. Y. 306; 58 Am. Rep. 502; *In re Arnett*, 49 Hun (N. Y.) 603. And see *In re Lenox's Estate*, 9 N. Y. Supp. 895, where resistance to the appraiser's report was made by the district attorney. See also *Crane v. New York*, 13 N. Y. St. Rep. 342, and *Lockwood v. Carr*, 4 Dem. (N. Y.) 515; *Davis v. Crandall*, 101 N. Y. 311. On application for appraiser, under Laws 1887, ch. 713, legatees are not proper parties. *Astor's Estate*, 20 Abb. N. Cas. (N. Y.) 405. See *Dos Passos, Col. Inh.*, etc., Taxes, p. 223.

The order appointing the appraiser should give the names of all persons entitled to notice. But the appraiser should not accept the list of names as complete; he should inquire of the parties, and should state in his report the result of such inquiry. *Matter of Astor*, 6 Dem. (N. Y.) 410.

Pennsylvania.—Executors are entitled to notice of time and place of making appraisement. *Coxe's Appeal*, *Purd. Dig.* (10th ed.) 218—Register's Court, Phila., 3 Feb. '54, MS.

The *New York* Act of 1885, § 13, declares that after the report of the appraiser, the surrogate shall assess and fix the value of the several estates and "the tax to which the same is liable, and immediately give notice thereof by mail to all parties known to be interested therein." An appeal might then be taken. In the absence of allegation or proof to the contrary it was presumed, in *Matter of Miller*, 110 N. Y. 217, that the surrogate gave the notice prescribed by the act.

3. *Matter of Astor*, 6 Dem. (N. Y.) 410.

2. Of Officials, Executors, etc.—In *New York*, the surrogate must pass on questions arising upon the settlement of decedent's estates. Questions of collateral inheritance tax are therefore incidental to his jurisdiction; and devolution upon him of the duty of adjusting such taxes is constitutional.¹ The statutes generally make the executor or administrator liable personally for the tax on the clear value of personalty passing to non-exempt legatees.² The *Maryland* court apparently was of opinion that the liability exists independently of express provision.³ The devisee only, and not the executor, is liable for the tax on real estate passing as

1. Matter of McPherson, 104 N. Y. 324; 58 Am. Rep. 502.

Where Paid.—*New York*.—Matter of Keenan, 1 Conn. (N. Y.) 226; Keith's Estate, 22 N. Y. St. Rep. 337.

Appraisers' Fees.—*New York*.—Payable by county treasurer out of tax moneys in treasury. Dos Passos on Col. Inh., etc., Taxes 108; citing Matter of Murray, per Bartlett, J., Kings' county.

County Treasurer's Commissions.—See Matter of Keenan, 1 Conn. (N. Y.) 226.

Pennsylvania.—Fees of Officials for Collection.—See *Stephen v. Com.*, 4 Watts (Pa.) 123.

Register's Bond.—A separate bond was required by the *Pennsylvania* law from the register concerning these taxes. It was held, therefore, that his general bond did not bind the sureties therein in this regard. *Com. v. Toms*, 45 Pa. St. 408. And see act of 1887, § 17; Brandt on Suretyship (2d ed.), § 170; Scott on the Intestate Law of Pa. (ed. of 1887), p. 166.

Maryland.—The register cannot retain the tax. *Banks v. State*, 60 Md. 305.

2. See Wright's Appeal, 38 Pa. St. 507; Cullen's Estate, 26 W. N. C. (Pa.) 216; *Com. v. Freedley*, 21 Pa. St. 33; Brewer's Estate, 32 Pa. L. J. 432; *Tyson v. State*, 28 Md. 587; *In re Vanderbilt's Estate*, 2 Conn. (N. Y.) 319; Matter of Wolfe's Estate, 66 Hun (N. Y.) 389. See *State v. Brevard*, Phil. Eq. (N. Car.) 141, opinion of court; the syllabus is misleading.

England.—See *In re Sammon*, 3 M. & W. 381; *Bate v. Payne*, 13 Q. B. 900; 66 E. C. L. 899; *Hales v. Freeman*, 1 Br. & B. 391; *Atty. Gen'l v. Munby*, 3 H. & N. 826; *Foster v. Ley*, 2 Bing. N. Cas. 269; 29 E. C. L. 331.

Pennsylvania.—A suit to recover taxes on personalty is not a proceeding *in rem*. There is a personal liability. This liability may be enforced even against the executor or administrator. Also

there is a personal liability on devisees or grantees of real estate. Devisees and grantees remain liable notwithstanding the five years' limitation in favor of purchasers has run. *Cullen's Estate*, 26 W. N. C. (Pa.) 216.

The Act of Congress, when in force, directed the executor to pay the tax, but in case of his failure to do so directed prosecution of the lien. This latter provision was held to exclude the idea of suit against the executor *in personam*; excepting that another act rendered the executor liable in case of willful neglect or refusal. *U. S. v. Trucks*, 27 Fed. Rep. 541. See *U. S. v. Allen*, 9 Ben. (U. S.) 154. See also *Central Trust Co. v. New York Cent., etc., R. Co.*, 15 N. Y. St. Rep. 180; *Dudley v. Mayhew*, 3 N. Y. 9; *Renwick v. Morris*, 7 Hill (N. Y.) 575; *Dodge v. Stevens*, 94 N. Y. 217; *Jessup v. Carnegie*, 80 N. Y. 456; 36 Am. Rep. 643; *U. S. v. Penna. Co. for Ins. on Lives*, 43 Leg. Int. (Pa.) 217.

Liability of Vendees.—Vendees of real estate were not liable, under the federal succession tax law. *Wilhelmi v. Wade*, 65 Mo. 39. But liens are fixed, under many of the statutes, on the lands.

The surrogate's decree that legacies are exempt from the tax, if made without jurisdiction, will not avail to relieve the executor from personal liability, even though he pays the bequests subsequently to such decree. Matter of Wolfe's Estate, 66 Hun (N. Y.) 389.

3. *Tyson v. State*, 28 Md. 587, where it was said: "In the case of *Latrobe v. Baltimore*, 19 Md. 14, the court held that in the absence of any law 'regulating the imposition and collection of taxes,' the trustee holding the legal title was properly chargeable with the tax." See *Carlisle v. Marshall*, 36 Pa. St. 402; *Greene v. Mumford*, 4 R. I. 313; *State v. Matthews*, 10 Ohio St. 431; *Catlin v. Hull*, 21 Vt. 152; *Baltimore v. Stirling*, 29 Md. 48. Where trustees reside in

such directly to the devisee.¹ This liability of the executors, etc., is by many of the statutes made a perpetual one, until payment.² An executor will be disallowed credit for a penalty which becomes due by reason of his neglect.³ And if his delay compels proceedings by the proper public official, costs will be put on him.⁴ Where a legatee accepts, and dies before payment, his executor cannot renounce the legacy and refuse to satisfy the legacy duty.⁵ The executor deducts or requires the tax before delivery of the subject of the legacy. He cannot be compelled to deliver until he has been furnished with the tax money.⁶ Where he had paid a legacy duty, but the legatee had the property, the Queen's Bench held that he could recover from the legatee as for money paid to the latter's use.⁷

3. Enforcement.—The fact that a court has charged upon it the duty of seeing that the tax is paid, before allowing for payment of any legacy, etc., does not prevent suit by the public official.⁸

different towns, see *Hardy v. Yarmouth*, 6 Allen (Mass.) 278. Compare *Carlisle v. Marshall*, 36 Pa. St. 402. See Cooley on Taxation (2d ed.) 375.

Settlement Between Executor and Guardian.—An executor who has paid a "collateral inheritance tax" upon a legacy to an infant, with the knowledge and consent of the infant's general guardian, cannot, on a subsequent accounting, be held liable, at the instance of a guardian *ad litem*, on the ground of an alleged exemption. *Farquharson v. Nugent*, 6 Dem. (N. Y.) 296.

1. *Boyd's Estate*, 4 W. N. C. (Pa.) 510; *Forbe's Estate*, 16 Phila. (Pa.) 356; *Com. v. Coleman*, 52 Pa. St. 468.

2. See the statutes of the respective states which have adopted the system. See *Cullen's Estate*, 26 W. N. C. (Pa.) 216.

3. *Allen's Estate*, 48 Leg. Int. (Pa.) 16; *Palmer's Estate*, 2 Del. Co. Rep. (Pa.) 180. See *Minturn's Estate*, N. Y. L. J., July 18, 1890.

4. *Minturn's Estate*, N. Y. L. J., July 18, 1890. See *In re Euston*, 5 Dem. (N. Y.) 95; *In re Wolfe*, 66 Hun (N. Y.) 389.

5. A testator gave to his daughter for life, remainder to her husband. The husband accepted. The husband made his wife beneficiary under his will and died before his wife. His executors, in order to allow the wife to take under the intestate law from her father, rather than under her husband's will and thus to save considerable legacy duty, renounced the benefit of the legacy by the father of the remainder. *Held*, that the crown could not thus be deprived

of its right to legacy duty on succession through the husband. *Atty. Gen'l v. Munby*, 3 H. & N. 826.

6. *Matter of Howe*, 112 N. Y. 103; *Atty. Gen'l v. Allen*, 6 Jones Eq. (N. Car.) 144; *In re Vanderbilt's Estate*, 2 Conn. (N. Y.) 319; *New Jersey Laws*, 1892, p. 209; *Ohio Laws*, 1893, § 5; *Connecticut Laws*, 1889, § 5; *Pennsylvania Act* 1887, § 5; *New York Act* 1892, § 5. And see *Maryland Code*, 1888, § 103.

7. *Bate v. Payne*, 13 Q. B. 900; 66 E. C. L. 899. And see *Hales v. Freeman*, 1 B. & B. 391; *Matter of Underhill*, 117 N. Y. 471; *Montague v. State*, 54 Md. 483; *Com. v. Coleman*, 52 Pa. St. 473; *Sohier v. Eldridge*, 103 Mass. 349; *Hathaway v. Fish*, 13 Allen (Mass.) 267.

A properly attested voucher is *prima facie* protection of an executor in *New York*. *White's Estate*, 15 N. Y. St. Rep. 729; *Frazer's Accounting*, 92 N. Y. 247; *Hoffman's Masters in Chancery*, 81; *Metzger v. Metzger*, 1 Bradf. (N. Y.) 267; *Valentine v. Valentine*, 3 Dem. (N. Y.) 597.

8. *In re Sammon*, 3 M. & W. 381.

Proceedings to Enforce Payment.—The statute imposing upon the surrogate the duty of assessing and fixing the amount of the collateral inheritance tax also gives him the power to enforce its payment by such proceedings as are provided for the enforcement of the decrees of the surrogate's court. Against persons interested in the property liable to the collateral inheritance tax, other than administrators, executors and trustees, the surrogate can, on the return of an execution issued upon

4. Lien and Limitation.—It is a principle of general law that taxes are not liens against land until they are assessed. It is manifest that this principle does not affect the collateral inheritance tax. The term "tax," as applied to the subject of this article, is satisfactory for most purposes; but it is not entirely accurate, since the percentage which goes into the treasury of the state is not so much a collection as a withholding. Such is the view evidently taken by legislatures, as illustrated below,¹ although

his decree, enforce the decree by proceedings for contempt, under Code of Civil Procedure, § 2555. *Matter of Prout*, 9 N. Y. St. Rep. 318.

For other cases upon the method in *New York* of enforcing payment of the tax, see *Union Trust Co. v. Gage*, 6 Dem. (N. Y.) 358. And see *New York Laws*, 1892, vol. 1, p. 814.

In *New York*, if the treasurer or comptroller of any county shall have reason to believe that any tax is due and unpaid after the refusal or neglect of the parties liable therefor to pay the same, he shall notify, in writing, the district attorney of the neglect to pay. The latter, if he have probable cause to believe, etc., shall apply to the surrogate's court for a citation, etc. *New York Laws*, 1892, p. 820. The "belief" cannot be controverted by the party against whom the prosecution is brought. See *Matter of Vanderbilt's Estate*, 2 Conn. (N. Y.) 319. The surrogate cannot decide on the executor's liability merely on the latter's motion. The law has guarded the interests of the commonwealth by providing that the proceeding to obtain such decision shall be instituted by the district attorney. *Farley's Estate*, 15 N. Y. St. Rep. 727, citing *New York Laws*, 1887, § 17. And see *New York Laws*, 1892, § 15.

In *Pennsylvania*.—See *Pennsylvania Act* 1887, May 6, §§ 14, 15.

Refusal or Neglect to Pay.—This, under the some-time federal law was held to arise only after demand. *U. S. v. Penn Co.*, 27 Fed. Rep. 539. But the state legislation usually throws on the executor or administrator a positive duty irrespective of demand. See the statutes.

Contempt.—In *Re Prout*, 19 N. Y. St. Rep. 318, Ransom, S., held that the surrogate's court, after decree ordering payment, and execution therefor returned unsatisfied, can proceed against the persons in default other than administrators, executors and trustees for contempt. As to executors, administrators

and trustees, application for an order directing them to pay the tax can be made to the surrogate's court without leave. *Matter of Prout*, 19 N. Y. St. Rep. 318. See *Union Trust Co. v. Gage*, 6 Dem. (N. Y.) 358; *In re Jones*, 5 Dem. (N. Y.) 30.

In *Massachusetts*, in default of probate or application for administration within four months from decease of any person leaving an estate liable to the tax, the state treasurer may apply to the proper probate court praying that an administrator may be appointed. *Laws*, 1891, p. 1032, § 15.

In *West Virginia*, the estate may be committed to the sheriff of the county where administration should be granted in case of no administration within three months. *Worth's West Virginia Code*, 1891, p. 245.

Stock.—On transfers by foreign executors, administrators or trustees of stock standing in decedent's name or in trust for him, the collateral inheritance tax due thereon shall be paid to the prescribed official, otherwise the corporation or person allowing the transfer shall be liable to pay the tax. *Tennessee Acts*, 1893, § 10. A similar provision, without the word "person," exists in *California*. *Statutes* 1893, § 10. Similar provisions are quite common in the different statutes upon the general subject.

1. *Pennsylvania Act* 1826, § 4 (P. L. 229): "The amount of the said tax or duty, together with the expenses of the collection, shall be and remain a lien on all and every estate and estates so made subject to tax from the death of the testator or intestate who shall have died seised of such estate, until the same shall have been fully paid and satisfied." And see *Pennsylvania Act* 1887, § 20. "The lien of the collateral inheritance tax shall continue until the said tax is settled and satisfied." Said Act of 1887, in § 3, provides respecting estates in remainder, etc., that the tax thereon shall not be payable until the

there are to be found those who argue that the tax is a property tax.¹ The statutes generally provide that the estates passing shall be subject to a tax, which provision might perhaps of itself create a lien. There is sometimes express creation of lien against real estate.² As to purchasers in *Pennsylvania*, a limit taking off the lien on real estate was introduced, the time fixed being at first twenty years; and now, by act of 1887, five years.³ The commonwealth cannot evade such bar by reason of the absence

persons liable come into actual possession, election of prior payment being allowed; failure within a year to make return of personalty and to give security for the payment of the tax thereon, to render the tax immediately payable; it being provided, *inter alia*, "That the tax on real estate shall remain a lien on the real estate on which the same is chargeable until paid," subject to the proviso with regard to purchasers, except in case of sale, the lien remains upon the land after the expiration of the five years. The personal liability of heirs or devisees remains. *Cullen's Estate*, 26 W. N. C. (Pa.) 216, *affirmed* in *Appeal of Guarantee Trust, etc., Co.*, 28 W. N. C. (Pa.) 41; 21 Atl. Rep. 781; *affirmed* 142 Pa. St. 18. And compare *James' Estate*, 2 Del. Co. Rep. (Pa.) 164.

Maryland Code 1888, vol. 2, p. 1242: "§ 113. The amount of said tax shall be a lien on said real estate from the death of the decedent."

New York Act 1892, § 3 (Laws, p. 815): "Every such tax shall be and remain a lien upon the property transferred until paid. . . . All taxes imposed by this act shall be due and payable at the time of the transfer; provided, however, that taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event, by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof." By § 5, legacies charged on real property, shall remain a lien or charge thereon until paid.

Ohio Laws 1893, § 1. The act taxes "property" passing, etc., and provides: "And all administrators, executors, and trustees, and any such grantee under a conveyance made during the grantor's life shall be liable for all such taxes,

with lawful interest as hereinafter provided, until the same shall have been paid. . . ." Section 3, as to remaindermen to non-exempt persons, provides: "The tax on the remainder shall be payable one year from the death of said testator, and, together with any interest that may accrue on the same, be and remain a lien on said property till paid to the state." Section 6 provides, respecting legacies subject to the tax and charged on or payable out of real estate, that the tax "shall remain a charge upon said real estate until it is paid."

New Jersey Laws 1892, p. 206. This act provides for a lien on real estate in case of non-exempt devisees in remainder, etc. But it begins in the usual way, directing that "property" passing shall be subject, etc.

In respect to the acts of Congress, see *U. S. v. Hazard*, 8 Fed. Rep. 380; *U. S. v. Brice*, 8 Fed. Rep. 381; *U. S. v. Allen*, 9 Ben. (U. S.) 154; *Com. v. Coleman*, 52 Pa. St. 470.

Vendor's Covenant with Vendee.—Action of covenant upon the words, "grant, bargain and sell," as interpreted by *Pennsylvania* Act of 1715, was held to be maintainable by grantee who was compelled to pay to the commonwealth collateral inheritance tax due by his grantors and constituting a lien on the land. *Large v. McClain* (Pa. 1886), 7 Atl. Rep. 101.

1. See *supra*, this title, *Nature and Constitutionality*.

2. *Tennessee* Laws 1893, § 7; *California* Laws 1893, § 2.

3. See *Mellon's Appeal*, 114 Pa. St. 564, *reversing* *Beatty's Estate*, 33 Pa. L. J. 283; *Com. v. Smith*, 20 Pa. St. 100; *Com. v. Eckert*, 53 Pa. St. 102; *Cullen's Estate*, 26 W. N. C. (Pa.) 217; *Willing's Estate*, 2 W. N. C. (Pa.) 307, on which case see Act of 1887; *Mason v. Sargent*, 104 U. S. 689. *James' Estate*, 2 Del. Co. Rep. (Pa.) 164, must therefore be modified.

Personal Liability of Heirs, etc.—The limitation in the *Pennsylvania* Act, §

of administration, even though such absence prevents the register from noticing the estate.¹ A succession-tax law is not to be regarded as imposing a penalty or forfeiture; and statutes of limitation governing suits for these latter do not apply.² Where legislation imposing the tax looked not so much to the particular parts as to the whole estate, so far as subject thereto, the lien on realty, it was held, did not become apportioned by partition; and on execution-sale of a purpart, it became necessary for the commonwealth to demand out of the proceeds the inheritance tax on the entire real estate, or lose the same even as to the other purparts.³ But where land subject to collateral inheritance tax is held by an owner, who sells a part, the principle evidently does not apply as to the part retained.⁴

5. Interest and Penalties.—Interest upon taxes for delay in payment does not run, as a matter of course, as it does when a debt is unpaid.⁵ It depends entirely on statutory provision.

Some of the statutes providing a system of succession or inheritance tax require that unless the tax be paid within a prescribed time, interest by way of penalty shall be imposed from a date indicated.⁶ Also some states require the payment of interest at legal

20, of five years, is only in favor of purchasers of the land. It does not extinguish the personal liability of heirs, devisees, and legatees, which continues. Cullen's Estate, 142 Pa. St. 18.

Date of Commencement.—In *Pennsylvania* the twenty years' limitation under the old law began to run at decedent's death. The new five-years' limitation is: The inheritance taxes "shall be sued for within five years after they are due and legally demandable, otherwise they shall be presumed to have been paid and cease to be a lien as against any purchasers of real estate." Act 1887, § 20. But the beginning of the lien and the time when the tax is "demandable," are two different things. The right to demand may not be until after a life, etc. See section 3. The lien begins immediately on death. "The lien of the collateral inheritance tax shall continue until the said tax is settled and satisfied" (§ 20), saving as to purchasers, as already indicated. And see section 3.

1. Mellon's Appeal, 114 Pa. St. 564.

2. *In re Vanderbilt's Estate*, 2 Conn. (N. Y.) 319.

3. Mellon's Appeal, 114 Pa. St. 564. See Dupuy's Succession, 33 La. Ann. 258.

4. Sale of part interest by order of court for payment of debts. See Martin's Estate, 19 Pittsb. L. J., N. S. (Pa.) 145. Compare with Mellon's Appeal, 114 Pa. St. 564. In Martin's Estate, 19

Pittsb. L. J., N. S. (Pa.) 145, there had been successive sales of part interests, one of which was sold on account of debts of the owner of that part. The Pittsburgh orphans' court distinguished Mellon's Appeal, 144 Pa. St. 564, and held that the part retained by the grantor in the successive sales of different parts, could not be relieved; that the rule is, that on sale of a part the unsold part has on it the primary burden.

Constructing the Federal statutes, the *Missouri* court held that no one could be made liable for payment of a share of the succession tax due on the descent of land greater than his share in the land. *Wilhelmi v. Wade*, 65 Mo. 39. Compare Mellon's Appeal, 114 Pa. St. 564, mentioned in text for preceding note.

The liability for one's share in land continues against him, although he takes its value in personality under partition proceedings. *Scholey v. Rew*, 23 Wall. (U. S.) 331. 16th & 17th Vict., ch. 51, §§ 42 and 52, may be referred to here.

5. **INTEREST**, vol. 11, p. 388 (d); *Dos Passos* on Col. Inh., etc., Taxes 233.

6. *Pennsylvania*.—Twelve per cent. from date of death, if not paid within one year from death, unless in case of "claims made upon the estate, litigation or other unavoidable cause of delay," in which event six per cent., is to be charged on such unsettled part, beginning at the end of one year from de-

rates and not by way of penalty, where, by reason of unavoidable delay, the tax money cannot be ascertained and is retained by the estate—as where an estate is involved in litigation.¹

6. Judgment and Appeal.—The order affirming appraisement defines the rights, so that an exemption subsequently introduced by statute cannot benefit the person bound, even though of the

cedent's death until default; although, if such unsettled parts do not produce six per cent., then no more need be paid to the commonwealth than they may have realized. Act 1887, § 4. And see section 3, where it is provided that reversionary interests, etc., need not pay tax until possession. On this act, see Commonwealth's Appeal, 128 Pa. St. 603.

New York.—Discount of 5 per cent. allowed if paid within six months from accrual. If not paid within eighteen months from accrual, 10 per cent. per annum is charged from such date; unless claims, necessary litigation, or other cause of delay, prevent ascertainment and payment of the tax, when 6 per cent. from accrual shall be due, besides the tax, and after the cause of delay is removed, 10 per cent. shall be charged. Where bond allowed under section 7, six per cent. interest is chargeable. Laws 1892, p. 816.

Ohio.—In case of non-payment, interest is chargeable at the rate of 6 per cent. from accrual. Law of 1893, Jan. 27, § 4.

Connecticut.—Nine per cent. interest from time of accrual; the tax is payable one year from the death of the testator, intestate, or the qualification of the trustee. Connecticut Laws 1889, § 4.

Maine.—As stated of Connecticut. Maine Laws 1893, p. 169.

Massachusetts.—Six per cent. interest chargeable from time of accrual. By same section, two years are allowed for payment of the tax, excepting where the share is paid before, in which case the tax is due at time of such payment. Massachusetts Laws 1891, p. 1029, § 4.

New Jersey.—Discount of 5 per cent. if paid within six months from accrual. Interest at 6 per cent. per annum if paid within one year, and at 10 per cent. per annum if not so paid. Laws 1892, § 4, p. 208. Section 5 remits penalty and charges but the 6 per cent. in case of non-payment through claims, necessary litigation, or other unavoidable cause of delay.

Delaware.—The tax shall be paid by the executor or administrator within thirteen months from grant of letters,

and on his default, as to the tax on property distributable by him, he is liable on his bond for the amount of the tax, and shall not be allowed commissions on the estate. § 13, Delaware Laws, vol. 13, p. 366.

1. Bank's Estate, 5 Pa. Co. Ct. Rep. 614; Commonwealth's Appeal, 34 Pa. St. 304; Com. v. Smith, 20 Pa. St. 100; Reish v. Com., 106 Pa. St. 521; Com. v. Bausman, 10 Lanc. Bar (Pa.) 189.

Where part of the estate cannot be settled up within the year, it is the duty of the executors to estimate the same and to pay the tax on the balance; otherwise they are chargeable with interest at the rate of twelve per cent. Commonwealth's Appeal, 34 Pa. St. 204.

Mistake in Assessment.—Interest does not run upon a collateral inheritance tax which remains unpaid, owing to mutual mistake in making assessment, until the party liable be informed of the mistake by demand for the part withheld. Brewer's Estate, 33 Pa. L. J. 114, Pittsburgh orphans' court. And see Pennsylvania R. Co. v. Henderson, 51 Pa. St. 329; Com. v. Freedley, 21 Pa. St. 33.

Maryland.—Every executor or administrator shall, within thirteen months from the date of his administration, pay or on failure shall forfeit his commissions. Act 1888, § 105.

Unavoidable cause of delay, as litigation, prevents imposition of the penalty in a number of states, as in *Pennsylvania* and in *New York*. Commonwealth's Appeal, 128 Pa. St. 603; *In re Stewart*, 30 N. Y. St. Rep. 738; *Pennsylvania Act 1887*, § 4; *New York Act 1887*, §§ 4, 5. Proceedings to revoke probate are such an unavoidable cause. Stewart's Estate (N. Y. 1892), 30 N. E. Rep. 184.

Interest in Case of Tax on Remainders—*Pennsylvania.*—See Act 1887, § 3, and Commonwealth's Appeal, 127 Pa. St. 440. Under old statutes containing provisions differing from those in the act of 1887, see Mellon's Appeal, 114 Pa. St. 570, with which James' Estate, 2 Del. Co. Rep. (Pa.) 164, apparently fails to agree.

Under former legislation which made

class in favor of which the exemption is made, unless the statute expressly exempts retrospectively.¹ The appraisement is as conclusive against the commonwealth as it is against individuals, unless appealed from.² The assessment is not final as to properties omitted through fraudulent concealment, or through the ignorance of the decedent's representatives.³ Administrators may appeal from the valuation for collateral inheritance tax on the

the tax payable in all cases on the death of the decedent, it was held that the collateral inheritance tax could not exceed five per cent. upon the whole estate. *King's Estate*, 11 Phila. (Pa.) 26. *Quære de hoc* under the act permitting remainder-men to wait until estates come into possession.

1. *In re Miller*, 110 N. Y. 216; *In re Wolfe*, 66 Hun (N. Y.) 389. And even although the statute exempts previous legacies, etc., yet if decree has been made, the liability remains. *In re Wolfe*, 66 Hun (N. Y.) 389.

Great age of life tenant is not a reason for postponing confirmation of appraisement of his interest. *Estate of Wilkes*, N. Y. L. J., Oct. 31, 1889, cited by Dos Passos, Col. Inh., etc., Taxes, p. 150.

The *New York* surrogate may take further evidence if he desires. *Matter of McPherson*, 104 N. Y. 323; 58 Am. Rep. 502; *McGowan's Estate*, N. Y. L. J., July 30, 1890. But see *Vanderbilt's Estate*, 2 Conn. (N. Y.) 319.

The surrogate may remit to appraisers for proceeding *de novo*. *Jones' Estate*, N. Y. L. J., July 31, 1890, cited in Dos Passos, Col. Inh., etc., Taxes, 151. See *New York Laws 1892*, p. 819, § 13. Compare p. 903.

In *Pennsylvania*, the orphans' court upon appeal has jurisdiction to determine all questions of valuation and liability. *Beatty's Estate*, 33 Pa. L. J. 283. See *Goldstein's Appeal*, 16 Phila. (Pa.) 319.

Where, on proceedings properly brought, the surrogate ruled that certain property was exempt, this barred the state. *Matter of Wolfe's Estate*, 137 N. Y. 205.

The *Maryland* statute in its provision that the judgment of the court fixing the amount of the tax against life tenant, annuitant, and remainder-man, shall be final and conclusive, appears to refer to the determination of amount or value, and not to the question whether the estate is liable. See *Tyson v. State*, 54 Md. 577. And see *Stinger v. Com.*, 26 Pa. St. 422; *Christ Church Hospital v. Philadelphia County*, 24 Pa. St. 229.

2. *Com. v. Freedley*, 21 Pa. St. 33. Assessments by tax assessors under general tax laws have been held to be judicial action, and to become fixed upon expiration of time for appeal, provided that the requirements prescribed by law have been observed. See *Cooley on Taxation*.

Under an English statute directing appraisement of "property which shall not be reduced into money," the representatives of an estate permitted appraisement of valuable pictures, concealing the fact that the pictures were about to be sold. The sale produced a sum beyond the amount fixed by the appraisers. It was held that the contemplated reduction into money having been conceded, the crown was not bound by the valuation. *Atty. Gen'l v. Dardier*, 11 Q. B. Div. 16.

Receipt in Full.—An accountant to whom the register, whose duty it is in *Pennsylvania* to have the tax assessed and to collect it, gives a receipt in full, is protected thereby from personal liability, if he is misled by such receipts and pays legacies which remained liable, without first deducting the tax payable on such legacies. *Brewer's Estate*, 15 Pittsb. L. J., N. S. (Pa.) 432. And see *Com. v. Freedley*, 21 Pa. St. 33; *In re Vanderbilt's Estate*, 2 Conn. (N. Y.) 319.

New York.—A purchaser of land appears to be protected by a certified receipt of the county treasurer or comptroller of the county where jurisdiction was first acquired. See *In re Keenan*, 1 Conn. (N. Y.) 226.

3. *In re Smith's Estate*, 23 N. Y. Supp. 762. See *Com. v. Freedley*, 21 Pa. St. 33, where mistake caused omission of property, additional appraisement was allowed thirteen years afterwards, but the executors were relieved from penalty. *Brewer's Estate*, 16 Pa. L. J., N. S. 114; 15 Pa. L. J., N. S. 435. See *Commonwealth's Appeal*, 128 Pa. St. 603; *Matter of Keenan*, 1 Conn. (N. Y.) 226; *Matter of Astor*, 6 Dem. (N. Y.) 416; *Fosselman's Appeal*, 2 Penn. (Pa.) 240.

Suspension of Appraisement.—Under

personal property of a decedent, but have nothing to do with the valuation of the real estate. The heirs are the ones to appeal as to the realty.¹

7. Restitution.—Express provision is frequently made for return by the commonwealth of the proper portion of succession taxes in case subsequent proof of debts diminishes the estate below the value found by the appraisers.²

SUCCESSIVELY.—See note 3.

SUE—(See also **SUIT**).—To sue means to prosecute; to make legal claim; to seek for in law.⁴

SUFFER—(See also **PERMIT**, vol. 18, p. 334).—To suffer an act to be done, by a person who can prevent it, is to permit or consent to it; to approve of it, and not to hinder it. It implies a willingness of the mind.⁵

the *Pennsylvania* law, where the appraisal sets out that it does not include certain property indicated, as to which there is a doubt whether it was not transferred by act *inter vivos*, and therefore not liable, the said appraisal does not bind the commonwealth on that question; but, on the contrary, the appraisal of the property indicated is suspended, and the limitation closing the time for appeal does not, as to it, begin to run until the appraiser has annexed his decision or appraisal touching the subject of the controversy. *Fosselman's Appeal*, 2 Penn. (Pa.) 238.

1. *Com. v. Coleman*, 52 Pa. St. 468.

On Appeals.—See remarks of Ransom, S., in *Matter of Astor*, 6 Dem. (N. Y.) 411.

The voluntary payment by a legatee of the tax upon a bequest, after and in compliance with a decree of the orphans' court fixing the amount thereof, will not bar the right of the commonwealth afterwards to appeal from the decree for error in not requiring payment of the six per cent. charge in addition. *Commonwealth's Appeal*, 128 Pa. St. 603.

2. *Pennsylvania Acts* 1887, p. 79, § 11. *New York Laws* 1892, ch. 399, § 6; *Connecticut Laws*, 1889, ch. 180, § 11. Reference will be made to the legislation of the state wherein the question may arise.

3. In *Frisk v. Reigelman*, 75 Wis. 499, it was held that proof of the publication of a summons in a daily newspaper "six weeks successively, commencing," etc., does not show compliance with a statute requiring the publication to be

made "not less than once a week for six weeks." See also *NOTICE*, vol. 16, p. 825.

4. Webster's Dict. followed in *U. S. v. Moore*, 11 Fed. Rep. 251. In that case where a statute provided that all fines, penalties, etc., "may be sued for" and recovered in the name of the *United States*, it was contended that the language of the statute "may be sued for," limited the action to a civil suit. But the court held that the words "sued for and recovered" meant the same as "prosecuted for and recovered," and that they could not be held to exclude a suit or prosecution by indictment.

In *Vocht v. Kuklence*, 119 Pa. St. 365, it was said: "To 'sue,' according to Webster, is to 'seek justice or right from, by legal process.' This definition is broad enough to include final process."

5. *Selleck v. Selleck*, 19 Conn. 505.

"Suffer," as used in an ordinance against "suffering" cattle at large, was held to mean knowingly and willingly or carelessly to permit. *Collinsville v. Scanland*, 58 Ill. 221. See also *Hall v. Adams*, 1 Aik. (Vt.) 130; *Com. v. Fourteen Hogs*, 10 S. & R. (Pa.) 393.

The definitions of "suffer" include knowledge of what is to be done under the sufferance. *Gregory v. U. S.*, 17 Blatchf. (U. S.) 325; *Bosley v. Davis*, 1 Q. B. Div. 84; *Redgate v. Haynes*, 1 Q. B. Div. 89; *Know*, vol. 12, p. 522.

But "a man may be said to 'suffer' a thing to be done if it is done through his negligence." *Bosley v. Davis*, 1 Q. B. Div. 87; *Hepkins v. Birmingham Gas Co.*, 6 H. & N. 43.

SUFFERANCE (ESTATE AT).—See ESTATES, vol. 6, p. 890; LANDLORD AND TENANT, vol. 12, p. 668.

SUFFICIENT.—See note 1.

SUFFICIENTLY.—See note 2.

SUGGESTIO FALSI.—See FRAUD, vol. 8, p. 635, and references there given.

SUGGESTION—IN PRACTICE.—A statement or entry made on a record by way of information to the court; a statement made incidentally, or out of the course of pleading; a statement on record of some fact which has occurred in the progress of a cause, such as the death of a co-plaintiff.³

SUICIDE.

I. Definition, 490.

II. As a Crime, 490.

III. As Affecting Life Insurance, 492.

I. DEFINITION.—A killer or a killing of one's self. Suicide is the act of designedly destroying one's own life. A suicide is one who commits suicide; at common law one who, being of the years of discretion and sound mind, destroys himself.⁴

II. AS A CRIME.—By the English common law suicide was a felony.⁵ As, however, forfeitures are not allowed in the *United*

And under an English statute forbidding innkeepers, etc., to "suffer" gambling upon their premises, it has been held that a person "suffers gaming" if he or his servant in charge knows or ought to know that gaming is going on. *Bond v. Evans*, 21 Q. B. Div. 249; *Bosley v. Davis*, 1 Q. B. Div. 84; *Redgate v. Haynes*, 1 Q. B. Div. 89; *Crabtree v. Hole*, 43 J. P. 799.

Suffer and Procure.—The word "suffer" as used in the bankruptcy act of 1867, is different from the word "procure;" "suffer" implies a passive condition, so to speak—as to allow, to permit, not a demonstrative, active course, like the word procure. It is the very definition to apply to the case of pressure and powerful motives brought to bear upon a party. Under the influence of this pressure and the operation of these motives, he suffers a thing to be done—that is, allows or permits it; and the law intended to prevent this. *Campbell v. Traders' Nat. Bank*, 2 Biss. (U. S.) 423. See also **PROCURE**, vol. 19, p. 226.

"Do or Suffer Any Act."—See **ACT OF GOD**, vol. 1, p. 173; **DO**, vol. 5, p. 848.

1. An action was brought for the price of two harvesters. The defense was a breach of warranty. The contract of warranty contained a clause

providing that the defendant should "allow sufficient time for a person to be sent to put it [the harvester] in order," after giving reasonable notice. It was held that the word "sufficient," as used in the contract, meant reasonable—a reasonable time under the circumstances. *Sandwich Mfg. Co. v. Feary*, 22 Neb. 53.

2. In an action to recover the value of two horses killed on defendants' railroad, the complaint alleged that the railroad track was not "sufficiently fenced." This was objected to. The language of the statute under which the action was instituted, was, "securely fenced." It was held that the word "sufficiently," as used in the complaint, was of the same import and meaning as the word "securely," and hence no error was committed by the court in overruling the demurrer to the complaint. *Evansville, etc., R. Co. v. Tipton*, 101 Ind. 197.

3. *Burrill's L. Dict.* In this sense is "suggestion" of and to "suggest" the death of a party, that his representative may be substituted; to "suggest" diminution of record; to "suggest" freehold as security for costs, or in stay of execution. *And. Law. Dict.*

4. *Century Dict.*

5. *Hales v. Petit*, *Plowd.* 253, 261;

States, and as the common-law punishment of forfeiture is the only punishment that would be available, the offense in the *United States* is not punishable;¹ yet it may be said that generally in the states of the Union suicide is criminal and is recognized as such whenever the question has a bearing collaterally.² For example, one who, in attempting to kill himself, accidentally kills another, is guilty of criminal homicide.³ So, one who persuades, advises, aids, or abets another to kill himself is guilty of a crime.⁴ When, in such case, the act is not done in the presence of the one counseling it, while he is an accessory before the fact, at

3 Inst. 54; 1 Hale P. C. 411-417; 2 Hale P. C. 62; 1 Hawk., ch. 27; 4 Bl. Com. 95, 189, 190; 1 East P. C. 219; *Rex v. Ward*, 1 Lev. 8; *Rex v. Russell*, 1 Moo. C. C. 356; *Reg. v. Clerks*, 7 Mod. 16.

1. 1 Bishop's Crim. Law, § 511; 2 Bishop's Crim. Law, § 1187. See also *Com. v. Bowen*, 13 Mass. 356; 7 Am. Dec. 154; *Rex v. Hughes*, 5 Car. & P. 126; 24 E. C. L. 241; *Reg. v. Burgess*, Leigh C. 258; *Rex v. Russell*, 1 Moo. C. C. 356; *Reg. v. Alison*, 8 Car. & P. 418; 34 E. C. L. 458; *Rex v. Dyson*, Russ. & R. C. C. 523.

2. 1 Bishop's Crim. Law 317; *Com. v. Mink*, 123 Mass. 422; 25 Am. Rep. 109.

3. *Com. v. Mink*, 123 Mass. 422; 25 Am. Rep. 109. In this case the court reviewed the *Massachusetts* legislation on the subject of suicide; referred to the ancient *Massachusetts* statutes of 1641 and 1660; declared that suicide had not ceased to be unlawful and criminal in that commonwealth by the simple repeal of the Colony Act of 1660 by the statute of 1823, ch. 143, and that, though at the present day suicide was not in that commonwealth technically a felony, it was unlawful and criminal as *malum in se*, so that an attempt to commit it was likewise unlawful and criminal. From this reasoning it followed that in the case at bar the elements of manslaughter if not murder appeared.

4. *Blackburn v. State*, 23 Ohio St. 146. In this case the defendant was convicted upon an indictment for the murder of a woman by administering poison. The defense was that she took the poison herself, thereby committing suicide; but the court said, referring to the evidence, that "to force poison down one's throat, or to compel him by threats of violence to swallow it, is an administering of poison. Neither deception nor breach of confidence is a necessary ingredient in the act. It matters not whether the poison be put into

the hand or into the stomach of the party whose life is to be destroyed by it. If the poison reaches the stomach or body of the deceased and does its work of death there, it is immaterial whether force or fraud was the means by which the guilty agent effected his object. In either case it is an administering of poison within the meaning of the act." It was conceded by the court in this case that suicide was no crime by the laws of *Ohio*, the statute not having so provided, and that therefore there could be no accessories or principals in the second degree in suicide.

In *Com. v. Bowen*, 13 Mass. 356; 7 Am. Dec. 154, it was held that if a person counseled another to commit suicide, and such other person by reason of the advice killed himself, the adviser was guilty of murder as principal. The evidence here was that J., who had been convicted for murder and was under sentence of death, was advised and urged by the defendant to destroy himself and thus disappoint the sheriff and the people who might assemble to see him executed, and that he put an end to his life accordingly. In this case the jury found the defendant not guilty, probably, says the reporter, from a doubt whether the advice given by him was in any measure the procuring cause of J.'s death.

In *Com. v. Mink*, 123 Mass. 429; 25 Am. Rep. 109, the court, after referring to the changes in the *Massachusetts* statute, said that the point decided in the case of *Com. v. Bowen*, 13 Mass. 356; 7 Am. Dec. 154, was ruled in the same way by the supreme court of that commonwealth, in *Com. v. Pratt*, Berkshire, 1862, a case not reported.

In *State v. Ludwig*, 70 Mo. 412, the defendant was found guilty of murdering his wife, on evidence tending to warrant a finding that the woman hanged herself and that the defendant was present and aided and assisted her

common law he would escape punishment because his principal could not be first tried and convicted.¹ But now generally, by statute in *England* and in the *United States*, an accessory before the fact is treated as a principal, so that it does not follow that he would necessarily escape punishment as at common law.²

If two persons mutually agree to kill themselves and the means adopted prove fatal to one only, the survivor is guilty of murder.³

An attempt to commit suicide is at common law an indictable misdemeanor.⁴ In the *United States* this may or may not be so, according to the statute.⁵

III. AS AFFECTING LIFE INSURANCE.—The effect of suicide upon the contract of insurance has been frequently before the courts,

in the act of self-murder. In this state the statute makes "deliberately assisting another in the commission of self-murder" the gist of the offense. So in other states, statutes have been enacted making it felony to assist in the commission of suicide—for example, in *Arkansas, California, Dakota, Minnesota, Kansas, New York* and *Oregon*.

In *Reg. v. Fretwell, Leigh & C.* 161; 9 Cox C. C. 152, where the prisoner procured poison for a woman at her instigation, and under a threat by her of self-destruction, and she took it with intent to produce a miscarriage, and died of it, but he neither administered it nor caused her to take it, and the facts of the case were consistent with the supposition that he hoped and expected that she would change her mind, and would not resort to it, it was held that whether the woman was or was not *felo de se*, the man was not an accessory before the fact.

In *Rex v. Russell*, 1 Moo. C. C. 356, a person who furnished poison in such a case was held to be an accessory before the fact.

If one persuades another to kill himself, the adviser is guilty of murder, and if the party takes poison himself by the persuasion of another, in the absence of the persuader, yet it is a killing by the persuader; and he is principal in it, though absent at the taking of the poison. And he who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head. *Bac., Max. Reg.* 15; 1 Russ. on Crimes 670, citing 1 Hawk. P. C., ch. 27, § 6; *Sawyer's Case*, Old Bailey, May, 1815. See also 1 East P. C. 228; *Reg. v. Hughes*, 5 Car. & P. 126; 24 E. C. L. 241; *Reg. v. Leddington*, 9 Car. & P. 79; 38 E. C. L. 42.

1. Bish. Cr. Law, § 652; 2 Bish. Cr. Law, § 1187; *Rex v. Russell*, 1 Moo. C. C. 356; *Rex v. Leddington*, 9 Car. & P. 79; 38 E. C. L. 42.

2. Statute 24 & 25 Vict., ch. 94. And see the statutes of the several states of the Union.

In 1 Bish. Cr. Law, § 510, note, a doubt is expressed as to the state of the law on the question of the legal liability of one at whose persuasion another, in the absence of the first, kills himself.

3. In *Reg. v. Jessop*, a case tried at the Nottingham assizes in 1887, and reported in 10 Crim. L. Mag. 862, where two persons had entered into an agreement to commit suicide together and the means employed to produce death proved fatal to one only, the survivor was held guilty of murder. The court said: "A person who administers poison to another with the intention of killing him is guilty of murder if that person dies; and if two persons agree that they will each take poison, each person is a principal and each is guilty. It is contrary to the law of the land to commit suicide, and if two persons meet together and agree so to do and one of them dies, it is murder in the other."

To the same effect is *Reg. v. Alison*, 8 Car. & P. 418; 34 E. C. L. 458. Here the court referred to a similar case of the time of James the First. See also *Rex v. Dyson, Russ. & R. C. C.* 523; 1 Hawk. P. C. 78; *Blackburn v. State*, 23 Ohio St. 146.

4. *Reg. v. Doody*, 6 Cox C. C. 463; *Reg. v. Burgess, Leigh & C.* 258; 9 Cox C. C. 247.

5. In *Massachusetts*, it has been held that the attempt is not a criminal offense, for the reason, as was said by the court in *Com. v. Mink*, 123 Mass. 422; 25 Am. Rep. 109, that the legislature,

This phase of the subject of suicide obviously falls more naturally into the discussion of the insurance contract and its breach than into the title of suicide, and is dealt with elsewhere.¹

SUIT—(See also ACTIONS, vol. 1, p. 178; CAUSE, vol. 3, p. 46; CIVIL, vol. 3, p. 256; PROCEEDINGS, vol. 19, p. 220).—"Suit," in its most comprehensive sense, applies to any proceeding in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the recovery of a right.² Although the terms "suit" and "action" are

having by the general revisions of the statutes measured the degree of punishment for attempts to commit offenses by the punishment prescribed for each offense, if actually committed, has intentionally or inadvertently left the attempt to commit suicide without punishment, because the completed act would not be punishable in any manner. Upon similar reasoning the same conclusion was reached in *Com. v. Dennis*, 105 Mass. 162.

The law in *Hawaii* is similar to that in *Massachusetts*, and depends on similar reasoning upon the provisions of the Penal Code. *Reg. v. Ahsee*, reported in 2 Am. L. Rev. 794.

In *New York*, the attempt constitutes an offense under the Penal Code. See *Darrow v. Family Fund Soc.*, 42 Hun (N. Y.) 245; *Freeman v. National Ben. Soc.*, 42 Hun (N. Y.) 252; *Meacham v. New York State Mut. Ben. Assoc.*, 46 Hun (N. Y.) 363.

1. See ACCIDENT INSURANCE, vol. 1, pp. 92a, 92b; INSANITY, vol. 11, p. 137; LIFE INSURANCE, vol. 13, p. 642. In addition to the cases cited in those articles, see the additional and more recent cases of *Berry v. Knight's, etc., Indemnity Co.*, 46 Fed. Rep. 439; *New Home L. Assoc. v. Hagler*, 29 Ill. App. 437; *Blackstone v. Standard*, 74 Mich. 592; *Travellers Ins. Co. v. McConkey*, 127 U. S. 661; *Smith v. National Ben. Soc.*, 123 N. Y. 85.

2. *McPike v. McPike*, 10 Ill. App. 332. And in that case it was held that a petition filed after divorce for a reduction of alimony was a suit.

In *Weston v. Charleston*, 2 Pet. (U. S.) 464, Marshall, C. J., thus defines "suit": "The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between the parties

in a court of justice, the proceeding by which the decision of the court is sought, is a suit." And in that case, a writ of prohibition was held "a suit." This definition has been approved in the following cases: *Upshur Co. v. Rich*, 135 U. S. 474; *Holmes v. Jenkinson*, 14 Pet. (U. S.) 566; *Kohl v. U. S.*, 91 U. S. 367.

And in *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, the same eminent authority declares a suit to be "a prosecution or pursuit of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice." See also *Ex p. Towles*, 48 Tex. 433.

"Suit" applies to any proceeding in a court of justice in which the plaintiff pursues his remedy to recover a right or claim." *Grover, etc., Mach. Co. v. Florence, etc., Mach. Co.*, 18 Wall. (U. S.) 553.

"Suit is a more general and comprehensive word than action. It means, in its ordinary and popular acceptance, 'any action or process for the recovery of a right or claim, legal application to a court for justice, for prosecution of right before any tribunal.' Webster's Dict. *ad verbum*. It is undoubtedly derived originally from the *secta* or suit of witnesses, which every plaintiff was required to produce, or offer to produce, when he preferred his claim in court. *Inde producit sectam* (thereupon he brings suit), a form of words still continued. 3 Black. Com. 295." *Ulshafer v. Stewart*, 71 Pa. St. 174.

"A suit is a lawful demand of one's right," 3 Bl. Com. 116; or, as Bracton, lib. 3, ch. 1, p. 407, more properly defines it, '*Actio nihil aliud est quam jus prosequendi in judicio, quod alicui debetur.*'" *Magill v. Parsons*, 4 Conn. 322.

That the term "suit" is not applicable to a defense, see the strong dissenting opinion of Miller, J., in *New Orleans, etc., R. Co. v. Mississippi*, 102 U. S. 143.

Suit May Include Criminal Prosecu-

tions.—The word "suit" has in practice been considered as meaning criminal prosecutions as well as civil proceedings. *Com. v. Moore*, 143 Mass. 136; *Com. v. Abbott*, 13 Met. (Mass.) 120; *Com. v. Gee*, 6 Cush. (Mass.) 174; *Com. v. Thrasher*, 11 Gray (Mass.) 55; *Com. v. O'Neil*, 6 Gray (Mass.) 343; *Com. v. Eagan*, 4 Gray (Mass.) 18; *U. S. v. Mann*, 1 Gall. (U. S.) 177. See also *SUE*.

Thus, Bacon says that an indictment is defined as an accusation at the *suit* of the king. Bacon's Abr., tit. *Indictment* (A); *U. S. v. Moore*, 11 Fed. Rep. 251. *Compare State v. Poll*, 1 Hawks (N. Car.) 442; 9 Am. Dec. 655.

A proceeding to take land for public uses by condemnation is a suit. *Kohl v. U. S.*, 91 U. S. 367. The court distinguishes this case and that of the assessment of property for the purpose of taxation. See also *Upshur Co. v. Rich*, 135 U. S. 477, cited *infra*.

In Mississippi, etc., *Boom Co. v. Patterson*, 98 U. S. 406, speaking of a judicial proceeding to appropriate private property to a public use and to fix the compensation therefor, it was said: "If that inquiry took the form of a proceeding before the courts between parties, the owners of the land on one side and the company seeking appropriation on the other, there is a controversy which is subject to the ordinary incidents of a civil suit." See also *Searl v. School Dist.* No. 2, 124 U. S. 197; *Colorado Midland R. Co. v. Jones*, 29 Fed. Rep. 193; *Mineral Range R. Co. v. Detroit*, etc., R. Co., 25 Fed. Rep. 515; *EMINENT DOMAIN*, vol. 6, p. 606; *REMOVAL OF CAUSES*, vol. 20, p. 1008, for a number of cases.

And so a petition to the court of quarter sessions for damages to adjacent property caused by the alteration of a street, etc., has been held a "suit." *In re Grape Street*, 103 Pa. St. 121.

Petition to Lay Out a Highway.—In *Massachusetts* it has been held that proceedings before the county commissioners on a petition to lay out a highway in which counsel appear, witnesses are examined and argument made as in other courts, is a "suit," within the meaning of the by-law of a town authorizing its selectmen to "appear and defend suits brought against them." *Hyde Park v. County Com'rs* (Mass. 1892), 31 N. E. Rep. 693.

Probate Proceedings.—The granting of probate, *ex parte*, is not a "suit," yet, if a contest arises, and is carried

on between parties litigating with each other, the proceeding then becomes a "suit." *Upshur v. Rich*, 135 U. S. 476; *Ellis v. Davis*, 109 U. S. 485; *Hess v. Reynolds*, 113 U. S. 73; *Gaines v. Fuentes*, 92 U. S. 10; *Davis v. Livingston*, 6 Ohio 225; *Haven v. Hilliard*, 23 Pick. (Mass.) 19; *REMOVAL OF CAUSES*, vol. 20, p. 1009.

The application of a poor debtor before a master in chancery to be permitted to take the poor debtor's oath under the *Massachusetts* statutes, is a "civil suit," as that term is used in the *Rhode Island* statute, permitting certain officers to take depositions to be used on the trial of a "civil suit" pending in another state or government. *In re Jenckes*, 6 R. I. 18. See generally *POOR DEBTORS*, vol. 18, p. 823.

A *Caveat* was held a "suit" in *Tennessee*, where a statute (Act of 1807, ch. 1, § 47) had legalized it as the method of trying title to lands in certain cases. *Peeler v. Norris*, 4 Yerg. (Tenn.) 331.

Foreign Attachment; Garnishment.—(See also *GARNISHMENT*, vol. 8, p. 1099).—An insurance policy contained a provision that no "suit" should be brought for the recovery of a loss, unless commenced within a year. A creditor of the insured proceeded against the amount due for a loss by means of a foreign attachment. It was held that this process was a "suit" within the provision aforesaid. *Harris v. Phoenix Ins. Co.*, 35 Conn. 310; *In re Aycinena*, 1 Sandf. (N. Y.) 690. See generally *FOREIGN ATTACHMENT*, vol. 8, p. 288.

An Unsatisfied Judgment Held a Suit.

—Within the saving clause of a statute, providing that the repealing act was not to affect pending "suits or proceedings" an unsatisfied judgment was held a "suit." The court, by Mulkey, J., said: "The learned counsel, however, suggests that the unsatisfied judgment was neither a suit nor a proceeding. What was it, then? The meaning of the word 'suit' in a legal sense, as given by Webster, is 'an attempt to gain an end by legal process.' What was the end to be obtained in this case? Confessedly the debt for which the judgment was obtained. This end not having been obtained, it was still a suit, though, by reason of the delay, it subsequently became defective, so that the plaintiffs therein could not proceed further in it without reviving the judgment by *scire facias*. Black-

stone's definition of the word 'suit' is in substance the same as Webster's." *Dobbins v. First Nat. Bank*, 112 Ill. 566. See also *Ulshafer v. Stewart*, 71 Pa. St. 174.

Prohibition.—In *Western v. Charleston*, 2 Pet. (U. S.) 449, the writ of prohibition was held a suit within the Federal Judiciary act providing for the removal of "suits" from state to federal courts.

Habeas Corpus.—And so the writ of *habeas corpus* has been held a suit. *Holmes v. Jennison*, 14 Pet. (U. S.) 540; *HABEAS CORPUS*, vol. 9, p. 164.

The Writs of Attachment, Ejectment, Mandamus, Quo Warranto, and Replevin have been held "suits" within different *United States* judiciary acts. See *REMOVAL OF CAUSES*, vol. 20, p. 1008.

Mandamus.—And, where an *Illinois* statute required all "suits" against a county to be brought in the circuit court, the term was held applicable to a proceeding by *mandamus*. *McBane v. People*, 50 Ill. 503. See also *State v. Jennings*, 56 Wis. 120.

Certiorari has been held a suit. *Hendrix v. Kellogg*, 32 Ga. 435.

A Proceeding to Foreclose a Mortgage by advertisement was held not to be a suit in *Hall v. Bartlett*, 9 Barb. (N. Y.) 300. The court, by Hand, J., said: "Such a proceeding is merely the act of the mortgagee, executing the power of sale given to him by the mortgagor. In no sense is it a suit in any court, and all the definitions of that word require it to be a proceeding in some court. A sale by foreclosure is entirely *ex parte*, and if unauthorized or illegal the objection can be taken whenever the proceedings are properly brought in question."

An Appeal from an Assessment of Taxation Held Not to be a Suit.—In *Upshur Co. v. Rich*, 135 U. S. 467, an appeal under a state law from an assessment of taxation to a "county court," which, in respect to such proceedings, acts as a board of commissioners, without judicial powers, was held not to be a "suit." The court, by Bradley, J., after remarking that the proceeding, though not a suit, "approaches very near to the line of demarkation," discusses the authorities at length, summing up the doctrine thus: "The principle to be deduced from these cases is, that a proceeding not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of prop-

erty for the just distribution of taxes or assessments, is purely administrative in character, and cannot in any just sense be called a suit; and that an appeal in such a case, to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion, and value, is not a suit; but that such an appeal may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on one side and the other."

Petition to County and Commissioners.—In *Delaware Co. v. Diebold Safe Co.*, 133 U. S. 473, it was held that where a claim against a county is heard before county commissioners, though the proceedings are, in some respects, assimilated to proceedings before a court, yet they are not in the nature of a trial *inter partes*, but are merely the allowance or disallowance, by county officers, of a claim against the county, upon their own knowledge, or upon any proof that may be presented to them; but that an appeal from their decision, tried and determined by the circuit court of the county, is a suit removable to the circuit court of the *United States*. See also *Gurnee v. Brunswick Co.*, 1 Hugh. (U. S.) 270.

Contest of an Election.—It has been held that there is a distinction between a mere contest of the result of an election and a suit for the office—*i. e.*, a suit to try the right to the office. Thus, within a statute conferring jurisdiction upon a court over "suits," complaints and pleas, whenever the matter in controversy is of a certain value, it has been held, that the mere contest of the result of an election was not a "suit." *Williamson v. Lane*, 52 Tex. 344. In that case the court said: "There is, however, a broad, well-established distinction between a suit for an office and a mere contest of the result of the election as declared by the officer to whom the duty of certifying the fact is primarily intrusted. In one case, the immediate right of the plaintiff to the office and its fees and emoluments is the purpose and direct subject-matter of the suit; while in the other, the right to the office may result as a consequence, from the contest, but is not its primary object, and may not follow from it, although the contestant may prove successful." And in the case of *Wright v. Fawcett*, 42 Tex. 203, it was

frequently used interchangeably,¹ the former is the more comprehensive.²

SUITABLE.—See note 3.

contended by appellant, that the district court, under the constitution, having jurisdiction of all "suits," complaints, and pleas whatever, when the matter in controversy shall be valued at or amount to \$100, exclusive of interest, had jurisdiction to try a case of contested election, independent of the statute. The court said: "It is true that the district court has jurisdiction, as has often been held, to try the right to an office. (*Banton v. Wilson*, 4 Tex. 402; *Bradley v. McCrabb*, Dall. (Tex.) 504.) To decide the result of an election is a question of a different character, part of the process of political organization, and not a question of private right."

1. *McPike v. MCPike*, 10 Ill. App. 332; *Magill v. Parsons*, 4 Conn. 322; *Claffin v. Robbins*, 1 Flip. (U. S.) 605; *Page v. Brewster*, 58 N. H. 126; *Calderwood v. Calderwood*, 38 Vt. 174; *People v. Colborne*, 20 How. Pr. (N. Y.) 381; *Bouvier's L. Dict.*; *ACTIONS*, vol. 1, p. 179.

Thus in *Ex parte Milligan*, 4 Wall. (U. S.) 112, it is said: "In any legal sense, action, suit, and cause are convertible terms."

And so, "Actions at law and suits at law are synonymous terms; they are one and the same thing." *White v. Washington School Dist.*, 45 Conn. 61.

Writ of Error.—A writ of error was held not to be a suit within a statute providing that "suits" should not abate under certain circumstances. *Overseers of the Poor v. Beedle*, 1 Barb. (N. Y.) 11. The court, by Allen, J., said: "The section under consideration provides that no 'suit' commenced, etc., shall abate, etc. The word suit is here used in its modern sense, and as synonymous with action. A suit is defined to be 'the prosecution or presentment of some claim, demand or request. In law language it is the prosecution of some demand in a court of justice.' (3 Story's Com. on Const., § 1719.) The words 'suit' and 'action' are used as synonymous in the section of the statute now under consideration. By that section it is provided that 'the court in which any such action shall be pending shall substitute the names,' etc. A civil action is defined

to be a legal demand of one's right; or it is the form of a suit given by law for the recovery of that which is due. Till judgment the suit is called an action. (*Bouv. L. Dict.*, tit. *Action*.) A writ of error is not a suit or action, as those words are understood and used." See also *Wilt v. Stickney*, 15 Nat. Bankr. Reg. 23. *Compare Wayman v. Southard*, 10 Wheat. (U. S.) 29. See also *SUE*; and the next note.

2. *McPike v. MCPike*, 10 Ill. App. 332; *Ulshafer v. Stewart*, 71 Pa. St. 174.

"Suit" is a term of wider significance than "action," and may include proceedings on a petition. *In re Wallis*, L. R., 23 Ir. 7.

"Suit and action are often synonymous, though an action may be considered a form of a suit; and the latter is often applied to proceedings in equity, and actions to those at law, up to judgment." *Hall v. Bartlett*, 9 Barb. (N. Y.) 300.

According to Lord Coke the word "suit" includes an execution, but the word action does not. Thus, if the body of a man be taken in execution, and the plaintiff release all "suits," the execution is gone; but if he release all actions, the defendant shall remain in execution. *Co. Litt.* 291a; *Wayman v. Southard*, 10 Wheat. (U. S.) 29; *People v. Colborne*, 20 How. Pr. (N. Y.) 381.

Again, "suit" applies to proceedings both at law and in equity, while "action" is properly confined to proceedings at law. *State v. Jennings*, 56 Wis. 120; *Didier v. Davidson*, 10 Paige (N. Y.) 515; *People v. Colborne*, 20 How. Pr. (N. Y.) 381.

3. A statute authorized the grant of administration to a "suitable person." It was held that "suitable person" meant proper and competent person, and intended a legal suitability, and not some vague and undefinable quality. *Peters v. Public Administrator*, 1 Bradf. (N. Y.) 207. And see *PROBATE*, vol. 19, p. 195.

Suitable Forms.—Where a statute prescribed certain forms to be used in prosecutions for offenses defined by the act, but provided that "this shall not be so construed as to prohibit the use of other suitable forms," it was held, that a form which omitted a ma-

SUM.—One of the lexical definitions of the word “sum,” and the sense in which it is most commonly used, is money. “A quantity of money or currency; any amount indefinitely, as a sum of money, a small sum or a large sum.”¹

SUMMARY PROCEEDINGS.—(See also CONTEMPT, vol. 3, p. 771; CRIMINAL PROCEDURE, vol. 4, p. 729; FORCIBLE ENTRY AND DETAINER, vol. 8, p. 101; LANDLORD AND TENANT, vol. 12, p. 658; NUISANCES, vol. 16, p. 922; RECAPTION, vol. 19, p. 1093; TAXATION; UNITED STATES OFFICERS; WARRANT OF ATTORNEY.)

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II. Nature; Constitutional Limitations, 498.

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2. *Criminal Prosecutions Generally*, 500.

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III. Conviction; Record, 507.

I DEFINITION.—The term summary proceedings, as used here, designates those proceedings before judicial tribunals which are of an immediate, speedy, or peremptory nature. Proceedings are said to be summary when they are short and simple in comparison with regular or formal proceedings, from which they usually

terial allegation, expressly required by the statute, was not a “suitable form,” within the saving clause. *Com. v. Intoxicating Liquors*, 105 Mass. 178.

Suitable Bridges.—In a *Massachusetts* statute providing for a railroad viaduct, the term “suitable bridges” was held to mean such bridges as in the judgment of the board of railroad commissioners, the safety and convenience of the public, and the interests of the railroad corporation required. *Mayor, etc., of Worcester v. Railroad Com'rs*, 113 Mass. 151.

Suitable Place.—A statute authorized the taking of land for a public cemetery by a town when “land necessary therefor cannot be obtained in any suitable place at a reasonable price by contract with the owner.” The court, by Smith, J., said of the term “suitable place,” as here used: “By ‘suitable place’ was intended a place not only convenient and accessible, but adapted by nature for a burial place, and capable of improvement and adornment creditable to the living and respectful to the memory of the dead. The commissioners as well as the selectmen have found that no other place is so suitable as the plaintiff's lot. What is a suitable place is a question of fact to be determined on a consideration of all the circumstances of the particular case. The term is a relative one. What

may be a suitable place in one community may not be in another. By ‘any suitable place’ the legislature meant nothing less than the most suitable place, or a place as suitable as any other, or a place as suitable as the town can afford to pay for.” *Crowell v. Londonderry*, 63 N. H. 48.

1. Webster's Dict. followed in *U. S. v. Van Auken*, 96 U. S. 366. In that case it was held that a statute which makes it an offense to circulate any obligation for a less sum than one dollar, intended to circulate as money, is not violated by circulating a note payable not in money but in goods.

A statute whose main object was taxation, authorized the treasurer to collect sums to be paid by curators of vacant successions. It was held to be restricted to sums that should go into the treasury as a revenue, and not to include those which should be deposited there for absent heirs, and which constituted no part of the revenue. *Succession of D'Aquin*, 9 La. Ann. 400; *Leake v. Linton*, 6 La. Ann. 262.

Sums advanced cannot be construed to include value for personal services rendered. *Hodges v. Hodges*, 9 R. I. 32.

Sum Due.—See DUE, vol. 6, p. 39.

Sum in Gross.—See GROSS, vol. 9, p. 62.

Like Sum.—See LIKE, vol. 13, p. 664.

differ in that the aid of a jury is dispensed with.¹ The statutes which authorize them, being in derogation of the common law, must be strictly construed.²

Summary proceedings exist under statutes for the recovery of debts due the state or the *United States* from collectors of taxes or revenue.³ Another proceeding of this nature commonly authorized by statute is that for the recovery by landlords of the possession of demised premises by the prompt dispossession of tenants who hold over after default in paying rent, or after the expiration of their terms.⁴ The proceeding where one is guilty of a contempt of court is another instance of a summary proceeding.⁵ The procedure in relation to the suppression or abatement of a nuisance is sometimes summary.⁶ Another instance of a proceeding which may be called summary is afforded by the statutes authorizing a confession of judgment upon a warrant of attorney.⁷ Summary proceedings frequently used and concerning which controversies have arisen in connection with rights claimed under the constitutional requirement of "due process of law," and recognizing the right of trial by jury, are those for the speedy trial of persons accused of minor offenses and for the enforcement of municipal ordinances.⁸

II. NATURE; CONSTITUTIONAL LIMITATIONS—1. In General.—Constitutional provisions as to the right to trial by jury do not extend the right, but only secure it in cases in which it was a matter of right before.⁹ So summary commitment for contempt is not in

1. Sweet's L. Dict.; Bouv. L. Dict.; 4 Bl. Com. 280; 1 Stephen Hist. Cr. Law, ch. 4, p. 122.

2. 4 Bl. Com. 282, n. (2); Endl. Interp. Stat. 344, n. 112; Blackw. Tax Tit., §§ 156, 157; 5 Rob. Pr. 14; Millor v. Farrelly, 25 Ark. 353; Haley v. Petty, 42 Ark. 392. See generally STATUTES—*Strict Construction*, vol. 23, p. 347 *et seq.*

It has been said that a special statutory proceeding, summary in its nature, and in derogation of the common law, must conform to the method of procedure prescribed by the statute, or the jurisdiction will fail to attach, and the proceeding be *coram non judice*. French v. Willer, 126 Ill. 611, where the court declared that a judgment entered by confession under a power of attorney and *cognovit*, in a forcible detainer suit, was unauthorized by law and void, and said that the rule that a remedy and mode of procedure prescribed by the legislature excluded a different proceeding substituted by the contract of the parties applied to summary statutory proceedings in courts of record.

3. *United States Rev. Stat.*, § 3625, provides for the issue of a warrant of distress against a delinquent revenue

collector or receiver of public money. This distress warrant has the effect of a judgment. *Armstrong v. U. S.*, Gilp. (U. S.) 399. It is constitutional. *Murray v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272. It is conclusive evidence of the facts recited in it, as well as of the authority to make the levy under it, so far as to justify the marshal in making it. *Murray v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272.

See TAXATION—*Collection*, for a treatment of the summary proceeding given by local statutes against delinquent tax-collectors. See also SHERIFFS, vol. 22, p. 525. See BONDS, vol. 2, p. 467d, for summary proceedings on official bonds.

4. See FORCIBLE ENTRY AND DETAINER, vol. 8, p. 101; LANDLORD AND TENANT, vol. 12, p. 758u.

5. See CONTEMPT, vol. 3, p. 771.

6. See NUISANCES, vol. 16, p. 922.

7. See WARRANT OF ATTORNEY.

8. See DUE PROCESS OF LAW, vol. 6, p. 43; CONSTITUTIONAL LAW, vol. 3, p. 670; MUNICIPAL COURTS, vol. 15, p. 1202.

9. Cooley's Const. Lim., p. 504, n. 2;

2 Hare's Am. Const. Law, p. 860;

violation of the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law,¹ or the constitutional right to trial by jury,² as contempt was at common law punished summarily.³

It is likewise as to the authority of courts over their officers.⁴ The action of a court in removing one of its officers has been declared not to be for the purpose of punishment, but the proceeding is, in its nature, civil, and for the purpose of preserving the courts of justice from the official administration of unfit persons, so that the constitutional provisions which declare that no person shall be held to answer for capital or otherwise infamous crimes, unless on a presentment or indictment by a grand jury, and that the trial for all crimes, except in cases of impeachment, shall be by jury, have no relation to such a proceeding, although the offense which prompts the removal is indictable.⁵

Proceeding summarily upon an official bond in pursuance of a statute which was in existence at the time of the execution of the bond is not an infringement of the right to trial by jury.⁶ It has

Singleton v. Madison, 1 Bibb (Ky.) 342; Howe v. Plainfield, 37 N. J. L. 146; Carter v. Camden Dist. Ct., 49 N. J. L. 600; Warren v. People, 3 Park. Cr. Rep. (N. Y.) 545; Keddle v. Moore, 2 Murph. (N. Car.) 41; 5 Am. Dec. 518; Com. v. Waldman, 140 Pa. St. 89; Haines v. Levin, 51 Pa. St. 412; Byers v. Com., 42 Pa. St. 189; Gaston v. Babcock, 6 Wis. 503; Trigally v. Memphis, 6 Coldw. (Tenn.) 382; Lake Erie, etc., R. Co. v. Heath, 9 Ind. 558; Woods v. Varnum, 85 Cal. 639; Grim v. Norris, 19 Cal. 141; 79 Am. Dec. 206; McInerney v. Denver, 17 Colo. 312; Ward v. Farwell, 97 Ill. 593; *Ex p.* Kiburg, 10 Mo. App. 447; *Ex p.* Marx, 86 Va. 40; Miller v. Com., 88 Va. 618; Walker v. Sauvinet, 92 U. S. 90; State v. Glenn, 54 Md. 572; Inwood v. State, 42 Ohio St. 186. This construction is given to the provision in the Constitution of the *United States* which guaranties the right to trial by jury. *In re* Dana, 7 Ben. (U. S.) 1; Callan v. Wilson, 127 U. S. 540.

New Statutory Offenses.—Upon the ground stated in the text, it has been decided that a statute making a new offense may authorize a prosecution before courts of inferior jurisdiction by summary proceedings without a jury, and yet not violate a constitutional requirement that "trial by jury shall be as heretofore, and the right thereof remain inviolate." Van Swartow v. Com., 24 Pa. St. 131; Rhines v. Clark, 51 Pa. St. 66. See also CONSTITUTIONAL LAW, vol. 3, p. 733, n. 5; Murphy v. People, 2 Cow. (N. Y.) 815; *In re* Pow-

ers, 25 Vt. 261; Woods v. Varnum, 85 Cal. 639; Tims v. State, 26 Ala. 165; Boring v. Williams, 17 Ala. 510.

In the recent case of McInerney v. Denver, 17 Colo. 302, it was held that the provisions of the *Colorado* constitution, guaranteeing the right of trial by jury in criminal cases, were adopted with reference to the procedure theretofore generally existing; that if, in a given class of cases, trials without a jury prevailed, the constitution effected no change; and that a particular offense which was unknown before the adoption of the constitution was triable by jury afterwards, or was not, according to its status, as falling naturally within a class of offenses that were or that were not so tried before.

1. Eilenbecker v. Plymouth County, 134 U. S. 31; Matter of McAdam, 54 Hun (N. Y.) 637.

2. State v. Becht, 23 Minn. 411.

3. Cooley's Const. Lim., p. 289; CONTEMPT, vol. 3, p. 790; HABEAS CORPUS, vol. 9, p. 215.

4. *Ex p.* Wall, 107 U. S. 265; ATTORNEY AND CLIENT, vol. 1, p. 944. See SHERIFFS, vol. 22, p. 525.

A statute which authorized a summary remedy against sheriffs who fail to pay over money, was declared constitutional. Wells v. Caldwell, 1 A. K. Marsh. (Ky.) 441. See also Woods v. Varnum, 85 Cal. 639; *In re* Marks, 45 Cal. 218.

5. *Ex p.* Wall, 107 U. S. 265; Fields v. State, 1 Mart. & Y. (Tenn.) 168.

6. See BONDS, vol. 2, p. 467d, n. 3.

similarly been held, where a statute authorized summary judgment upon an appeal bond operating as a *supersedeas*, and such proceedings were had in pursuance of a rule of court, that a surety had no right to trial by jury, for, by becoming a surety, he submitted himself to be governed by the fixed rules which regulate the practice of the court.¹

So, a person may waive his right to trial by jury, by giving a note payable to a bank, the charter of which authorizes collection by summary process.² Legislation authorizing these proceedings is intended only to secure a prompt and speedy remedy, and not to deprive the defendant of any defense founded upon real and substantial merit which he would have in the regular plenary action.³

2. Criminal Prosecutions Generally.—Summary proceedings are by statute in many of the states and in *England* authorized in prosecutions for minor offenses. In these cases there is no intervention of a jury, but the trial is concluded before the magistrate or justice of the peace.⁴ Such proceedings, in the case of minor and petty offenses, are not in violation of constitutional provisions declaring generally that the right to trial by jury shall remain inviolate.⁵

The statutes authorizing these proceedings sometimes provide for a trial by a committing magistrate without the intervention of a jury, but give the accused a right of appeal and to a trial by a

It has been held that a statute authorizing judgment to be entered on motion, for a breach of an agreement thereafter to be made to pay money for the building of a penitentiary, was not unconstitutional, and that, in such case, a judgment without a jury might be rendered, if the defendant should not appear. *Ewing v. Directors of Penitentiary, Hard. (Ky.) 6.*

1. *Smith v. Gaines*, 93 U. S. 341; *Hiriart v. Ballou*, 9 Pet. (U. S.) 156. See *Murry v. Askew*, 6 J. J. Marsh. (Ky.) 27.

2. *Bank of Columbia v. Okely*, 4 Wheat. (U. S.) 235.

3. The act of the legislature of *Maryland* of 1793, incorporating the Bank of Columbia, one of the sections of which gave to the bank a summary proceeding against debtors to the bank, did not intend to interfere with any legal defense against the claim of the bank the party might have. It did not prescribe the nature of that defense, nor deprive him of any which might have been used had the action been begun in the usual way. *Bank of Columbia v. Sweeney*, 2 Pet. (U. S.) 671.

Upon the true interpretation of the provisions in the Duty Collection Act

of 1799, ch. 123, § 65, relative to granting judgment on motion in suits on bonds to the *United States* for duties, Congress intended no more than to interdict the party from an imparlance, or any other means for mere delay, and not to bar the party from any good defense against the suit founded upon real or substantial merits. *Ex p. Davenport*, 6 Pet. (U. S.) 661.

4. *Callan v. Wilson*, 127 U. S. 540; *State v. Glenn*, 54 Md. 573; *People v. Dutcher*, 83 N. Y. 240; *People v. Rawson*, 61 Barb. (N. Y.) 619; *Devine v. People*, 20 Hun (N. Y.) 98.

5. See *DUE PROCESS OF LAW*, vol. 6, p. 43; *CONSTITUTIONAL LAW*, vol. 3, p. 733, n. 4; *INDICTMENT*, vol. 10, p. 459; *Williams v. Augusta*, 4 Ga. 509; *Beers v. Beers*, 4 Conn. 535; 10 Am. Dec. 186; *Tims v. State*, 26 Ala. 165; *Byers v. Com.*, 42 Pa. St. 94; *State v. Glenn*, 54 Md. 573; *McGear v. Woodruff*, 33 N. J. L. 213; *People v. McCarthy*, 45 How. Pr. (N. Y.) 97; *People v. Phillips*, 1 Park. Cr. Rep. (N. Y.) 95; *Murphy v. People*, 2 Cow. (N. Y.) 815; *Duffy v. People*, 6 Hill (N. Y.) 75; *People v. Justices*, 74 N. Y. 406; *State v. Maxcy*, 1 McMull. (S. Car.) 501; *State v. Conlin*, 27 Vt. 318; *In re Dougherty*, 27 Vt.

jury in the appellate court. It has been held that a statute which, although it authorizes a summary conviction in the first instance, gives a trial by jury in the appellate court, subject only to the requirement of giving bail for his appearance there, or, in default of bail, being committed to jail, is not unconstitutional as impairing the right of trial by jury.¹ It has been held recently, how-

325; *State v. Gutierrez*, 15 La. Ann. 190; *Frost v. Com.*, 9 B. Mon. (Ky.) 362.

Such minor offenses are sometimes excepted by the terms of the constitution securing the right of trial by jury. *State v. McCory*, 2 Blackf. (Ind.) 5; *State v. Mead*, 4 Blackf. (Ind.) 309; 30 Am. Dec. 661.

In *State v. Glenn*, 54 Md. 600, it was said that "in *England*, notwithstanding the provision in the Magna Charta of King John, art. 46, and in that of 9 Hen. III, ch. 29, which declares that no freeman shall be taken, imprisoned, or condemned but by lawful judgment of his peers, or by the law of the land, it has been the constant course of legislation in that kingdom for centuries past to confer summary jurisdiction upon justices of the peace for the trial and conviction of parties for minor and statutory police offenses. . . . And when it is declared that the party is entitled to a speedy trial by an impartial jury, that must be understood as referring to such crimes and accusations as have, by the regular course of the law and the established modes of procedure as theretofore practiced, been the subjects of jury trial. It could never have been intended to embrace every species of accusation involving either criminal or penal consequences."

In *McGear v. Woodruff*, 33 N. J. L. 213, the court said: "Extensive and summary police powers are constantly exercised in all the states of the Union for the repression of breaches of the peace and petty offenses, and these statutes are not supposed to conflict with the constitutional provisions securing to the citizen a trial by jury. . . . This constitutional provision does not prevent the enforcement of the by-laws of a municipal corporation without a jury trial."

In *Michigan* also, one accused of this offense is entitled to a trial by jury. *Slaughter v. People*, 2 Doug. (Mich.) 334; as in *Virginia*, *Miller v. Com.*, 88 Va. 618.

In *Vermont*, it was held that the legislature might, if it saw fit, provide that minor offenses punishable by fine only,

or imprisonment in the county jail for a brief and limited period, having reference to the internal police of the state, be tried upon informal or merely oral complaint. *State v. Conlin*, 27 Vt. 318.

In *U. S. v. Herzog* (D. C.), 20 Wash. L. Rep. 302, it was held that gaming was not a petty offense, triable without a jury, under the *United States Constitution*.

In *U. S. v. Jackson* (D. C.), 20 Wash. L. Rep. 297, it was held that one accused of receiving stolen goods was entitled to a trial by jury under the *United States Constitution*.

And in *Re Fauldan* (D. C.), 20 Wash. L. Rep. 302, it was held that one accused of petit larceny was entitled to a trial by jury.

What Are Petty Offenses?—"It is certainly difficult to define, in view of the English legislation, what are such petty offenses. 1 Stephen's Hist. Cr. Law, ch. 4, p. 122, where the history and character of such legislation are given." 1 Dillon Mun. Corp. (4th ed.), p. 508, n. 1. See also *Byers v. Com.*, 42 Pa. St. 89.

In *New York*, it was held that keeping a bawdy house was an indictable offense at common law, and a person accused of it was entitled to a trial by jury, that right being secured by the state constitution of 1821; the provision of the Revised Statutes (1 *New York Rev. Sts.* 638, § 1), by which keepers of bawdy houses are declared disorderly persons, and subjected to summary punishment, is unconstitutional and void. *Warren v. People*, 3 Park. Cr. Rep. (N. Y.) 545.

1. 1 Bish. Crim. Proc., § 893; *Beers v. Beers*, 4 Conn. 535; 10 Am. Dec. 186; *State v. Brennan's Liquors*, 25 Conn. 278; *State v. Bryan*, 4 Iowa 349; *State v. Beneke*, 9 Iowa 203; *Zelle v. McHenry*, 51 Iowa 572; *Emporia v. Volmer*, 12 Kan. 622; *Pollard v. Holman*, 4 Bibb (Ky.) 416; *Steuart v. Baltimore*, 7 Md. 500; *Jones v. Robbins*, 8 Gray (Mass.) 329; *State v. Everett*, 14 Minn. 439; *St. Peter v. Bauer*, 19 Minn. 327; *Marshall v. Stan-*

ever, by the *United States* Supreme Court, that in the case of so grave a crime as conspiracy, the accused is entitled to a jury in the court of first instance.¹ If one does not choose to appeal, or to prosecute his appeal after it is taken,² he waives

ard, 24 Mo. App. 193; *State v. Allen*, 45 Mo. App. 367; *Wilson v. Simonton*, 1 Hawks (N. Car.) 482; *Lamb v. Lane*, 4 Ohio St. 167; *Wong v. Astoria*, 13 Oregon 538; *Emerick v. Harris*, 1 Binn. (Pa.) 416; *Biddle v. Com.*, 13 S. & R. (Pa.) 410; *Littlefield v. Peckham*, 1 R. I. 500; *Morford v. Barnes*, 8 Yerg. (Tenn.) 444; *Moundsville v. Fountain*, 27 W. Va. 182. See *Head v. Hughes*, 1 A. K. Marsh. (Ky.) 372; 10 Am. Dec. 742. But see *Singleton v. Madison*, 1 Bibb (Ky.) 342; *Wolverton v. Com.*, 75 Va. 909.

In *Jones v. Robbins*, 8 Gray (Mass.) 329, Shaw, C. J., said: "We believe it has been generally understood and practiced here and in *Maine*, and perhaps in other states having a similar provision, that as the object of the clause is to secure a benefit to the accused, which he may avail himself of or waive, at his own election; and as the purpose of the provision is to secure the right, without directing the mode in which it shall be enjoyed, it is not violated by an act of legislation, which authorizes a single magistrate to try and pass sentence, provided the act contains a provision that the party shall have an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to the common liability to give bail, or to be committed to jail, to insure his appearance and to abide the judgment of the court appealed to. This is a necessary inconvenience, as is also the delay of the trial till the sitting of such court; they are the same, and no greater than they would be in case the magistrate, instead of passing sentence, should, on examination, bind the accused over, or, as the necessary alternative, commit him to jail. Such seems to have been the construction of a similar provision in other states. *Emerick v. Harris*, 1 Binn. (Pa.) 416; *Murphy v. People*, 2 Cow. (N. Y.) 815; *Jackson v. Wood*, 2 Cow. (N. Y.) 819; *Beers v. Beers*, 4 Conn. 535; 10 Am. Dec. 186; *Sullivan v. Adams*, 3 Gray (Mass.) 477. It appears to us, therefore, that such a provision is not void as a violation of that clause, which, in criminal cases, secures to the accused a right of trial by jury."

In *Maine*, under a statute authoriz-

ing a trial without jury in an inferior court, and a constitution guarantying a jury trial, it was held that although the statute was silent on the question of appeal, the right of appeal proceeded from the right of the constitutional right to a jury trial as a necessary consequence, in order to give effect to the provision of the constitution. *Johnson's Case*, 1 Me. 230.

1. *Callan v. Wilson*, 127 U. S. 540. This case came up from the *District of Columbia*. The court, while conceding that there was a class of petty or minor offenses which might well be tried in the court of first instance without a jury, declared its opinion that the offense with which the accused was charged did not belong to that class, being by no means a petty or trivial offense, but one of a grave character affecting the public at large. The court said that, "To accord to the accused a right to be tried by a jury in an appellate court after he has been once fully tried otherwise than by a jury in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the [*United States*] constitution." See also, as in line with this decision, *Ex p. Fry*, 3 Mackey (D. C.) 135; *In re Dana*, 7 Ben. (U. S.) 1.

The case of *Callan v. Wilson*, 127 U. S. 540, is adverted to with approval in 1 Dill. Mun. Corp. (4th ed.), § 439. Judge Dillon says: "The distinction is sharply drawn by the supreme court in the case cited between offenses essentially criminal affecting the public at large, and petty offenses which, at the common law, may be proceeded against in a summary manner. . . . This distinction would appear to be sound, and the doctrine of the supreme court is consonant with the established and traditional regard of our jurisprudence for the rights of the citizen and for the trial by jury in criminal cases." If there is an apparent conflict between this case and the doctrine of any of the foregoing cases, it is only to the extent that in this case the line is drawn sharply between petty and trivial offenses and those of a graver character.

2. *People v. Goodwin*, 5 Wend. (N.

his right to a jury trial.¹ The analogous practice in civil cases has been declared permissible, though constitutional provisions secure the right of trial by jury.²

But the right to appeal must not be clogged with such conditions and restrictions as would, in effect, amount to a denial of trial by jury. It has been said that a statute which renders it difficult for the accused to obtain the privilege of a trial by jury, beyond what public necessity requires, as where the statute requires conditions for the purpose of prosecuting a trial by jury, impairs individual rights and is inconsistent with the constitutional guaranty.³

Y.) 251; *State v. Larger*, 45 Mo. 510. In *Com. v. Whitney*, 108 Mass. 5, Morton, J., said: "It has been the uniform practice of the legislature, since the adoption of the constitution, to pass laws regulating the mode in which the rights secured to the subject by the Bill of Rights and Constitution shall be enjoyed. And if the subject neglects to comply with these regulations, he thereby waives his constitutional privileges."

1. 1 Bish. Crim. Proc., § 893; Abb. L. Dict., tit. *Summary Conviction*.

2. *Flint River Steamboat Co. v. Foster*, 5 Ga. 194; 48 Am. Dec. 248; *Steuart v. Baltimore*, 7 Md. 500; *Keddie v. Moore*, 2 Murph. (N. Car.) 41; 5 Am. Dec. 518; *Haines v. Levin*, 51 Pa. St. 412; *Gaston v. Babcock*, 6 Wis. 503; *Emerick v. Harris*, 1 Binn. (Pa.) 416; *Norton v. McLeary*, 8 Ohio St. 205; *Wilson v. Simonton*, 1 Hawks (N. Car.) 482.

So, when at the time the constitution declaring that "the right of trial by jury shall remain inviolate" was adopted, the jurisdiction of a justice of the peace in actions of trespass was limited to \$15, it was held that a law enacted after the adoption of such constitutional provision extending the jurisdiction of a justice of the peace in actions of trespass to \$35, but authorizing an appeal to the county court when the sum demanded should exceed \$7, was not repugnant to the constitution of the state as impairing the right of trial by jury. *Beers v. Beers*, 4 Conn. 535; 10 Am. Dec. 186.

In *Steuart v. Baltimore*, 7 Md. 500, the principle that where a law secures a trial by jury upon appeal, a law providing for a primary trial without the intervention of a jury does not violate the constitutional provision for guarding that right, was supported upon the ground that the party, if he thinks

proper, can have his case decided by a jury before it is finally settled. Under the constitutional provision that the "Legislature shall enact no law authorizing private property to be taken for public use without just compensation, as agreed upon between the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation," it was held that the legislature may pass a law taking private property for public uses if provision be made for compensation first to be paid or tendered to the owner, the ascertainment of which is to be made by a contract with him or by the assessment of commissioners, giving the owner the right of appeal from their decision and securing him a trial by jury before the appellate tribunal, provided the appeal be taken in some specified reasonable time.

3. *McInerney v. Denver*, 17 Colo. 309; *State v. Gurney*, 37 Me. 156; 58 Am. Dec. 782; *Saco v. Wentworth*, 37 Me. 165; 58 Am. Dec. 786; *Saco v. Woodsum*, 39 Me. 258; *State v. Everett*, 14 Minn. 439. See *Greene v. Briggs*, 1 Curt. (U. S.) 311; *In re Liquors of McSoley*, 15 R. I. 608; *Lord v. State*, 37 Me. 177.

Thus, a statute taking away from a person charged with assault and battery the right to give bail for his appearance at the next criminal court having jurisdiction, was held an infringement of the right to trial by jury. *People v. Carroll*, 3 Park. Cr. Rep. (N. Y.) 22.

Conditions Not Impairing Constitutional Rights.—In *Biddle v. Com.*, 13 S. & R. (Pa.) 405, it was held that the condition that appellant should make oath "that he verily believed injustice had been done him, and that the appeal was not made for the purpose of delay," did not impair his right to appeal and trial by jury.

3. Violations of Municipal Ordinances.—A common use of summary proceedings is in the enforcement of city ordinances.¹ Both in *England* and the *United States*, statutes have been enacted conferring the power upon municipal tribunals sitting within the bounds of the municipal corporation,² of enforcing the ordinances, or by-laws of the corporation in summary proceedings.³ These proceedings for the punishment of offenders against the ordinances, which are made in virtue of the implied or incidental power of the corporation, or in the exercise of its legitimate police authority, for the preservation of peace, good order, safety, and health, and which relate to minor acts and matters, are not usually or properly regarded as criminal, and hence are not in contravention of

In *State v. Brennan's Liquors*, 25 Conn. 278, it was held that the condition that the appellant should give bond for costs, did not unreasonably impair his right to a trial by jury.

In *State v. Allen*, 45 Mo. App. 567, Ellison, J., said: "Notwithstanding the statute in question does not provide for a jury trial, yet it does provide, without unreasonable restriction, for an appeal to a court where a jury trial may be had. Where such is the case, the constitution is not only not violated, but the mode and manner of securing the constitutional right is pointed out."

Conditions Impairing Constitutional Right.—Where a statute required that if any person should claim an appeal from a judgment rendered against him by any judge of a municipal court or justice of the peace, on trial of such action or complaint for unlawfully selling spirituous or intoxicating liquors, he should, before his appeal should be allowed, in every case, give a bond in the sum of two hundred dollars, with two other good and sufficient sureties, running to the town or city where the offense was committed, that he would not during the pendency of such appeal violate any of the provisions of the statute, this requirement was held to impair the right of trial by jury secured to the accused by the constitution, and was, therefore, inoperative and void, and that the bond given under that requirement was also contrary to the provisions of the constitution and void. *Saco v. Wentworth*, 37 Me. 165; 58 Am. Dec. 786.

In *Reeves v. State* (Ala. 1892), 11 So. Rep. 296, it was held that a statute which in all cases of misdemeanor, except violations of the revenue laws, cuts off the right of the accused to demand a trial by jury unless he gives a bond

with sureties, is in violation of the constitutional provision that in all cases of indictment the accused has the right to a "speedy public trial by an impartial jury," etc.

And in *State v. Everett*, 14 Minn. 439, Berry, J., said: "If this right of appeal is so absolute, unqualified and unfettered that it, together with the right to trial by jury, is secured to every man who demands an appeal, we are of opinion that the requirement of the constitution is satisfied. But these rights must be secured; they must not be made to depend upon a condition with which the party prosecuted may or may not be able to comply;" and held that where the right to appeal and trial by jury was conditioned upon defendant entering into a recognizance with one or more sureties, the constitutional guaranty was not satisfied.

1. *State v. White*, 76 N. Car. 15; *State v. Treadgill*, 76 N. Car. 17.

2. *Norristown, etc., Turnpike Co. v. Burket*, 26 Ind. 53.

3. *Pomeroy's Const. Law*, § 246; *Williams v. Augusta*, 4 Ga. 509; *Byers v. Com.*, 42 Pa. St. 89; *State v. Lee*, 29 Minn. 453; *Ex p. Hollwedell*, 74 Mo. 400; *Shafer v. Mumma*, 17 Md. 331; *State v. Glenn*, 54 Md. 572; *Thomas v. Com.*, 22 Gratt. (Va.) 912.

A careful examination of authorities has led us to the conclusion that, both in this country and in *England*, the transgression of municipal regulations enacted under the police power for the purpose of preserving the health, peace and good order, and otherwise promoting the general welfare within cities and towns had for more than a century prior to the adoption of our constitution, been generally prosecuted without a jury. *McInerney v. Denver*, 17 Colo. 302.

the constitutional guaranty of trial by jury in criminal cases.¹ And, moreover, since the constitutional provisions preserving the right of trial by jury do not extend the right, but merely secure it in the cases in which it was a matter of right before, these proceedings are not interdicted thereby, for they were in general use at the time of the adoption of the different constitutions.²

It has been held sometimes that under constitutions summary proceedings of this kind can be employed only in the trial of such offenses as are "not embraced in the public criminal statutes of the state," and that where the act charged constitutes an offense against the criminal law of the state, a person charged with such

1. 1 Dill. Munic. Corp., § 432; *State v. Topeka*, 36 Kan. 76; 59 Am. Rep. 529; *Williamson v. Com.*, 4 B. Mon. (Ky.) 146; *Monroe v. Meuer*, 35 La. Ann. 1192; *Ex p. Hollwedell*, 74 Mo. 395; *Liberman v. State*, 26 Neb. 464; 18 Am. St. Rep. 791; *Wong v. Astoria*, 13 Oregon 538; *Ex p. Schmidt*, 24 S. Car. 363. See *Mankato v. Arnold*, 36 Minn. 62; *Williams v. Augusta*, 4 Ga. 509; *Floyd v. Eatonton*, 14 Ga. 354; 58 Am. Dec. 559.

Of the proceedings in form of civil actions for the enforcement of municipal ordinances, under state constitutions extending the protection of jury trial to all "criminal cases" or "criminal offenses," Mr. Bishop says: "A proceeding in the form of a civil action for the violation of a city ordinance is not criminal within this provision." 1 Bish. Crim. Proc., § 892, citing *Williams v. Augusta*, 4 Ga. 509; *Floyd v. Eatonton*, 14 Ga. 354; 58 Am. Dec. 559; *Triggally v. Memphis*, 6 Coldw. (Tenn.) 382. See Fire Department of New York v. Harrison, 2 Hilt. (N. Y.) 455; *Emporia v. Volmer*, 12 Kan. 622.

In *Natal v. Louisiana*, 139 U. S. 621, Gray, J., said: "The ordinance of the city of New Orleans prohibiting the keeping of a private market within six squares of any public market of the city, under penalty of a fine of twenty-five dollars, and of imprisonment for not more than thirty days if the fine is not paid, was within the authority constitutionally conferred upon the city council by the legislature of the state. A breach of such an ordinance is one of those petty offenses against municipal regulations of police which in *Louisiana*, as elsewhere, may be punished by summary proceedings before a magistrate, without trial by jury"; citing *State v. Gutierrez*, 15 La. Ann. 190; *Monroe v. Meuer*, 35 La. Ann. 1192.

2. Cooley Const. Lim. (5th ed.) 390; *Mankato v. Arnold*, 36 Minn. 62; *State*

v. Glenn, 54 Md. 572; *Ex p. Kiburg*, 10 Mo. App. 447; *Inwood v. State*, 42 Ohio St. 186; *Hill v. Dalton*, 72 Ga. 319; *Floyd v. Eatonton*, 14 Ga. 356; 58 Am. Dec. 559; *Greeley v. Hamman*, 12 Colo. 94; *McInerney v. Denver*, 17 Colo. 302.

In some states, the terms of the constitution are to the effect that the right of jury trial shall remain inviolate. The construction of these provisions is that it requires a jury trial only where that was the usage at the time of the adoption of the constitution. *Hill v. Dalton*, 72 Ga. 314; *Johnson v. Barclay*, 16 N. J. L. 1; *McGear v. Woodruff*, 33 N. J. L. 213; *Howe v. Plainfield*, 37 N. J. L. 145; *Anderson v. O'Donnell*, 29 S. Car. 355.

In *Williams v. Augusta*, 4 Ga. 509, in regard to the claim that, under the constitutional provision declaring "trial by jury, as heretofore used in this state, shall remain inviolate," the legislature could not constitutionally confer on the city council the power to pass an ordinance, inflicting a fine for its violation, where the guilty party was to be tried by the council without a jury, the court, by Warner, J., said: "That inasmuch as the right of trial by jury existed in *England* and was secured by the Magna Charta, and municipal corporations in that country enforced their by-laws by pecuniary penalties in a summary manner, and the same right being conferred upon similar corporations in this state anterior to the adoption of the constitution, and constantly exercised, 'the right of trial by jury, as heretofore used in this state,' has not been violated by the city council of Augusta by the imposition of the penalty for a breach of the local police regulations of that city." And this is necessarily the construction of the provision that the trial by jury shall remain inviolate "in all

act cannot be tried by a municipal court without a jury, even though such act may be a violation of an ordinance of the municipality.¹ This view seems based on the idea that otherwise a person might be liable to be tried and punished twice for the same offense. But this reason can have no force in those states where the same act may constitute an offense both against the state and the municipal corporation, and both offenses be punished without violating any constitutional principle. In the courts where this view is held it has been denied that the test is whether the act prohibited by ordinance is embraced in and made indictable by the criminal code of the state, and the true criterion declared to be rather whether it may not be an act not only against the peace and dignity of the state, but also subversive of, or dangerous to, the peace, good order, safety, or health of the municipality.²

cases in which it has heretofore been used." *Floyd v. Eatonton*, 14 Ga. 354; 58 Am. Dec. 559; *People v. Justices*, 74 N. Y. 406; 18 Alb. L. J. 254.

1. 1 Dill. Mun. Corp., § 432; *Rec-tor v. State*, 6 Ark. 187; *Durr v. Howard*, 6 Ark. 461; *Lewis v. State*, 21 Ark. 211; *Taylor v. Reynolds*, 92 Cal. 573; *In re Sie*, 73 Cal. 142; *Slaughter v. People*, note to *Welch v. Stowell*, 2 Dougl. (Mich.) 335; *Barter v. Com.*, 3 P. & W. (Pa.) 253; *Burns v. La Grange*, 17 Tex. 415; *In re Rolfs*, 30 Kan. 758.

In *Ex p. Slattery*, 3 Ark. 484, it was held that a person might be proceeded against before a corporation court for using obscene language on the street, because such an offense was not declared criminal by any statute of the state.

Under a constitution declaring "that no free man shall be put to answer any criminal charge but by indictment," etc., and "that no free man shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court, as heretofore used," an act of the legislature which sought to confer upon the courts of a corporate town summary jurisdiction to try a person for acts which are indictable or are criminal offenses, in that it gave to an officer of the town the power of trying assaults and battery or other crimes, was held unconstitutional because it violated both provisions of the constitution. *State v. Moss*, 2 Jones (N. Car.) 66.

In *Slaughter v. People*, 2 Dougl. (Mich.) 334, where the constitution provided that "no person shall be held to answer for a criminal offense unless on presentment of a grand jury," it was

held that an ordinance prescribing the punishment for keeping a house of ill fame within the limits of the city, and providing for convictions of offenders by the mayor's court without presentment of a grand jury was valid.

In *Burns v. La Grange*, 17 Tex. 415, under a constitutional provision that "in all cases in which justices of the peace or inferior tribunals shall have jurisdiction of causes where the penalty is fine and imprisonment (except in cases of contempt), the accused shall have the right of trial by jury," it was held that the mayor's court could not be given the power to try a person for assault summarily and without a jury.

The extent of the right to prosecute violations of municipal ordinances in summary proceedings which will be permitted by the authorities holding this view, has been stated as follows: "Violations of municipal by-laws proper, such as fall within the description of municipal police regulations—as, for example, those concerning markets, streets, water works, city officers, etc., and which relate to acts and omissions that are not embraced in the general criminal legislation of the state, the legislature may authorize to be prosecuted in a summary manner, by and in the name of the corporation, and need not provide for a trial by jury. Such acts and omissions are not crimes or misdemeanors to which the constitutional right of trial by jury extends." 1 Dill. Mun. Corp. (4th ed.), § 433. See *Callan v. Wilson*, 127 U. S. 540.

2. *Cooley Const. Lim.* (5th ed.) 241; 1 Dill. Mun. Corp. (4th ed.), § 367; *Bish. St. Cr.*, § 23; *Mobile v. Allaire*, 14 Ala. 400; *McInerney v. Denver*, 17 Colo.

III. CONVICTION; RECORD.—The adjudications of a magistrate before whom summary proceedings are had in a case where the offender has been convicted and sentenced are required to be made up in a record called a conviction.¹ Such a record must

302; *Hughes v. People*, 8 Colo. 536; *Howe v. Plainfield*, 37 N. J. L. 145; *State v. Trenton*, 51 N. J. L. 498; *Shaffer v. Mumma*, 17 Md. 331; *Johnson v. State*, 59 Miss. 543; *State v. Lee*, 29 Minn. 453; *St. Louis v. Cafferata*, 24 Mo. 96; *Robbins v. People*, 95 Ill. 175; *Wragg v. Penn Tp.*, 94 Ill. 11; 34 Am. Dec. 199; *Waldo v. Wallace*, 12 Ind. 569; *Rogers v. Jones*, 1 Wend. (N. Y.) 238; 19 Am. Dec. 493; *Polinsky v. People*, 11 Hun (N. Y.) 390; *State v. Sly*, 4 Oregon 277; *Brownville v. Cook*, 4 Neb. 101; *Anderson v. O'Donnell*, 29 S. Car. 355; *Greenwood v. State*, 6 Baxt. (Tenn.) 567; 32 Am. Rep. 539; *Cross v. North Carolina*, 132 U. S. 131.

In *State v. Trenton*, 51 N. J. L. 498, the court considered it well established that certain acts, which are indictable offenses against the state, may also be, by the legislature, constituted offenses against the police regulations of municipalities, so as to subject the offender to the mode of trial incident to proceedings for the violation of ordinances, and that in such cases, if the legislature has not made special provision for a trial by jury, it cannot be demanded as a matter of right.

In *State v. Lee*, 29 Minn. 460, Mitchell, J., said: "I do not think that a prosecution for a violation of an ordinance of a municipal corporation is a prosecution for a crime or offense, within the meaning of the constitutional prohibition against putting a party twice in jeopardy of punishment for the same offense, although the act constituting the violation of the ordinance may be a crime under the statutes of the state. In *England*, almost from time immemorial, and in this country from its earliest history, municipal corporations have been granted the power to forbid certain acts of this character by ordinance or by-law, and to impose a penalty for its violation. The guaranty against being put twice in jeopardy for the same offense has been an universal principle of the common law of *England* for centuries. Yet never in *England*, that I am aware of, and rarely in this country, has the validity of such ordinances been questioned, or the doctrine advanced that a prosecution for a viola-

tion of such an ordinance was a bar to an indictment for the same act as an offense against the state."

In *McInerney v. Denver*, 17 Colo. 302, the court, by Helm, J., said: "It is now too firmly established to admit of serious question that the same act may constitute two offenses, viz., a crime against the public law of the state and also a petty offense against a local municipal regulation. The weight of authority likewise fairly sustains the view that a prosecution and punishment for one of these offenses are no bar to a proceeding for the other, though, if it be not so provided by statute, every fair-minded judge will, when pronouncing judgment in the second prosecution or proceeding, consider a penalty already suffered. Since the act constitutes two distinct offenses against separate jurisdictions, it is analogous to those cases where the same act is punishable under a congressional statute, and also under a state law. The offenses being different, there is no violation of the constitutional inhibition against putting one twice in jeopardy for the same offense."

Under constitutional provisions providing that "no person shall for any indictable offense be proceeded against criminally by information," and that "all prosecutions shall be carried on in the name and by authority of the commonwealth," it was held that persons violating ordinances of a municipal corporation may be proceeded against and punished by fine in the courts of the municipality, although the offense was indictable under the laws of the state. *Williamson v. Com.*, 4 B. Mon. (Ky.) 146.

1. Bouv. L. Dict.; *Holthouse's Dict.*; 1 Bish. Cr. Law, § 361; *Reg. v. Green*, 10 Mod. 212; *Rex v. Vipont*, 2 Burr. 1165; *Preusser v. Cass*, 54 N. J. L. 532; *Com. v. Hardy*, 1 Ashm. (Pa.) 410.

A conviction in this sense is the record of the summary proceedings upon any penal statute before one or more justices of the peace or other persons duly authorized in a case where the offender has been convicted and sentenced. *Bosc. Penal Sts.* 7.

In *Preusser v. Cass*, 54 N. J. L. 534, it is said that in the absence of legisla-

show everything necessary to constitute a legal conviction; ¹ viz., jurisdiction,² process, appearance, and defense or confession,³ or, if no confession is made, the evidence presented or, at least, the substance of the testimony; ⁴ and, lastly, the judgment.⁵

SUMMER.—The word summer strictly, perhaps, includes only the months of June, July, and August, yet it is frequently used in a more general sense to indicate the warmest period of the year.⁶

SUMMING UP.—(See also INSTRUCTIONS, vol. 11, p. 236; NEW TRIAL, vol. 16, p. 524; OPEN AND CLOSE, vol. 17, p. 194; TRIAL).—On the trial of an action by a jury the summing up is a recapitulation of the evidence adduced, in order to draw the attention of the jury to the salient points. The counsel for each party has the right of summing up his evidence, if he has adduced any, and the judge finally sums up the whole.⁷

tion requiring such a magistrate to keep a record or docket of such proceedings as is required in courts for the trial of small causes, no official character can be attributed to any record or docket so kept.

Statutory Forms.—Where a form of summary conviction is peremptorily prescribed, it must be exactly followed. But if such a provision is merely directory and the conviction contains everything required by the form given, it will not be vitiated by unnecessarily stating more than is required. *Com. v. Hardy*, 1 Ashm. (Pa.) 411.

1. 1 Burns' Just. 409; *Reg. v. Green*, 10 Mod. 212; *Rex v. Killett*, 4 Burr. 2063; *Philadelphia v. Nell*, 3 Yeates (Pa.) 475; *Com. v. Hardy*, 1 Ashm. (Pa.) 410; *State v. Trenton*, 51 N. J. L. 496; *Doughty v. Conover*, 42 N. J. L. 193; *Buck v. Danzenbacker*, 37 N. J. L. 359; *State v. Spratford*, 43 N. J. L. 370; *Handlin v. State*, 16 N. J. L. 96; *Keeler v. Milledge*, 24 N. J. L. 142; *Singleton v. Tobacco Com'rs*, 2 Bay (S. Car.) 205.

In *State v. Trenton*, 51 N. J. L. 496, it was held that a record of conviction failing to show the ordinance of the board of excise commissioners upon which conviction was based, was fatally defective, and the judgment of the police justice was reversed.

In *State v. Newton*, 49 N. J. L. 617, Dixon, J., said: "That in some convictions the record must show the evidence on which the defendant was convicted, and of what offense he was found guilty."

2. *Preusser v. Cass*, 54 N. J. L. 532; *Brackett v. State*, 2 Tyler (Vt.) 152; *Powers v. People*, 14 Johns. (N. Y.)

293; *People v. Miller*, 14 Johns. (N. Y.) 371; *People v. Koeber*, 7 Hill (N. Y.) 39.

3. *Preusser v. Cass*, 54 N. J. L. 532;

4. *Rex v. Reed*, Doug. 469; *Rex v. Killett*, 4 Burr. 2063; *Doughty v. Conover*, 42 N. J. L. 193; *State v. Spratford*, 43 N. J. L. 376; *State v. Trenton*, 51 N. J. L. 497.

5. *Preusser v. Cass*, 54 N. J. L. 532.

6. Webster's Dict. followed in *De Witt v. Wheeler*, 17 Neb. 533. And in that case, where, in a stipulation of facts, it was agreed that the debt "accrued in the summer" of a certain year, a homestead law having taken effect on the first day of June of that year, the court refused to presume that the debt accrued after the first of June.

In *Vanderhoef v. Agricultural Ins. Co.*, 46 Hun (N. Y.) 328, an action was brought on a policy of insurance, and it was shown that, during the negotiations between the plaintiff and the defendant's agents for the insurance, it was agreed between them that the plaintiff might leave the house wholly unoccupied during the "farming season" of each year. The policy returned by the company containing no consent whatever, it was, upon the demand of the plaintiff, sent back to the defendant, which inserted a clause consenting that the house might be left unoccupied "during the summer." It was held that the intent of the parties was to employ the word "summer" in its broadest sense, and that it was understood by both parties as being an equivalent to the words "farming season," and not limited to the summer months of June, July, and August.

7. *Smith, Action 157*; *Bouv. L. Dict.*; 1 Chitty's Crim. Law 632.

SUMMONS.—(See also GARNISHMENT, vol. 8, p. 1116; JUSTICE OF THE PEACE, vol. 12, p. 431; NOTICE, vol. 16, p. 808; SERVICE OF PROCESS, vol. 22, p. 107; WRITS.)

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I. DEFINITION.—A summons is the name of a writ commanding the sheriff or other authorized officer to notify a party to appear in court to answer a complaint made against him, and in the said writ specified, on a day therein mentioned.¹ Again it is defined as the first step in the process to compel the defendant to appear in court at the return of the original writ.² Formerly the suing out of an original writ, in the appropriate form, was the plaintiff's first step in beginning an action at law,³ and in some jurisdictions these writs, in a more or less modified form, are still in use.⁴ But in *England* they were abolished by statute in personal actions in 1832, and the writ of summons was adopted in their stead.⁵ In those jurisdictions where the reformed code of procedure has been adopted, and in some other states where judicial proceedings are conducted mainly in accordance with the common-law formalities, the summons is now the appropriate writ for the commencement of most civil actions.⁶

1. Bouv. L. Dict., tit. *Summons*; Bouv. Inst., § 2797; 22 Vin. Abr. 42. A writ or process by which an action is commenced, the defendant being thereby summoned to appear in court to answer the plaintiff. Burr. L. Dict., *Summons*.

2. Blackstone in 3 Com. 279 says: "But process, as we are now to consider it, is the method taken by the law to compel a compliance with the original writ, of which the primary step is by giving the party notice to obey it. This notice is given upon all real *præcipes*, and also upon all personal writs, for injuries not against the peace, by summons; which is a warning to appear in court at the return of the original writ, given to the defendant by two of the sheriff's messengers, called summoners, either in person or left at his house or land; in like

manner, as in the civil law, the first process is by personal citation *in jus vocando*."

3. 3 Bl. Com. 272-3; Steph. on Pl. ch. 1; Chit. Pl. (16th Am. ed.) 106; Brac. 413b. For a discussion of the origin and history of original writs, see Steph. on Pl. Appendix, note 2.

4. See Pub. Stat. of *Massachusetts* (1882), p. 922, § 13 *et seq.*; Rev. Stats. of *Maine* (1883), p. 672, § 2 *et seq.*

5. Stat. 2 Wm. IV, ch. 39. For the provisions of this statute, see 1 Chit. Pl. (16th Am. ed.), p. 720 *et seq.* See also The Common Law Procedure Act, 1852, § 2, and 2 Chit. Pl. (16th Am. ed.), p. 1.

6. Wait's Pr., vol. 1, p. 467; Rumsey's Pr., vol. 1, p. 144; 4 Minor's Inst., p. 564; Blair v. Cary, 9 Wis. 543; State Bank v. State, 1 Blackf. (Ind.) 273; State Bank v. Van Horn, 4 N. J. L. 439.

II. REQUISITES OF THE WRIT—1. Venue.—The venue generally appears in the margin of the writ, and should state the name of the county in which the trial is to be held;¹ and, in practice, it is customary to give also the name of the state, although it has been held that it is not necessary to do so.²

2. Names of Parties.—A summons should contain the names of all the parties, plaintiffs and defendants;³ and it is good practice

The action is begun when the summons is placed in the hands of the officer for service. *Clark v. Redman*, 1 Blackf. (Ind.) 379; *Hancock v. Ritchie*, 11 Ind. 48; *Spinning v. Ohio L. Ins., etc., Co.*, 2 Disney (Ohio) 336. *Compare Carpenter v. Butterfield*, 3 Johns. Cas. (N.Y.) 145. And proof may be given of the date when the officer received the writ. *Porter v. Kimball*, 3 Lans. (N.Y.) 330.

Placing the summons in the hands of the officer will prevent the claims being barred by the Statute of Limitations. *Kerr v. Mount*, 28 N. Y. 659; *Davis v. Duffie*, 8 Bosw. (N. Y.) 617; *Wiggins v. Orser*, 5 Duer (N. Y.) 118. But jurisdiction does not become complete until the summons is served, unless the defendant appears voluntarily. *Akin v. Albany Northern R. Co.*, 14 How. Pr. (N. Y.) 327; *Kendall v. Washburn*, 14 How. Pr. (N. Y.) 380; *In re Griswold*, 13 Barb. (N. Y.) 413; *O'Hara v. Brophy*, 24 How. Pr. (N. Y.) 399; *Diefendorf v. Elwood*, 24 How. Pr. (N. Y.) 285; *Williams v. Van Valkenburgh*, 16 How. Pr. (N. Y.) 144.

1. *Womsley v. Cummins*, 1 Ark. 125; *Relfe v. Valentine*, 45 Ala. 286; *Orendorff v. Stanberry*, 20 Ill. 89; *Gill v. Hoblit*, 23 Ill. 473; *Hall v. Davis*, 44 Ill. 494; *Van Namee v. Peoble*, 9 How. Pr. (N. Y.) 198; *Davison v. Powell*, 13 How. Pr. (N. Y.) 287; *Osborn v. McClosky*, 55 How. Pr. (N. Y.) 345; *Wallace v. Dimmick*, 24 Hun (N. Y.) 635; *Murdy v. McCutcheon*, 95 Pa. St. 435.

In *Gill v. Hoblit*, 23 Ill. 473, it was held that a summons from Logan county directed to the sheriff of Cook county commanding him to summon the defendant, if found in his county, to appear before the circuit court of said county to be held at Lincoln, was void on the ground that it did not properly express the name of the county in which the trial was to be held. To the same effect are *Orendorff v. Stanberry*, 20 Ill. 89, and *Womsley v. Cummins*, 1 Ark. 125.

In *Hall v. Davis*, 44 Ill. 494, it appeared that the venue of the writ was,

"State of Illinois, Jackson county," and the process was directed to "the sheriff of Jasper county," commanding him to summon the defendant to appear before said circuit court on the first day of the next term thereof, to be holden at the courthouse in Murphysboro, etc. It was held (*distinguishing Orendorff v. Stanberry*, 20 Ill. 89, and *Gill v. Hoblit*, 23 Ill. 473) that there was no ambiguity in the writ, the place where the court was to be held being certain.

In *Relfe v. Valentine*, 45 Ala. 286, it appeared that the venue, as stated in the margin of the summons, named one county, but the defendant was directed in the body of the writ to appear in another county. It was held that the venue stated in the margin should control.

2. *Cook v. Kelsey*, 19 N. Y. 412.

Name of Court.—The summons should also contain the name of the court from which it emanates. *James v. Kirkpatrick*, 5 How. Pr. (N. Y.) 241; *Dix v. Palmer*, 5 How. Pr. (N. Y.) 233; *Walker v. Hubbard*, 4 How. Pr. (N. Y.) 154; *Ward v. Stringham*, 1 Code Rep. (N. Y.) 118; *Tallman v. Hinman*, 10 How. Pr. (N. Y.) 89.

It was held under the *New York Code* of 1848, which did not require that the summons state the name of the court, that if the complaint, which did contain such name, were served with the summons, the omission of the name from the summons should be disregarded. *Yates v. Blodgett*, 8 How. Pr. (N. Y.) 278. But section 417 of the present Code of Civil Procedure requires that the summons shall contain the name of the court, and Judge Rumsey is of the opinion that the provision is mandatory, but that the summons may be amended, if the complaint contains the name of the court, as was done in *Walker v. Hubbard*, 4 How. Pr. (N. Y.) 154. See *Rumsey's Practice*, vol. 1, p. 145-6.

3. *Kellar v. Stanley*, 86 Ky. 240; *Burleson v. Henderson*, 4 Tex. 49; *Rodgers v. Green*, 33 Tex. 661; *Portwood v. Wilburn*, 33 Tex. 713; *Graves v. Drane*, 66 Tex. 658; *Reynolds v. May*, 4 Greene

(Iowa) 283; *Lewis v. Grace*, 44 Ala. 307; *Burgett v. Williford*, 56 Ark. 187; *Smith v. Morris*, 29 Ga. 339; *Bank of Havana v. Magee*, 20 N. Y. 355; *Bentley v. Smith*, 3 Cal. (N. Y.) 170; *Walker v. Parkins*, 2 D. & L. 982; *Scott v. Soans*, 3 East 111; *Clay v. Oxford*, 4 H. & C. 690; *Leatherbarrow v. Ward*, 5 Jur. 388; *Traill v. Porter*, L. R., 1 Ir. Ch. Div. 60.

In *Smith v. Morris*, 29 Ga. 339, it was held that under the *Georgia* statutes it was sufficient if the names of the parties appeared in the declaration which was served with the summons.

Where there are several defendants it is not sufficient to give the name of one only and follow that with *et al.* *Lyman v. Milton*, 44 Cal. 630.

A writ directing the officer to summon "the unknown children" of certain persons is not a valid summons. *Kellar v. Stanley*, 86 Ky. 240; *Reynolds v. May*, 4 Greene (Iowa) 283.

Fictitious Names.—In some jurisdictions it is provided by statute that persons whose names are unknown may be sued under fictitious names, but in such cases it must appear that the names are fictitious, and that the plaintiffs are ignorant of the true names of the defendants. *Crandall v. Beach*, 7 How. Pr. (N. Y.) 271; *Gardner v. Kraft*, 52 How. Pr. (N. Y.) 499; *Miller v. Stettiner*, 7 Bosw. (N. Y.) 692; *People v. Herman*, 45 Cal. 692; *Kane v. Rock River Canal Co.*, 15 Wis. 179; *Mecklem v. Blake*, 19 Wis. 397. See also *Abbott v. Curran*, 98 N. Y. 665; *Hancock v. First Nat. Bank*, 93 N. Y. 82; *Rosencrantz v. Rogers*, 40 Cal. 489. When the real name becomes known it should be substituted by amendment in place of the fictitious name. *Campbell v. Adams*, 50 Cal. 205; *McKinlay v. Tuttle*, 42 Cal. 570; *Baldwin v. Morgan*, 50 Cal. 585; *Rosencrantz v. Rogers*, 40 Cal. 489; *McCabe v. Doe*, 2 E. D. Smith (N. Y.) 64. But if the defendant appears and defends without objection, he may not afterwards take advantage of the misnomer. *McCreery v. Everding*, 54 Cal. 168; *Moore v. Lewis*, 76 Mich. 300.

Misnomer.—If one who is sued by a wrong name appears, and is declared against by his right name, it is no misnomer. *Hare v. Harrington*, Wright (Ohio) 290.

In *Weil v. Martin*, 24 Hun (N. Y.) 645, it appeared that two of the defendants in a foreclosure proceeding were not named in the summons, but were

described as the wives of two defendants who were named, and it was held that the writ was defective, but that it might be amended.

In *Farnham v. Hildreth*, 32 Barb. (N. Y.) 277, the name of the defendant appeared in the summons as *Freeman Hildreth*, but the writ was served on *Truman Hildreth*, who was the person intended to be made defendant. There was no appearance, and judgment was taken by default, and the record was subsequently amended *nunc pro tunc* upon the *ex parte* application of the plaintiff. It was held that a sale of the property of *Truman Hildreth* upon execution issued on the judgment was void, notwithstanding the amendment. To the same effect are *Moulton v. De ma Carty*, 6 Robt. (N. Y.) 470, and *Cole v. Hindson*, 6 T. R. 234. So where the defendant was described in the summons as *Wm. A. Landers*, his true name being *Wm. A. Landis*, it was held that the court acquired no jurisdiction, and that the record might not be amended after judgment by default. *Atwood v. Landis*, 22 Minn. 558.

But in *Blinn v. Chessman*, 49 Minn. 140, the court held that one who accepted and recorded a deed in which his name was not correctly given, had no right to complain if, in a suit concerning the property conveyed by the deed, his name were stated in the summons as it was in the deed.

In *Graham v. Roberts*, 1 Head (Tenn.) 56, the name of the defendant was given in the summons as *Garrett H. Graham*, but the writ was served on *Jared H. Graham*, who was the party intended. There was judgment by default, but the defendant appeared and defended at the trial upon the execution of the writ of inquiry. It was held that he was grossly negligent in not appearing in the first instance, and that the defect in the writ was waived by his subsequent appearance.

Where one has been sued by a wrong name, the title of the cause cannot be changed until he enters an appearance and gives his true name. *Borthwick v. Ravenscroft*, 5 M. & W. 31.

If the name given in the writ is *idem sonans* with the defendant's real name, the variance is immaterial. *Webb v. Lawrence*, 1 C. & M. 806; 2 Dowl. Pr. Cas. 81. See also *Patmor v. Rombauer*, 41 Kan. 295. But the name *Brimford* in the writ is not *idem sonans* with *Binford*. *Entrekin v. Chambers*, 11 Kan. 368.

to give the names in full, and not to make use of initial letters only in place of Christian names.¹

In *Wells v. Suffield*, 5 D. & L. 177; 4 C. B. 750; 56 E. C. L. 749, the court refused to set aside a writ in which the defendant was described as "The Right Honorable Baron Suffield," his true description being "The Right Honorable Edward Vernon Harbord, Baron Suffield."

If a person is known as well by one name as another, he may sue or be sued by either. *Eagleston v. Son*, 5 Robt. (N. Y.) 640; *Cooper v. Burr*, 45 Barb. (N. Y.) 9.

It is sufficient if the names of the parties appear in the title of the cause; they need not be repeated in the body of the writ. *Martin v. Parker*, 14 Minn. 13.

In *Southern Pac. Co. v. Block*, 84 Tex. 21, it was held that, where the writ described the defendant as the Southern Pacific Railway Company and was served on the Southern Pacific Company, a judgment by default against the latter was unwarranted.

The mere verbal inaccuracy of describing a defendant as a "railway" company instead of a "railroad" company, and *vice versa*, is immaterial. *Galveston, etc., R. Co. v. Donahoe*, 56 Tex. 162; *Central, etc., R. Co. v. Morris*, 68 Tex. 49; *Chicago, etc., R. Co. v. Johnston*, 89 Ind. 88. In the last-named case the default was set aside, the summons amended, and a judgment by default again entered.

In *Needham v. School Dist. No. 6*, 62 Vt. 176, it appeared that the action was brought against one of two school districts having the same name, and the defendant was further described in the writ as the one which was "running a school." It was held that this description, although defective, was sufficient to show which district was meant.

In *Jacobs v. Frère*, 28 La. Ann. 625, it appeared that the citation was addressed not to the defendant but to his attorney in fact; and it was held that a judgment by default against the defendant was null and void for want of citation. To the same effect are *Vogel v. Brown Tp.*, 112 Ind. 299; 2 Am. St. Rep. 187; *Plemmons v. Southern Imp'l. Co.*, 108 N. Car. 614; *Texas, etc., R. Co. v. Florence* (Tex. 1889), 14 S. W. Rep. 1070; *Gulf, etc., R. Co. v. Rawlings*, 80 Tex. 579; *Frink v. Sly*, 4 Wis. 310.

But in *Western, etc., R. Co. v. Kirk-*

patrick, 66 Ga. 86, it appeared that the summons was directed to the agent of the railroad company and not to the company itself; but the declaration, in which the defendant was correctly named, was served with the summons, and it was held that the summons was substantially against the defendant and served on its agent.

The addition "junior" is no part of a name, and need be used only when father and son have the same Christian name, and the son is made defendant in a suit. Any other words describing the defendant as the son will be sufficient. *Kincaid v. Howe*, 10 Mass. 203. See also *Bidwell v. Coleman*, 11 Minn. 78; *Headley v. Shaw*, 39 Ill. 354.

A writ in which the plaintiff is described as "The Inhabitants of the Town of L." instead of "The Town of L." is irregular, but may be amended. *Lebanon v. Griffin*, 45 N. H. 558.

1. *Knox v. Starks*, 4 Minn. 20; *Gardner v. McClure*, 6 Minn. 250; *Kellam v. Toms*, 38 Wis. 592 (per Ryan, C. J.); *Likens v. McCormick*, 39 Wis. 313. If the initial letters are correctly stated, however, it is an irregularity which may be disregarded by the court, if no objection is made. *Ferguson v. Smith*, 10 Kan. 402; *Grant v. Birdsall*, 2 N. Y. Civ. Pro. Rep. 422; *Zwickey v. Haney*, 63 Wis. 464. But if the initials are transposed, the writ will be fatally defective. *Fanning v. Krapfl*, 61 Iowa 417. In *Clawson v. Wolfe*, 77 N. Car. 100, it appeared that the initial letters of the defendant's Christian name were correctly stated in the title or margin of summons, but incorrectly stated on the face of the writ, and it was held to be the duty of the court to amend the writ and proceed with the trial.

In *Martin v. Barron*, 37 Mo. 301, it was held that a judgment rendered against a defendant, whose Christian name was abbreviated in the summons, might not be attacked collaterally, where it appeared that personal service of the writ had been made. But in *Skelton v. Sackett*, 91 Mo. 377, the court held that, where the name of a non-resident defendant was thus abbreviated in the summons and service thereof was made by publication, the court acquired no jurisdiction in the absence of a personal appearance under the order of publication.

When members of a copartnership are made parties to an action, their individual names should appear in the summons. It is not sufficient to state only the partnership name, unless it is made so by statute.¹ In actions by or against persons who act in a representative capacity, the character in which they become parties should be made to appear in the summons by the insertion of the word "as" between the names of the parties and their appropriate descriptive titles.² In some jurisdictions it is necessary that the writ should designate the place of the defendant's residence.³

In *Rust v. Kennedy*, 4 M. & W. 586; 3 Jur. 198, it was held that the use of the initials only of the defendant's Christian name must be treated as a misnomer, and should be remedied by summons to amend.

In *Houser v. Jones*, 1 Phila. (Pa.) 394, the defendant's Christian name did not appear in the summons, and it was held after judgment to be a radical and fatal defect.

In *Osgood v. Norris*, 21 N. H. 435, it was held that, if the sheriff, by request of the plaintiff's attorney, ascertained the full Christian name of a defendant and inserted it in the writ, the process was not thereby rendered void.

In *Bertoulin v. Bourgoin*, 19 La. Ann. 360, the citation was addressed to "Mrs. Bertoulin," the Christian name of the defendant being omitted, and it was held that the writ was fatally defective.

1. *Wyman v. Stewart*, 42 Ala. 163; *Hayes v. Lanier*, 3 Blackf. (Ind.) 322; *Hughes v. Walker*, 4 Blackf. (Ind.) 50; *Davis v. Hubbard*, 4 Blackf. (Ind.) 50; *Holland v. Butler*, 5 Blackf. (Ind.) 255; *Pollock v. Dunning*, 54 Ind. 115; *Martin v. Godwin*, 34 Ark. 682; *Seely v. Schenck*, 2 N. J. L. 71; *McCredy v. Vanneman*, 3 N. J. L. 435; *Burns v. Hall*, 3 N. J. L. 539; *Tomlinson v. Burke*, 10 N. J. L. 295; *American Cent. R. Co. v. Miles*, 52 Ill. 174.

But if the firm name is used in the writ, it may be amended by substituting the individual names of the copartners. *Bannerman v. Quackenbush*, 11 Daly (N. Y.) 529; *Bushnell v. Allen*, 48 Wis. 460; *Martin v. Godwin*, 34 Ark. 682.

2. *Blanchard v. Strait*, 8 How. Pr. (N. Y.) 83; *McMahon v. Allen*, 12 How. Pr. (N. Y.) 39; *Wild v. Columbia County*, 9 How. Pr. (N. Y.) 315; *Magee v. Cutler*, 43 Barb. (N. Y.) 261; *People v. Com'rs of Highways*, 27 Barb. (N. Y.) 94; *Paige v. Fazackerly*, 36 Barb. (N. Y.) 392; *Galway v. Stimson*, 4 Hill (N. Y.) 136; *Rollins v. Marsh*, 128 Mass. 116; *Hamilton v.*

Spiers, 2 Utah 225; *Vogel v. Brown Tp.*, 112 Ind. 299; 2 Am. St. Rep. 187; *Cicero School Tp. v. Chicago Nat. Bank*, 127 Ind. 79; *Holton v. Parker*, 13 Minn. 383; *Wheeler v. Smith*, 18 Wis. 651.

The word "as" must appear between the name of the party and his descriptive title, otherwise the words following the name will be regarded as mere *descriptio personæ*. *Vogel v. Brown Tp.*, 112 Ind. 299; 2 Am. St. Rep. 187; *Holton v. Parker*, 13 Minn. 383. See also *Merritt v. Seaman*, 6 N. Y. 172; *Sheldon v. Hoy*, 11 How. Pr. (N. Y.) 11; *Worden v. Worthington*, 2 Barb. (N. Y.) 368; *Root v. Price*, 21 How. Pr. (N. Y.) 372; *Ogdensburgh Bank v. Van Rensselaer*, 6 Hill (N. Y.) 240.

3. *Place of Residence*.—In *England*, it is sufficient if the defendant is described as of his last supposed residence. *Norman v. Winter*, 7 Scott 251.

But it is irregular to describe his supposed address as "now or late carrying on business in King William street in the city of London." *Pilbrow v. Pilbrow's Atmospheric R., etc., Co.*, 4 Ry. Cas. 683; 3 C. B. 730.

"Newcastle-upon-Tyne, in the county of Northumberland," is a sufficient description of a defendant's residence. *Rippon v. Dawson*, 5 Bing. N. Cas. 206; 7 Scott 145.

"Yorkshire" is a good description of defendant's residence, although he resides at the town of Kingston-upon-Hull, if he may be supposed to reside in the former county. *Jelks v. Fry*, 3 Dowl. Pr. Cas. 37.

A writ directed to A. B. of S., in the county of Kent, but to be heard of at Peele's Coffee House in the city of London, is bad when served in London. *Simpson v. Ramsay*, 5 Q. B. 371; 8 Jur. 288.

It is not sufficient to describe one as late of B., in the county of York but now in the castle of the city of York, it not appearing that there was a place

3. In What Name the Writ Should Run.—Generally, in those jurisdictions where the reformed code of procedure has not been adopted, it is required by law that the writ of summons shall run in the name of the state, of the commonwealth, or of the people of the state; and where such requirement exists, a summons is fatally defective if it does not so run.¹ In some of the states where the reformed code of procedure has been adopted, the summons is not required to run as above stated; and it is generally held in such states that a summons is not process within the meaning of constitutional provisions concerning the manner in which process shall run.²

4. To Whom Directed.—Under the common-law practice the writ should be directed to the sheriff, constable, or other officer authorized to serve the same, commanding him to summon the defendant if found in his bailiwick, and to make return of the writ.³ But

called "the castle" in the city of York. *Balman v. Sharp*, 16 M. & W. 93.

So of a writ describing the defendant as of Wellington in the county of Salop, but now of Middlesex. *Downes v. Garbett*, 2 D. & L. 945.

But it is sufficient to describe the defendant as of Clapham, in the county of Surrey. *Toulmin v. Bowditch*, 2 B. C. Rep. 89; 11 Jur. 455.

It is not sufficient to describe the defendant simply as of the city of London. *Cotton v. Sawyer*, 10 M. & W. 328.

Whether the actual or supposed residence of the defendant is given it must in either case be correctly described. *King v. Hopkins*, 2 D. & L. 637.

The omission of the name of the county in the description of the writ of the defendant's residence is an irregularity which will be deemed waived if objection is not made in a reasonable time. *Ross v. Gandell*, 6 D. & L. 698; 7 C. B. 766.

1. *Charless v. Marney*, 1 Mo. 537; *Fowler v. Watson*, 4 Mo. 27; *Davis v. Wood*, 7 Mo. 162; *Doan v. Boley*, 38 Mo. 449; *Branch v. Branch*, 6 Fla. 314; *Knott v. Pepperdine*, 63 Ill. 219; *Cleveland v. Tavernier*, 11 Minn. 194; *Gorman v. Steed*, 1 W. Va. 1; *Gilbreath v. Kuykendall*, 1 Ark. 50; *Manville v. Battle Mt. Smelting Co.*, 5 McCrary (U. S.) 328 (*construing Colorado Constitution*).

In *Gorman v. Steed*, 1 W. Va. 1, the summons purported to run in the name of the commonwealth of *West Virginia*, but the constitution required that it should run in the name of the State of *West Virginia*, and the court held that the writ should be quashed.

It is not a fatal defect in a summons that its style is "State of W.," instead of "The State of W." *Mabbett v. Vick*, 53 Wis. 158.

In *Fowler v. Watson*, 4 Mo. 27, it appeared that the name of the state was given in the venue of the writ, thus: "State of *Missouri*, County of *Charlton*," but the name of the state did not appear in the command to the officer to summon the defendant; and it was held that the writ was fatally defective.

2. *Gilmer v. Bird*, 15 Fla. 410 (decided under the code); *Nichols v. Burlington*, etc., Plank Road Co., 4 Greene (Iowa) 42; *Porter v. Vandercook*, 11 Wis. 70; *Comet, etc., Min. Co. v. Frost*, 15 Colo. 310; *Bailey v. Williams*, 6 Oregon 71; *Hanna v. Russell*, 12 Minn. 80; *Lowry v. Harris*, 12 Minn. 255; *Bludworth v. Sompeyrac*, 3 Martin (La.) 719, followed in *Kimball v. Taylor*, 2 Woods (U. S.) 37, to the effect that the clause in the state constitution, which requires the style of process to be "The State of *Louisiana*," does not apply to citations.

3. *Vaughn v. Brown*, 9 Ark. 20; 47 Am. Dec. 730; *McCabe v. Payne*, 37 Ark. 450; *Colby v. Dillingham*, 7 Mass. 475; *Hearsey v. Bradbury*, 9 Mass. 95; *Cicero v. Bates*, 1 Mich. (N. P.) 25; *Carroll v. Peck*, 31 Tex. 649; *Pierson v. W. C. Belcher Land Mtg. Co.* (Tex. 1893), 22 S. W. Rep. 925.

In *Pelham v. Edwards*, 45 Kan. 547, it appeared that the writ was directed to the sheriff who was a party to the action, although it was delivered to the coroner who served it, and the court held that the writ and the service thereof should be set aside.

in many jurisdictions where the reformed code of procedure is in use, the direction to the officer is omitted, the summons being addressed to the defendant himself.¹

5. Should Name a Time for Appearance.—A summons should direct the defendant to appear and plead on or before a day certain, usually the first day of the next term beginning after the expiration of a period fixed by statute as the minimum time allowed the defendant to enter his appearance.² But in some jurisdictions it is not necessary that the date fixed for the defendant's appearance

In *Andrews v. Fitzpatrick* (Va. 1892), 16 S. E. Rep. 278, it was held that, under the provisions of section 3220 of the Code of *Virginia*, the fact that the summons was directed to the sheriff and served by the coroner would not make it invalid.

A citation against a corporation must direct the officer to summon it; and if it directs him to summon an agent of the corporation, it should be set aside on motion. *Texas, etc., R. Co. v. Florence* (Tex. 1889), 14 S. W. Rep. 1070; *Gulf, etc., R. Co. v. Rawlings*, 80 Tex. 579. The service of such a citation is insufficient to support a judgment by default. *Phoenix Fire Ins. Co. v. Cain* (Tex. 1893), 21 S. W. Rep. 709.

Where there are several defendants, a citation which directs the officer to deliver a copy thereof "to the defendant" instead of directing a delivery to each of them, is not for that reason defective. *Pierson v. W. C. Belcher Land Mtg. Co.* (Tex. 1893), 22 S. W. Rep. 925.

A command in the writ to summon the defendant if found in the state, does not vitiate the writ, if it is served in the proper county. *Cicero v. Bates*, 1 Mich. (N. P.) 25.

A writ of summons directed to the sheriff of — county is void, and no officer is authorized to execute it. *Vaughn v. Brown*, 9 Ark. 20; 47 Am. Dec. 730.

In *Colby v. Dillingham*, 7 Mass. 475, it appeared that the defendant was a deputy sheriff, and the writ was directed to the coroner of the county or any of them, and it was held that a coroner who was also a deputy sheriff might serve the process.

In *Hearsey v. Bradbury*, 9 Mass. 95, the original writ was directed to the sheriff, but it was served by a constable who had authority to serve it, and it was held that the plaintiff should be allowed to amend the writ by inserting a direction to the constable.

In *Union Mut. F. Ins. Co. v. Page*, 61 Mich. 72, it was held that when a justice of the peace authorizes a person who is not an officer to serve a summons, he must indorse the authority on the writ, otherwise the court would have no jurisdiction.

1. *New York* Code of Civil Procedure, § 418. See also statutes of other "code states" for similar provisions. In *New York* the summons is to be deemed the mandate of the court. Code of Civ. Proc., § 418; *Wadsworth v. Georger*, 18 Abb. N. Cas. (N. Y.) 199; and may be served by any person not a party to the action, except where it is otherwise specially prescribed by law. Code of Civ. Proc., § 425. Similar provisions are to be found in the statutes of other states.

2. *Anderson v. Pearce*, 36 Ark. 293; 38 Am. Rep. 39; *Rattan v. Stone*, 4 Ill. 540; *Rogers v. Miller*, 5 Ill. 333; *Hildreth v. Hough*, 20 Ill. 331; *Culver v. Phelps*, 130 Ill. 217; *Mechanics' Sav. Inst. v. Givens*, 82 Ill. 157; *Carey v. Butler*, 11 Ind. 391; *Michigan, etc., R. Co. v. Shannon*, 13 Ind. 171; *Rigsbee v. Bowler*, 17 Ind. 167; *Fuller v. Indianapolis, etc., R. Co.*, 18 Ind. 91; *Ohio, etc., R. Co. v. Hanna*, 16 Ind. 391; *Ross v. Glass*, 70 Ind. 391; *Dunkle v. Elston*, 71 Ind. 585; *Decatur County v. Clements*, 18 Iowa 536; *Clough v. McDonald*, 18 Kan. 114; *Gardiner v. Gardiner*, 71 Me. 266; *Lowrey v. Richmond, etc., R. Co.*, 83 Ga. 504; *Crowell v. Galloway*, 3 Neb. 215; *Violand v. Saxel*, 31 Tex. 283; *Wheeling Gas Co. v. Wheeling*, 7 W. Va. 22.

In *Anderson v. Pearce*, 36 Ark. 293; 38 Am. Rep. 39, it was held that a summons issued and served in March, ten days before the March term of the court, and commanding the defendant to answer on the first day of the next spring term, was sufficient to support a judgment by default at the March term.

In *Rogers v. Miller*, 5 Ill. 333, it

was held that, where a writ was directed to a sheriff, commanding him to summon defendant to appear on the first day of the next term, to be holden, etc., without specifying the particular time, the summons was neither void nor voidable.

In *Darby v. McConnel*, 13 Ill. 358, it was held that a summons issued after the appointment of a special term of the circuit court might be returned to such special term.

In *Rattan v. Stone*, 4 Ill. 540, it was held that where a summons from the circuit court was made returnable to the fourth day of the term, it was not merely voidable, but absolutely void, and should be quashed, on motion, and a final judgment rendered against the plaintiff for costs. But in *Davis v. Pike*, 13 Ind. 379, and *Trittipo v. Talbott*, 13 Ind. 544, it was held that a summons issued against defendant, returnable on the second day of the term instead of the first, was not thereby rendered invalid. And in *Rigsbee v. Bowler*, 17 Ind. 167, it was held that the naming of a wrong day for the return in the right term was a mere clerical error which would work no prejudice, the defendant being supposed to know the law, but that a writ made returnable to a wrong term, or made to run past a term, would be void.

In *Wheeling Gas Co. v. Wheeling*, 7 W. Va. 22, it was held that a summons returnable to the next term of the circuit court, and not expressly to the first or to any day thereof, was a good summons.

In *Farmers' Sav. Inst. v. Highsmith*, 44 Iowa 330, it was held that a summons which notified defendant to appear at the next term, without expressly naming the term, was sufficient.

In *Cave v. Houston*, 65 Tex. 619, it was held sufficient if the citation directed defendant to appear at the next regular term, but it was said to be unnecessary that these words should be used in the citation.

In *Gulf, etc., R. Co. v. Wheat*, 68 Tex. 133, it was held that a citation to a defendant which required him to appear at the next regular term of the court, and on the Monday in the month designated by law for the term to begin, was sufficient without more particularly specifying the day of the month.

A writ, which cites the defendant to appear on the sixteenth Monday after the fourth Monday in September is not sufficient to support a judgment by default. *Wright v. Wilmot*, 22 Tex. 398;

neither is a writ which cites the defendant to appear on the second Monday after the tenth Monday in March. *Covington v. Burleson*, 28 Tex. 368.

A summons issued in October returnable on the "first day of the next term, which is the fourth Monday of October next," is a nullity, the word next referring to the month and not to the Monday, there being more than one term intervening between the issuance of the writ and the return day, makes it void. *Hildreth v. Hough*, 20 Ill. 331. To the same effect are *Carey v. Butler*, 11 Ind. 391; *Briggs v. Snegham*, 45 Ind. 14; *Culver v. Phelps*, 130 Ill. 217; and *Folk v. Howard*, 72 N. Car. 527.

In *Indiana* the plaintiff's attorney may fix the time by indorsement on the writ for the defendant to appear, and this should be done with the same certainty of date that is required in the summons. *Dunkle v. Elston*, 71 Ind. 585; *Johnson v. Lynch*, 87 Ind. 326; *Moore v. Glover*, 115 Ind. 367.

Where the process is made returnable on a date prior to the issuance of the writ it is a nullity. *Violand v. Saxel*, 31 Tex. 283; *Brandenburger v. Easley*, 78 Mo. 659.

A summons which fails to state the time and place in which a defendant is required to appear and answer the complaint filed against him, is defective, and will be quashed on motion interposed before appearance and plea. *Winters v. Hughes*, 3 Utah 443.

Where a summons calls for an appearance at an impossible term of court, it is a nullity. *Lowrey v. Richmond*, etc., R. Co., 83 Ga. 504. And it has been held that the term should be named and not merely designated as the next term. *Decatur County v. Clements*, 18 Iowa 536, citing *State Bank v. Van*, 12 Iowa 523.

If a justice of the peace issues a summons returnable beyond the time fixed by statute for the return thereof, the writ is void. *Fuller v. Indianapolis*, etc., R. Co., 18 Ind. 91; *Ohio*, etc., R. Co. v. *Hanna*, 16 Ind. 391; *Simmons v. Cochran*, 29 S. Car. 31.

Where a writ issued by a justice is returnable at 10 o'clock, A. M., he should wait until 11 A. M. common time—common time being presumed unless standard time is expressly stated. *Searles v. Averhoff*, 28 Neb. 668. A summons in justice court to appear at ten o'clock in the — noon on a day named is void. *Seurer v. Horst*, 31 Minn. 479. If the summons is blank as to the return day,

be in term time. He is required to appear and answer the complaint within a certain number of days after the service of the summons upon him, and to serve a copy of his answer on the plaintiff's attorney.¹

6. *Statement of Cause of Action.*—In the early English practice, it was necessary to incorporate into the original writ the whole form and cause of action.² Although it is no longer necessary to state the cause of action *in extenso* in the writ,³ it is still generally necessary that the summons contain a summary statement of the cause of action, and, in jurisdictions where forms of action have not been abolished, it should specify the form thereof.⁴

it is void. *Craighead v. Martin*, 25 Minn. 41.

A mistake in the copy of a summons stating the hour of appearance to be 10 A. M. instead of 2 P. M. is no ground for reversing a judgment, where the defendant did not appear at any time on that day, and was not injured by the mistake. *Titus v. Whitney*, 16 N. J. L. 85; 31 Am. Dec. 228. But if the summons directs the defendant to appear at 12 o'clock in the afternoon, it is defective, and a judgment founded on it should be reversed. *Ross v. Ward*, 16 N. J. L. 23.

Where a summons was issued less than ten days before the return day, it was held that the plaintiff was entitled to judgment unless the defendant appeared absolutely on the expiration of the ten days and the usual *dies gratia*, viz., four days. *Fisher v. Potter*, 2 Miles (Pa.) 147.

A summons issued on the 28th day of October returnable on the first Monday of November, during the sitting of the court, was held good. *Heberton v. Stockton*, 2 Miles (Pa.) 164.

But a summons made returnable on the same day it was issued was held irregular, and, on motion, was quashed. *Dyott v. Pennock*, 2 Miles (Pa.) 213. See also *Warrington v. Tull*, 5 Harr. (Del.) 107.

Where the summons is returnable on the first day of the term, and is returned served, it is the duty of the clerk to put the case on the docket without an order to that effect. *O'Brien v. Camden*, 3 W. Va. 20.

In *North Carolina*, the summons in civil actions is returnable before the judge in term time. *Woodley v. Gilliam*, 64 N. Car. 649.

But in special proceedings, the writ is returnable before the clerk of the court. *Smith v. McIlwaine*, 63 N. Car. 95; *Swepson v. Harvey*, 63 N. Car. 106;

Johnson v. Judd, 63 N. Car. 498; *Tate v. Powe*, 64 N. Car. 644; *Sumner v. Miller*, 64 N. Car. 688.

1. *New York Code Civ. Proc.*, § 418. In jurisdictions where this practice is in vogue, the defendant's appearance is made by serving a notice of appearance, demurrer, or an answer upon the plaintiff's attorney within the time fixed by statute, usually twenty days from the service of the summons, exclusive of the day of service. *New York Code Civ. Proc.*, § 421.

It is no objection to a summons, which requires the defendant to answer within 20 days after service thereof, that it also requires him to appear on the first day of the next term of court, the appearance day named being more than 20 days after such service. *Gould v. Johnston*, 24 Minn. 188. See also *Ralph v. Lomer*, 3 Wash. 401.

In *Patout v. Rawls*, 4 La. Ann. 485, it was held that where there was sufficient time between the date and the return day of a citation, the fact that the return day was not during any regular term of court was immaterial.

Where it is required by statute that a summons be made returnable on the second Monday after its date, it is void if made returnable at any other time. *Crowell v. Galloway*, 3 Neb. 215. See also *Hurford v. Baker*, 17 Neb. 443; *Clough v. McDonald*, 18 Kan. 114.

2. 1 Chit. Pl. (16th Am. ed.), p. 106.

3. 1 Chit. Pl. (16th Am. ed.), p. 106; *Stephen on Pl.*, p. 40. Writs were greatly simplified in this regard by statute 2 Wm. IV, ch. 39.

4. 1 Chit. Pl. (16th Am. ed.) 106; *Howell v. Hallett*, 1 Minor (Ala.) 102; *Barndollar v. Patton*, 5 Colo. 46; *Tabor v. Goss*, etc., Mfg. Co., 11 Colo. 419; *Calderwood v. Brooks*, 28 Cal. 151; *King v. Blood*, 41 Cal. 314; *Bewick v. Muir*, 83 Cal. 368; *Harkins v.*

7. Notice of Relief to be Demanded.—In a number of states which have adopted the reformed code of civil procedure, it is provided that a summons shall contain a notice of the relief for which the plaintiff will apply in case the defendant does not appear and answer or demur. Generally there are two forms of notice prescribed: The first form is intended to include all cases where the

Edwards, 1 Iowa 296; Moody v. Taylor, 12 Iowa 71; Gray v. Wolf, 77 Iowa 630; Bishop v. Weber, 139 Mass. 411; 52 Am. Rep. 715; Damhorst v. Missouri Pac. R. Co., 32 Mo. App. 350; Hill v. St. Louis Ore. etc., Co., 90 Mo. 103; Houston, etc., R. Co. v. Burke, 55 Tex. 323; 40 Am. Rep. 808; Loungeway v. Hale, 73 Tex. 495; Hinzle v. Kempner, 82 Tex. 617; Miles v. Kinney (Tex. 1888), 8 S. W. Rep. 542; Rowley v. Chautauqua County Bank, 19 Wend. (N. Y.) 26; Silkman v. Boiger, 4 E. D. Smith (N. Y.) 236; Brown v. Hoy, 16 N. J. L. 157; Sawyer v. Robertson, 11 Mont. 416; Slocumb v. Powers, 10 R. I. 255; Walker v. Tunstall, 3 How. (Miss.) 259; Berry v. Bingham (S. Dak. 1891), 47 N. W. Rep. 825. Compare Ritter v. Offutt, 40 Md. 207; Williamson v. Wardlaw, 40 Ga. 702.

The failure to indorse the cause of action on the writ renders a judgment by default erroneous. Howell v. Hallett, 1 Minor (Ala.) 102. It is sufficient if the summons state in general terms what is specialized in the complaint to which the summons points expressly, or by implication of law. Bewick v. Muir, 83 Cal. 368. It is unnecessary to set forth the cause of action in detail; it is sufficient if the defendant be informed with reasonable certainty what is the substance of the cause of action, as "on account," or "for labor," or "for money due on a promissory note," or "for trespass committed by your cattle," or the like, and what remedy plaintiff seeks. Harkins v. Edwards, 1 Iowa 296; Houston, etc., R. Co. v. Burke, 55 Tex. 323; 40 Am. Rep. 808. See also Loungeway v. Hale, 73 Tex. 495.

An original notice should set forth the amount of plaintiff's demand, and the nature of his cause of action. Moody v. Taylor, 12 Iowa 71.

If an action is entitled in the writ "one of tort," and the declaration contains only counts in tort, an amendment of the writ whereby "or a contract" was inserted after the word "tort," may be disregarded on demurrer to the writ and declaration. Bishop

v. Weber, 139 Mass. 411; 52 Am. Rep. 715.

A summons issued by a justice of the peace is defective if it fails to state the nature of the suit. Hill v. St. Louis Ore. etc., Co., 90 Mo. 103.

In actions in courts of justices of the peace it is necessary that the summons shall contain a statement of the sum, or the value of the property sought to be recovered, and a defect in this particular will not be cured by the insertion of the necessary averments in the pleadings, or other process. Leathers v. Morris, 101 N. Car. 184.

The allegations of the summons that the action was brought to recover \$150, the value of thirty tons of ice belonging to the plaintiff, and taken possession of and disposed of by the defendant at a certain time and place, constitute a sufficient statement of the cause and general nature of the action. Sawyer v. Robertson, 11 Mont. 416.

A writ describing an action as "an action of the case for trover and conversion of certain personal property," sufficiently states the nature and cause of action. Slocumb v. Powers, 10 R. I. 255.

Where the summons recited correctly the amount of the note, the time of payment, etc., but described it as payable at one bank when it was payable at another, it was held that the notice given of the cause of action was a sufficient compliance with the statute. Walker v. Tunstall, 3 How. (Miss.) 259.

A writ to answer unto "J. H.," that the defendant render to him \$2,000, which to him he owes upon covenant, is defective; it is neither debt nor covenant, and has no style of action. Brown v. Hoy, 16 N. J. L. 157.

A writ in an action at law for damages is fatally defective if it contains no *ad damnum* clause; and it does not suffice that the declaration shows that the plaintiff has sustained damages and furnishes the data for ascertaining the amount thereof. Deveau v. Skidmore, 47 Conn. 19. But in *Pennsylvania* it is not necessary, in an action on contract, that the amount of the debt should

clerk can assess the damages—such, for example, as arise out of express or implied contracts, and cases in which the damages are liquidated. In such cases the summons should notify the defendant that in case of his default the plaintiff will take judgment against him for a stated amount.¹ The second form is intended to include all cases not included in the first, and to notify the defendant that in case of default the plaintiff will apply to the court for the relief demanded in the complaint.²

8. By Whom Signed.—Except in jurisdictions where the law has been changed in this regard by statute, it is necessary that a sum-

be stated in the *præcipe* or summons; the verdict may be for a sum not exceeding that named in the declaration. *Marsteller v. Marsteller*, 93 Pa. St. 350.

An action for a separation is an action for a limited divorce; and where in such action the summons is served without a complaint, and is indorsed with the words "action for a divorce," it is a sufficient statement of the cause of action. *Rudolph v. Rudolph*, 19 N. Y. Civ. Pro. Rep. 424.

1. Notwithstanding the slight differences in the verbiage of the statutes, it is their common object to authorize the first form of notice in all cases where default final may be taken in case of the defendant's non-appearance, and a money judgment entered by the clerk without further inquiry as to the amount of damages. Of this class are actions to recover money deposited, *Goff v. Edgerton*, 18 Abb. Pr. (N. Y.) 381; actions to recover liquidated damages expressed in contracts to convey land, *Cemetery Board v. Teller*, 8 How. Pr. (N. Y.) 504; *Croden v. Drew*, 3 Duer (N. Y.) 652; actions on undertakings given in proceedings for claim and delivery of personal property, *Montegriffo v. Musti*, 1 Daly (N. Y.) 77; actions for the price of goods sold, *Dibblee v. Mason*, 1 Code Rep. (N. Y.) 37; *Champlin v. Deitz*, 37 How. Pr. (N. Y.) 214; *Mason v. Hand*, 1 Lans. (N. Y.) 66; *Behlow v. Shorb*, 91 Cal. 141. It has been held that a summons with this form of notice might be used in actions of breach of promise to marry, *Williams v. Miller*, 4 How. Pr. (N. Y.) 94; *Leopold v. Poppenheimer*, 1 Code Rep. (N. Y.) 39; and in actions against common carriers for a loss of goods, *Trapp v. New York, etc., R. Co.*, 6 How. Pr. (N. Y.) 237.

It was held in the trial courts of *New York* that the summons might properly contain this form of notice

in actions for penalties given by statute. *People v. Bennett*, 5 Abb. Pr. (N. Y.) 384; *Albany County Excise v. Classon*, 17 How. Pr. (N. Y.) 193. But in *McCoun v. New York Cent., etc., R. Co.*, 50 N. Y. 176, there is a strong expression of opinions to the contrary, although the appeal was in that case dismissed, as it appeared that the complaint was served with the summons and no substantial right of the defendant was affected. In *Warren v. Gordon*, 10 Wis. 499, it was held that this form of summons should be used in an action on a bond; but if, as in that case, a summons for relief were used, and the complaint served with it, such irregularity would affect no substantial right.

The amount for which judgment will be taken must appear in the notice, *State v. Woodlief*, 2 Cal. 241; *Farris v. Walter*, 2 Colo. App. 450; and if the word "dollars" is omitted from the specification of the amount, the summons is fatally defective. *Gundry v. Whittlesey*, 19 Wis. 211.

In section 419 of the present Code of Civil Procedure of *New York*, it is provided that judgment may be taken by default without application to the court in certain cases enumerated in section 420 of said code, provided a copy of the complaint is served with the summons, or a notice such as that under consideration accompanies the summons. The enumeration in section 420 of the cases where judgment may be taken without application to the court is intended to embrace all cases where the clerk can assess the damages. 1 Rumsey Pr., p. 148.

2. *Clark v. Palmer*, 90 Cal. 504; *Sweene v. Schultes*, 19 Nev. 53; *Higley v. Pollock* (Nev. 1891), 27 Pac. Rep. 895; *Warner v. Kenny*, 3 How. Pr. (N. Y.) 323; *Field v. Morse*, 7 How. Pr. (N. Y.) 12; *Travis v. Tobias*, 7 How. Pr. (N. Y.) 90; *Ridder v. Whitlock*, 12

How. Pr. (N. Y.) 208; *Cobb v. Dunkin*, 19 How. Pr. (N. Y.) 164; *Tuttle v. Smith*, 6 Abb. Pr. (N. Y.) 329; *Davis v. Bates*, 6 Abb. Pr. (N. Y.) 15; *McNeff v. Short*, 14 How. Pr. (N. Y.) 463; *Shafer v. Humphrey*, 15 How. Pr. (N. Y.) 564; *Webb v. Mott*, 6 How. Pr. (N. Y.) 439; *Voorhies v. Scofield*, 7 How. Pr. (N. Y.) 51; *West v. Brewster*, 1 Duer (N. Y.) 647; *Norton v. Cary*, 14 Abb. Pr. (N. Y.) 364; *Hartshorn v. Newman*, 15 Abb. Pr. (N. Y.) 63; *Schuttler v. King* (Mont. 1892), 30 Pac. Rep. 25; *Sawyer v. Robertson*, 11 Mont. 416; *St. Paul Harvester Co. v. Forberg* (S. Dak. 1891), 50 N. W. Rep. 628; *Farris v. Walter*, 2 Colo. App. 450; *Swift v. Meyers*, 37 Fed. Rep. 37; *Chamberlain v. Mensing*, 47 Fed. Rep. 202; *Chamberlain v. Bittersohn*, 48 Fed. Rep. 42; *U. S. v. Turner*, 50 Fed. Rep. 734.

This form of notice is proper in an action to foreclose a mortgage. *Clark v. Palmer*, 90 Cal. 504; *Wyant v. Reeves*, 1 Code Rep. (N. Y.) 49; *Swift v. Meyers*, 37 Fed. Rep. 37. And in actions in the nature of a creditor's bill, *Shafer v. Humphrey*, 15 How. Pr. (N. Y.) 564; in actions against common carriers, *Luling v. Stanton*, 8 Abb. Pr. (N. Y.) 378; *Clor v. Mallory*, 1 Code Rep. (N. Y.) 126; *Flynn v. Hudson River R. Co.*, 6 How. Pr. (N. Y.) 308; *Hewitt v. Howell*, 8 How. Pr. (N. Y.) 347. See also *Campbell v. Perkins*, 8 N. Y. 438.

Where the contract sued on furnishes no guide to the measure of damages, the summons should be for relief. *Flynn v. Hudson River R. Co.*, 6 How. Pr. (N. Y.) 308; *Hewitt v. Howell*, 8 How. Pr. (N. Y.) 346.

Where the complaint sets up fraud in the contract, the form of summons should be for relief. *Field v. Morse*, 7 How. Pr. (N. Y.) 12; *Travis v. Tobias*, 7 How. Pr. (N. Y.) 90; *Hartshorn v. Newman*, 15 Abb. Pr. (N. Y.) 63. So in an action for the conversion of personal property, the notice should be for relief. *Ridder v. Whitlock*, 12 How. Pr. (N. Y.) 208. In an action for breach of warranty the second form of notice should be used. *Dunn v. Bloomingtondale*, 14 How. Pr. (N. Y.) 474. It has also been held that this form of notice should be used in actions for breach of promise to marry. *Davis v. Bates*, 6 Abb. Pr. (N. Y.) 15; *McNeff v. Short*, 14 How. Pr. (N. Y.) 463; *McDonald v. Walsh*, 5 Abb. Pr. (N. Y.) 68; *Barnes v. Buck*, 1 Lans. (N.

Y.) 268. And in actions on undertakings, *Kelsey v. Covert*, 15 How. Pr. (N. Y.) 92; *Levy v. Nicholas*, 15 Abb. Pr. (N. Y.) 63 n; in actions upon a constable's bond, *New York v. Lyons*, 1 Daly (N. Y.) 296. So where the plaintiff sets forth demands for both liquidated and unliquidated damages the form of notice should be for relief. *Norton v. Cary*, 23 How. Pr. (N. Y.) 469; *Tuttle v. Smith*, 14 How. Pr. (N. Y.) 395; *Cobb v. Dunkin*, 19 How. Pr. (N. Y.) 164; *People v. Bennett*, 6 Abb. Pr. (N. Y.) 343. And in actions for unliquidated damages on contract, express or implied. *Garrison v. Carr*, 3 Abb. Pr., N. S. (N. Y.) 266; *Salters v. Ralph*, 15 Abb. Pr. (N. Y.) 273; *Johnson v. Paul*, 14 How. Pr. (N. Y.) 454. If the notice in the summons is in the second form when it properly should be in the first, and the complaint is served with the summons, the summons should not on that account be set aside. *Brown v. Eaton*, 37 How. Pr. (N. Y.) 325; *Hemson v. Decker*, 29 How. Pr. (N. Y.) 385; *Schuttler v. King* (Mont. 1892), 30 Pac. Rep. 25. But it has been held that if the complaint is not served with the summons it will in such case be conclusively presumed that the defendant was prejudiced by the use of the wrong form of notice. *St. Paul Harvester Co. v. Forberg* (S. Dak. 1891); 50 N. W. Rep. 628. And if the first form of notice is used when the second should be used, the summons is irregular. *Sawyer v. Robertson*, 11 Mont. 416. But in such case the complaint, and not the summons, will be set aside. *Brown v. Eaton*, 37 How. Pr. (N. Y.) 325; *Hemson v. Decker*, 29 How. Pr. (N. Y.) 385; *Cobb v. Dunkin*, 19 How. Pr. (N. Y.) 164; *Ridder v. Whitlock*, 12 How. Pr. (N. Y.) 208; *Johnson v. Paul*, 14 How. Pr. (N. Y.) 454; *Shafer v. Humphrey*, 15 How. Pr. (N. Y.) 564; *Bender v. Comstock*, 4 Robt. (N. Y.) 644; *Fond du Lac v. Bonesteel*, 22 Wis. 251.

In *Minnesota* there is, in addition to the two forms of notice already considered, a third form which is employed in those cases where the clerk cannot assess the amount of pecuniary damages the plaintiff is entitled to recover. By this form of notice the defendant is informed that in case of his default the plaintiff will have the amount which he is entitled to recover ascertained by the court, or under its direction, and take judgment against

mons bear the signature of the clerk of the court from which it issues; or, if it issues from a court of a justice of the peace, it should bear the signature of the justice.¹

In a number of jurisdictions, where the code practice has been adopted, the signature of the clerk is not required, but it is provided that the summons shall be signed by the plaintiff's attorney.²

him for the amount so ascertained. See *White v. Iltis*, 24 Minn. 43.

1. *Smith v. Affanassieff*, 2 Rich. (S. Car.) 334; *Huntley v. Henry*, 37 Vt. 165; *Dearborn v. Twist*, 6 N. H. 46; *Hanson v. Rowe*, 26 N. H. 327; *Lyford v. Bryant*, 38 N. H. 88; *Eastman v. Morrison*, 46 N. H. 136; *Pendleton v. Smith*, 1 W. Va. 16; *Laidley v. Bright*, 17 W. Va. 779; *Ambler v. Leach*, 15 W. Va. 677; *Doolittle v. Clark*, 47 Conn. 316; *Harrett v. Housatonic R. Co.*, 47 Conn. 575; *Ligare v. California, etc., R. Co.*, 76 Cal. 610; *Baker v. Swift*, 87 Ala. 530; *Abbey v. W. B. Grimes, etc., Co.*, 44 Kan. 415; *Peaslee v. Haberstro*, 15 Blatchf. (U. S.) 472; *Dwight v. Merritt*, 18 Blatchf. (U. S.) 305.

It has been held that if the officer who signed the summons is a party to the action, the writ will be abatable on that ground. *Doolittle v. Clark*, 47 Conn. 316; *Parrott v. Housatonic, etc., R. Co.*, 47 Conn. 575. But where the defendant pleaded to the merits, and the case stood for trial upon such plea for nearly two years, it was held that the objection was waived. *Parrott v. Housatonic, etc., R. Co.*, 47 Conn. 575.

But in *North Carolina*, it was held that the clerk of the court acts in a ministerial capacity in issuing process, and the fact that he is a party to the action does not affect the validity of a summons signed by him. *Evans v. Etheridge*, 96 N. Car. 42.

In some jurisdictions it is held that the clerk may sign and seal blank forms of the writ and issue them to the attorneys of the court, to be filled up and used when required. *Dearborn v. Twist*, 6 N. H. 46; *Lyford v. Bryant*, 38 N. H. 88; *Eastman v. Morrison*, 46 N. H. 136; *Kinne v. Hinman*, 58 N. H. 363; *Sweet v. Newago Circuit Judge*, 95 Mich. 449; *Stevens v. Ewer*, 2 Met. (Mass.) 74. There is no reason why the mere filling out of a summons by an attorney, after it is signed and sealed by the clerk, where no abuse is shown, should vitiate the writ. *Potter v. John Hutchinson Mfg. Co.*, 87 Mich. 59; *Jewett v. Garrett*, 47 Fed. Rep. 625.

But where the writ was made upon a blank issued by the clerk to be used in another court, it was held to be irregular. The fact that the same man was clerk of both courts was said to be immaterial. *Dearborn v. Twist*, 6 N. H. 44. And a writ which has been once filled up for use in one action cannot afterwards be used in another action. *Eastman v. Morrison*, 46 N. H. 136.

If a writ is signed by a deputy clerk, he should sign the name of the clerk and not his own. *Wimbish v. Wofford*, 33 Tex. 109. Compare *Pendleton v. Smith*, 1 W. Va. 16. In *Walke v. Bank of Circleville*, 15 Ohio 288, the court refused to reverse a judgment where the summons had been signed by a deputy and not by the clerk, although it was said to be more technically correct for a deputy to sign for his principal.

It has been held that a writ, to which the name of a justice of the peace, before whom it is returnable, is affixed by his direction and in his presence, is legally signed by such justice. *Hanson v. Rowe*, 26 N. H. 327; *Richardson v. Bachelder*, 19 Me. 82. And in *Gamble v. Trahen*, 3 How. (Miss.) 32, it was held to be immaterial whether the clerk subscribed his name to the process himself or suffered another to do it for him, if it were issued with his consent and approbation.

But in *Gardner v. Lane*, 3 Dev. (N. Car.) 53, it was held that a writ signed by an attorney, under the verbal authority of the clerk, was a nullity, and its subsequent recognition by the clerk would not render it valid. See *Shepherd v. Lane*, 2 Dev. (N. Car.) 148.

In *Andrus v. Carroll*, 35 Vt. 102, it was held that the signature of the officer issuing the writ simply to the minute of recognizance at the foot of the writ, was not a sufficient signing of the writ.

In *Bishop Hill Colony v. Edgerton*, 26 Ill. 54, it was held to be no objection to the writ that the clerk, in signing it, used the initial letter of his Christian name.

2. *Gilmer v. Bird*, 15 Fla. 410; *Herrick v. Morrill*, 37 Minn. 250; 5 Am.

9. **Seal.**—When a summons is issued from a court of record, it should, in most jurisdictions, be sealed by the clerk with the seal of the court from which it issues.¹ But in a number of states the

St. Rep. 841; *Johnston v. Hamburger*, 13 Wis. 175; *Hays v. Lewis*, 21 Wis. 663; *Mezchen v. More*, 54 Wis. 214; *Prentice v. Stefan*, 72 Wis. 151; *Rand v. Pantagraph Stationery Co.*, 1 Colo. App. 270; *Barnard v. Heydrick*, 49 Barb. (N. Y.) 62; *Weir v. Slocum*, 3 How. Pr. (N. Y.) 397; *Bank of Geneva v. Rice*, 12 Wend. (N. Y.) 424; *Genobles v. West*, 23 S. Car. 154.

It was formerly held that the summons must bear the written signature of the plaintiff's attorney. *Farmers' L. & T. Co. v. Dickson*, 17 How. Pr. (N. Y.) 477; *Ames v. Schurmeier*, 9 Minn. 221. But it is now well settled that a printed signature is good. *Barnard v. Heydrick*, 49 Barb. (N. Y.) 62; *Mutual Ins. Co. v. Ross*, 10 Abb. Pr. (N. Y.) 260, n.; *New York v. Eisler*, 2 Civ. Pro. Rep. (N. Y.) 125; *Herrick v. Morrill*, 37 Minn. 250; 5 Am. St. Rep. 841 (*overruling Ames v. Schurmeier*, 9 Minn. 221); *Mezchen v. More*, 54 Wis. 214.

The individual names of the members of a firm need not be used. It is sufficient if the firm name is subscribed. *Bank of Geneva v. Rice*, 12 Wend. (N. Y.) 424. See also *Sluyter v. Smith*, 2 Bosw. (N. Y.) 673.

The subscriber must be an attorney at law and not merely an agent. *Weir v. Slocum*, 3 How. Pr. (N. Y.) 397; *Johnston v. Winter* (N. Y.), 7 Alb. L. J. 135; *Dixey v. Pellock*, 8 Cal. 570.

In *Prentice v. Stefan*, 72 Wis. 151, the service of a summons signed by a non-resident attorney, who was not authorized to practice in the courts of the state, was set aside; but the plaintiff was allowed to serve an amended summons, signed by resident attorneys, upon the defendant's attorney.

Post Office Address.—The summons should also contain the post office address or place of business of the plaintiff's attorney in order that the defendant may know where to make service of his answer. *Wiggins v. Richmond*, 58 How. Pr. (N. Y.) 376; *Hurd v. Davis*, 13 How. Pr. (N. Y.) 57; *Van Wyck v. Hardy*, 39 How. Pr. (N. Y.) 392; *Hotchkiss v. Cutting*, 14 Minn. 537.

1. *Stayton v. Newcomer*, 6 Ark. 451; *Rudd v. Thompson*, 22 Ark. 363; *Hannum v. Thompson*, 2 Ill. 238; *Easton v. Altum*, 2 Ill. 250; *Anglin v. Nott*, 2

Ill. 395; *Garland v. Britton*, 12 Ill. 232; 52 Am. Dec. 587; *Boyd v. Fitch*, 71 Ind. 306; *State v. Davis*, 73 Ind. 359; *Dexter v. Cochran*, 17 Kan. 447; *Abbey v. W. B. Grimes, etc., Co.*, 44 Kan. 415; *Choate v. Spencer* (Mont. 1893), 32 Pac. Rep. 651; *Tibbetts v. Shaw*, 19 Me. 204; *Hall v. Jones*, 9 Pick. (Mass.) 446; *Chambers v. Chapman*, 32 Tex. 569; *Brewster v. Norfleet* (Tex. 1893), 22 S. W. Rep. 226; *Frosch v. Schlumpf*, 2 Tex. 422; 46 Am. Dec. 665; *Pharis v. Conner*, 3 Smed. & M. (Miss.) 87; *Governor v. McRea*, 3 Hawks (N. Car.) 226; *Riggs v. Bagley*, 2 Greene (Iowa) 383; *Peaslee v. Haberstro*, 15 Blatchf. (U. S.) 472; *Dwight v. Merritt*, 18 Blatchf. (U. S.) 305.

The clerk should affix the seal of the court to the writ if there is any; and if there is no seal he should affix his private seal and certify that no public seal has been provided. *Garland v. Britton*, 12 Ill. 232; 52 Am. Dec. 487.

A writ issuing to one county from the court of another county must bear the seal of the court from which it issues. *Governor v. McRea*, 3 Hawks (N. Car.) 226.

It has been held that the seal should be referred to in the attestation of the writ. *Riggs v. Bagley*, 2 Greene (Iowa) 383.

But in *Morrison v. Silverburgh*, 13 Ill. 551, it was held that a clerk is not required to state on the face of the process that it is issued under the seal of the court if the seal is actually affixed.

It has been held that the omission of the seal is an irregularity which is amendable and does not render the writ void. *State v. Davis*, 73 Ind. 359; *Boyd v. Fitch*, 71 Ind. 306; *Rudd v. Thompson*, 22 Ark. 363.

On the other hand, it has been held that the seal is matter of substance, and that its omission from the writ is not amendable. *Tibbetts v. Shaw*, 19 Me. 204; *Dwight v. Merritt*, 18 Blatchf. (U. S.) 305; *Dexter v. Cochran*, 17 Kan. 447; *Choate v. Spencer* (Mont. 1893), 32 Pac. Rep. 651.

In *Hall v. Jones*, 9 Pick. (Mass.) 446, the original writ bore the seal of one court and was returnable at another, and it was held that it could not be amended. See also *Brewster v. Norfleet* (Tex. 1893), 22 S. W. Rep. 226.

use of the seal, as well as the signature of the clerk, is dispensed with by statute.¹

10. *Teste*.—In the absence of a statutory abolition of this formality, the writ should be tested in the name of the presiding judge of the court from which it issues, or some other judicial officer designated by statute.² And it should bear the date of its issuance. But this date is not conclusive as to the time when it was issued.³

III. **INDORSEMENT OF THE WRIT**.—In some jurisdictions it is provided by statute that when the writ is sued out by a non-resident

The defect may be taken advantage of by plea in abatement. *Hall v. Jones*, 9 Pick. (Mass.) 446; *Pharis v. Conner*, 3 Smed. & M. (Miss.) 87; or by a motion to quash the writ which may be made at any time, *Tibbetts v. Shaw*, 19 Me. 204; *Anglin v. Nott*, 2 Ill. 395; but the defect is cured by an appearance without objection. *Easton v. Altum*, 2 Ill. 250.

If a judgment be obtained on an unsealed process, and such judgment be afterwards revived without objection, the want of a seal will not impair the validity of the judgment. *Doe v. Pendleton*, 15 Ohio 735.

A failure to copy the seal or indicate its place on the copy of the writ served on the defendant is not a sufficient objection to the service. *Kelley v. Mason*, 4 Ind. 618; *Hughes v. Osborn*, 42 Ind. 450; *Cameron v. Wheeler*, 6 U. C., Q. B. 355.

1. *Johnston v. Hamberger*, 13 Wis. 177; *Genobles v. West*, 23 S. Car. 154; *Gilmer v. Bird*, 15 Fla. 410 (decided under the code); *New York Code Civ. Proc.*, §§ 417, 418.

2. *U. S. v. Turner*, 50 Fed. Rep. 734; *Howerter v. Kelly*, 23 Mich. 337; *Grey v. Bolton*, 4 Ont. Pr. Rep. 309; *Folkard v. Fitzstubbbs*, 1 F. & F. 376; *Ripley v. Warren*, 2 Pick. (Mass.) 592.

Process issuing from the Supreme Court of the *United States* or from a circuit court should bear *teste* of the chief justice of the *United States*; or, when that office is vacant, of the associated justice next in precedence; and that issuing from a district court should bear *teste* of the judge, or when that office is vacant, of the clerk thereof. *Rev. Sts. U. S.*, § 911.

A writ will not be set aside because the Christian name of the chief justice is misstated in the *teste*. *Folkard v. Fitzstubbbs*, 1 F. & F. 376.

3. *Rev. Sts. U. S.*, § 912; *McClarren v. Thurman*, 8 Ark. 313; *Jackson v.*

Bowling, 10 Ark. 578; *Wambaugh v. Schenck*, 2 N. J. L. 229; *Allen v. Smith*, 12 N. J. L. 159; *Jenkins v. Cockerham*, 1 Ired. (N. Car.) 309; *Trafton v. Rogers*, 13 Me. 315.

If a defective writ is resealed, it ought to be dated as of the date of the resealing. *Knight v. Warren*, 7 Dowl. Pr. Cas. 663.

A mistake in the year, in the *teste*, of the copy of a writ, the writ itself being right, is a mere irregularity which is waived if the defendant does not come to the court before the time for entering an appearance has elapsed. *Edwards v. Collins*, 5 Dowl. Pr. Cas. 227.

The court has no power to alter the date of a writ of summons. And where such an alteration is made by a judge in order to prevent the operation of the Statute of Limitations, the defendant does not waive the objection by appearing to the writ after notice. *Clark v. Smith*, 2 H. & N. 753.

A writ dated on Sunday is a nullity, and the objection is not waived by lapse of time. *Hanson v. Shackelton*, 4 Dowl. Pr. Cas. 48; 1 H. & W. 342; *Haines v. McCormick*, 5 Ark. 663; *Trafton v. Rogers*, 13 Me. 315.

But a copy tested on Sunday and service thereof, the writ being correctly tested, are mere irregularities and the defect is waived by laches. *Corrall v. Foulkes*, 5 D. & L. 590.

Date of the Writ Not Conclusive.—*Wambaugh v. Schenck*, 2 N. J. L. 229; *Allen v. Smith*, 12 N. J. L. 159; *Jenkins v. Cockerham*, 1 Ired. (N. Car.) 309; *Trafton v. Rogers*, 13 Me. 315.

In *Haines v. McCormick*, 5 Ark. 663, it was held that it was not competent for the clerk to prove that the writ was in fact tested on a day different from that which appeared on its face.

But in *Jackson v. Bowling*, 10 Ark. 578, the court held that the date of a writ was only *prima facie* evidence of the time of its issuance, and that the

plaintiff, and in other cases when it shall appear reasonable to the court, it shall be indorsed, before service, by some responsible person in order to provide security for costs.¹

IV. ALIAS AND PLURIES WRITS.—In case a summons is returned not executed, an *alias* writ may issue; and if that be similarly returned, it may be followed by *pluries* writs until service is made upon the defendant.²

true time thereof might be shown by other evidence.

1. Talbot v. Whiting, 10 Mass. 359; Ripley v. Warren, 2 Pick. (Mass.) 592; Carpenter v. Aldrich, 3 Met. (Mass.) 58; Clark v. Paine, 11 Pick. (Mass.) 66; Wheeler v. Lynde, 1 Allen (Mass.) 402; Seagrave v. Erickson, 11 Cush. (Mass.) 89; Chapman v. Phillips, 8 Pick. (Mass.) 25; Robbins v. Hill, 12 Pick. (Mass.) 569; Gilbert v. Nantucket Bank, 5 Mass. 97; McGee v. Barbor, 14 Pick. (Mass.) 212; Miller v. Washburn, 11 Mass. 411; Williams v. Hadley, 19 Pick. (Mass.) 379; Ely v. Forward, 7 Mass. 25; Caldwell v. Lovett, 13 Mass. 422; Petitioner v. Willis, 99 Mass. 460; Stevens v. Getchell, 11 Me. 443; Sawtelle v. Wardwell, 56 Me. 146; Richards v. McKenney, 43 Me. 177; Bennett v. Holmes, 79 Me. 51; Davis v. McArthur, 3 Me. 27; Harmon v. Watson, 8 Me. 286; Stone v. McLanathan, 39 Me. 131; Skillings v. Boyd, 10 Me. 43; Philpot v. McArthur, 10 Me. 127; Blake v. Hill, 14 Me. 417; Scruton v. Deming, 36 N. H. 432; Pettin-gill v. McGregor, 12 N. H. 179; Butler v. Haynes, 3 N. H. 21; White v. Taylor, 48 N. H. 284.

Where the writ is not properly indorsed the defendant must make objection at the first term or he will be considered as having waived it. Carpenter v. Aldrich, 3 Met. (Mass.) 58; Stevens v. Getchell, 11 Me. 446.

Sufficiency of Indorsement.—Any mode of signing such as would bind a party to a bond or note is sufficient. Clark v. Paine, 11 Pick. (Mass.) 66; Sawtelle v. Wardwell, 56 Me. 146.

Thus an indorsement stamped on the back of a writ, "From the Office of A. B.," is sufficient. Wheeler v. Lynde, 1 Allen (Mass.) 402; Seagrave v. Erickson, 11 Cush. (Mass.) 89; Richards v. McKenney, 43 Me. 177; Bennett v. Holmes, 79 Me. 51. So also "J. E. S., attorney of J. C.," or "E. C., by A. P., his attorney." Chapman v. Phillips, 8 Pick. (Mass.) 25; Clark v. Paine, 11 Pick. (Mass.) 66; Davis v. McArthur, 3 Me. 27.

But an indorsement "A. B., by his at-

torney," has been held not sufficient. Harmon v. Watson, 8 Me. 286; Robbins v. Hill, 12 Pick. (Mass.) 569.

And if one indorse a writ with his name only, without adding the capacity in which he acts, he will be estopped from denying that he indorsed as the plaintiff's agent. Gilbert v. Nantucket Bank, 5 Mass. 97; M'Gee v. Barber, 14 Pick. (Mass.) 212.

The statutes require that the indorser be a sufficient person, an inhabitant of the state. Bennett v. Holmes, 79 Me. 51; Stone v. McLanathan, 39 Me. 131; Pettingill v. McGregor, 12 N. H. 179.

In case of two plaintiffs, where one is an inhabitant of the state and the other not, any indorsement which would be sufficient, if both parties were citizens, will be sufficient. Scruton v. Deming, 36 N. H. 432.

2. *Alias* and *pluries* writs issue as a matter of right and without a special order of the court. Cherry v. Mississippi Valley Ins. Co., 16 Lea (Tenn.) 292; Gillmour v. Ford (Tex. 1892). 19 S. W. Rep. 442; Lauderdale v. Ennis Stationery Co., 80 Tex. 496.

But in *Georgia* a second process issued by the clerk of his own will after the appearance term of the case was held void. Peck v. La Roche, 86 Ga. 314.

An *alias* should not issue until the original is returned. Boggs v. Symmes, 8 Rich. (S. Car.) 443; Parker v. Grayson, 1 Nott & M. (S. Car.) 171; Ensign v. Roggencamp, 13 Neb. 30.

But an *alias* summons issued and served within the life of a prior summons is not void or voidable when, at the time of its issuance and service, the prior summons was not in the hands of the officer or under his control. Williams v. Welton, 28 Ohio St. 451.

Pending a motion to quash the original summons, the defendant is under no obligation to obey a second writ in the same cause. Farris v. Walter, 2 Colo. App. 450.

If the original summons be not served, the *alias* and *pluries* must be seasonably issued and regularly placed in the hands of the officer for service in

V. AMENDMENT OF THE WRIT.—If a summons is fundamentally defective, the court acquires no jurisdiction of the cause by the service thereof, and, in the absence of an appearance by the defendant, the writ cannot be amended.¹ But where the defect is in some matter of form and the writ has sufficient vitality to bring the defendant into court, it may, upon application to the court, be amended.²

order to avoid the running of the Statute of Limitations. *State Bank v. Baker*, 3 McCord (S. Car.) 281. See also *Hazlehurst v. Morris*, 28 Md. 67; *Etheridge v. Woodley*, 83 N. Car. 11.

If a writ against A and B be returned served on A and "not found" as to B, the second writ issued to be served on B should show that it is in the same suit as the first. *Dunn v. Hall*, 8 Blackf. (Ind.) 32.

If the *alias* writ against B be held void, the plaintiff may suggest on the record the return of "not found" as to B on the first writ and proceed against A alone. *Grover v. Sims*, 5 Blackf. (Ind.) 498.

New process should issue on an amended petition when it contains a new cause of action. *Kentucky Electric Inst. v. Gaines* (Ky. 1886), 1 S. W. Rep. 444; *Joyes v. Hamilton*, 10 Bush (Ky.) 544.

But if the amended petition contains no new cause of action, a second summons is unnecessary. *Schuyler Nat. Bank v. Bollong*, 28 Neb. 684.

Defects in an original summons, which is not served, are cured by the issuance and service of a correct *alias*. *Goodlet v. Hansell*, 56 Ala. 346. See also *Scull v. Kuykendall*, 1 Hempst. (U. S.) 9.

If the original be correct and a variance appear in the *alias* writ, the defect should be taken advantage of by plea in abatement. *Richmond, etc., R. Co. v. Rudd*, 88 Va. 648.

The fact that a judgment of *non pros*, entered by the prothonotary without authority, and subsequently stricken off by the court for that reason, was standing upon the record at the time of the issuance of an *alias* summons will not prevent the writ from being an *alias* summons in effect as well as in form. *Everett v. Niagara Ins. Co.*, 142 Pa. St. 322.

1. *Dwight v. Merritt*, 18 Blatchf. (U. S.) 305; *Peaslee v. Haberstro*, 15 Blatchf. (U. S.) 472; *Brown v. Pond*, 5 Fed. Rep. 31; *U. S. v. Rose*, 14 Fed. Rep. 681; *McGill v. Weil*, 10 N. Y. Supp. 246; *Jones v. Sutherland*, 73

Me. 157; 1 Wait's Pr. 490, citing *Cole v. Hindson*, 6 T. R. 234; *Farnham v. Hildreth*, 32 Barb. (N. Y.) 277; *Moulton v. De ma Carty*, 6 Robt. (N. Y.) 470; *Hoffman v. Fish*, 18 Abb. Pr. (N. Y.) 76; *Cook v. Farren*, 34 Barb. (N. Y.) 95; *Hallett v. Righters*, 13 How. Pr. (N. Y.) 43; *Kendall v. Washburn*, 14 How. Pr. (N. Y.) 380.

A summons without the seal of the court or signature of the clerk where these are required is not amendable. *Peaslee v. Haberstro*, 15 Blatchf. (U. S.) 472; *Dwight v. Merritt*, 18 Blatchf. (U. S.) 305.

But if the summons be signed by the clerk it may be amended as regards the seal. *Peaslee v. Haberstro*, 15 Blatchf. (U. S.) 472. And if it bears the seal of the court, it may be amended as regards the signature of the clerk. *Austin v. Lamar F. Ins. Co.*, 108 Mass. 338.

A mistake in the name of the defendant may not be amended unless there is an appearance. *McGill v. Weil*, 10 N. Y. Supp. 246.

A writ in which no plaintiff is named is not amendable. *Jones v. Sutherland*, 73 Me. 157.

2. *Gulf, etc., R. Co. v. James*, 48 Fed. Rep. 148; *Chamberlain v. Bittersohn*, 48 Fed. Rep. 42; *Boardman v. Parrish*, 56 Ala. 54; *U. S. v. Turner*, 50 Fed. Rep. 734; *Martin v. Godwin*, 34 Ark. 682; *Fisher v. Collins*, 25 Ark. 97; *State v. Davis*, 73 Ind. 359; *Gibbon v. Freel*, 65 How. Pr. (N. Y.) 273; *McKane v. Adams* (Supreme Ct.), 1 N. Y. Supp. 580; *Wiggins v. Richmond*, 58 How. Pr. (N. Y.) 376; *disproving Osborn v. McCloskey*, 55 How. Pr. (N. Y.) 345; *Martin v. Johnson*, 8 Daly (N. Y.) 541; *Lane v. Beam*, 19 Barb. (N. Y.) 51; *Tallman v. Hinman*, 10 How. Pr. (N. Y.) 80; *Follower v. Laughlin*, 12 Abb. Pr. (N. Y.) 105; *Walkenshaw v. Perzel*, 32 How. Pr. (N. Y.) 310; *Deane v. O'Brien*, 13 Abb. Pr. (N. Y.) 11; *Sluyter v. Smith*, 2 Bosw. (N. Y.) 673; *Keeler v. Belts*, 3 Code Rep. (N. Y.) 183; *Griffin v. Pinkham*, 60 Me. 123; *Gar-*

In such case, the allowance of an amendment is within the discretion of the court, and the exercise of such discretion is not reviewable.¹ But it is error to refuse to amend the sum-

diner *v.* Gardiner, 71 Me. 266; Driscoll *v.* Stanford, 74 Me. 103; Cain *v.* Rockwell, 132 Mass. 193; Buckland *v.* Green, 133 Mass. 421; Kelly *v.* Harrison, 69 Miss. 856; Cheatham *v.* Crews, 81 N. Car. 346; Henderson *v.* Graham, 84 N. Car. 496; Thomas *v.* Womack, 64 N. Car. 657; Walston *v.* Bryan, 64 N. Car. 764; Plemmons *v.* Southern Imp. Co., 108 N. Car. 614; Richmond, etc., R. Co. *v.* Benson, 86 Ga. 203; Telford *v.* Coggins, 76 Ga. 683; Scudder *v.* Massengill, 88 Ga. 245; Stimmel *v.* Miller, 8 Pa. Co. Ct. Rep. 128; Hansford *v.* Hansford, 34 Mo. App. 262; State *v.* Berry, 42 N. J. L. 60; Bushnell *v.* Allen, 48 Wis. 460; Prentice *v.* Stefan, 72 Wis. 151; Hathaway *v.* Sabin, 61 Vt. 608; Higley *v.* Pollock (Nev. 1891), 27 Pac. Rep. 895; Bogue *v.* Prentis, 47 Mich. 124.

A summons may be amended by changing the name or description of a party so as to conform to that given in the complaint. Gulf, etc., R. Co. *v.* James, 48 Fed. Rep. 148; Hathaway *v.* Sabin, 61 Vt. 608; Cain *v.* Rockwell, 132 Mass. 193; Buckland *v.* Green, 133 Mass. 421; Griffin *v.* Pinkham, 60 Me. 123; Scudder *v.* Massengill, 88 Ga. 245, citing Smith *v.* Morris, 29 Ga. 339; Baldwin *v.* McMichael, 68 Ga. 828; McMichael *v.* Hardee, 68 Ga. 831. See also Shackman *v.* Little, 87 Ind. 181; National Ben. Assoc. *v.* Jackson, 114 Ill. 533.

When a suit is brought by an agent of an undisclosed principal, the writ may be amended by substituting the principal for the agent as plaintiff of record. Boudreau *v.* Eastman, 59 N. H. 467.

The writ may be so amended as to give the individual names of the defendants instead of the partnership name of their firm. Martin *v.* Godwin, 34 Ark. 682; Bushnell *v.* Allen, 48 Wis. 460.

An omission in a summons to describe a justice of the peace as of the county from which he was elected is amendable. State *v.* Berry, 42 N. J. L. 60.

If a summons issued out of the United States district court bears the *teste* of the chief justice instead of that of the district judge, as required by statute, it may be amended. U. S. *v.*

Turner, 50 Fed. Rep. 734. See also Pleasants *v.* East Dereham Local Board, 47 L. T. 439, and Wakeling *v.* Watson, 1 C. & J. 467; 1 Tyr. 377, in which amendments were allowed to correct errors in the *teste*.

When a summons is subscribed by non-resident attorneys, it may be amended by substituting the names of resident attorneys. Prentice *v.* Stefan, 72 Wis. 151.

An error as to the time within which the defendant must appear and answer is amendable. Gibbon *v.* Freely, 65 How. Pr. (N. Y.) 273.

Where the plaintiff has made an error in the notice of the relief sought, it may be remedied by amendment. Champlin *v.* Deitz, 37 How. Pr. (N. Y.) 214; Willett *v.* Stewart, 43 Barb. (N. Y.) 98; McDonald *v.* Walsh, 5 Abb. Pr. (N. Y.) 68; Chamberlain *v.* Bittersohn, 48 Fed. Rep. 42, citing Randolph *v.* Barrett, 16 Pet. (U. S.) 141; Semmes *v.* U. S., 91 U. S. 21; Tilton *v.* Cofield, 93 U. S. 164.

It has been held that the requirement that the writ shall run in the name of the state is directory and that the omission may be cured by amendment. Hansford *v.* Hansford, 34 Mo. App. 262; Doan *v.* Boley, 38 Mo. 449.

The omission of the seal of the court from the writ may be corrected by an amendment *nunc pro tunc*. State *v.* Davis, 73 Ind. 359.

A clerical error in a date may be corrected by amendment. Kelly *v.* Harrison, 69 Miss. 856; Richmond, etc., R. Co. *v.* Benson, 86 Ga. 203; Gardiner *v.* Gardiner, 71 Me. 266; Driscoll *v.* Stanford, 74 Me. 103; McEvoy *v.* School Dist. No. 8, 38 N. J. Eq. 420.

The writ should not be amended where third persons have acquired rights which would be prejudiced, or where the effect would be to take away any defense which could be made to an action begun at the time of the amendment. Phillips *v.* Holland, 78 N. Car. 31; Henderson *v.* Graham, 84 N. Car. 496.

1. Henderson *v.* Graham, 84 N. Car. 496; Jackson *v.* McLean, 90 N. Car. 64; McKinnon *v.* Faulk, 68 N. Car. 279; Austin *v.* Lamar F. Ins. Co., 108 Mass. 338; Tallman *v.* Hinman, 10 How. Pr. (N. Y.) 89.

mons on the ground that the court has no power to allow an amendment.¹

VI. SERVICE AND RETURN OF THE WRIT.—Treatment of the service and return of the writ of summons and other similar process may be found in another article.²

VII. DEFECTIVE WRITS—1. **Effect of.**—Defects in the writ or the total absence of process may be waived by a defense on the merits or by a general appearance of the defendant.³ But in the absence of such defense or appearance, the court acquires no jurisdiction of the cause by the service of a void summons.⁴ In case the writ is defective, but not fundamentally so, subsequent proceedings in the cause are not void, but merely voidable.⁵

2. **How Taken Advantage of.**—In case a defect appears on the face of a summons, the defendant may move the court to quash the writ or set it aside.⁶ If the defect is not apparent on the face of the writ, the defendant should, in jurisdictions where the common-law practice is still in vogue, proceed by plea in abatement.⁷

1. *Henderson v. Graham*, 84 N. Car. 496, in which there is a review of the authorities on amendment of process by Smith, C. J.

It is error to refuse any amendment of the record where such refusal proceeds not upon the exercise of the court's discretion, but upon the ground of a want of power to act. *Winslow v. Anderson*, 3 Dev. & B. (N. Car.) 9; *Freeman v. Morris*, Busb. (N. Car.) 287; *McKinnon v. Faulk*, 68 N. Car. 279.

2. See *SERVICE OF PROCESS*, vol. 22, p. 127; as to the return, see *SERVICE OF PROCESS*, vol. 22, p. 175.

3. See *SERVICE OF PROCESS*, vol. 22, p. 168.

4. See *supra*, this title, *Amendment of the Writ*.

5. *Ambler v. Leach*, 15 W. Va. 677; *Harrington v. Wofford*, 46 Miss. 31; *McAlpin v. Jones*, 10 La. Ann. 552; *McLaughlin v. Cowley*, 127 Mass. 316; *Sheldon v. San Antonio*, 25 Tex. Supp. 177. See also *supra*, this title, *Amendment of the Writ*, and consult the authorities there cited to the text proposition that a defective writ may be amended.

6. *Brown v. Brown*, 10 Neb. 349; *Perkins v. Mead*, 22 How. Pr. (N. Y.) 476; *Tibbetts v. Shaw*, 19 Me. 204; *Hawkes v. Kennebec County*, 7 Mass. 461; *Purple v. Clark*, 5 Pick. (Mass.) 206; *Bliss v. Connecticut*, etc., R. Co., 24 Vt. 428.

Where there is an objection in point of form which applies as well to the writ

as to the copy, a defendant should move to set aside both the writ and copy and not merely the service of the writ. *Anonymous*, 1 Dowl. Pr. Cas. 654; *Hesker v. Jarman*, 1 C. & M. 408.

The court will not quash a writ on the ground of irregularity in the service. *Watson v. Stedman*, 1 Marsh. 9.

Where the copy served on the defendant is irregular, the application should be to set aside the service, or the copy and service. *Hall v. Redington*, 5 M. & W. 605; *Crow v. Field*, 8 Dowl. Pr. Cas. 231; *Geyde v. Bishop*, 2 Scott N. R. 203; *Truslove v. Whitechurch*, 1 Scott 415; 1 M. & G. 426; *Parker v. Wardner* (Idaho, 1887), 13 Pac. Rep. 172.

An affidavit in support of a motion to set aside the service of an irregular writ need not show that defendant had not been served with any regular process. *Patterson v. Busby*, 7 Dowl. Pr. Cas. 868; *Wintle v. Hogg*, 7 Dowl. Pr. Cas. 623.

Neither need it state that affiant is the defendant in the cause. *Stevenson v. Thorne*, 13 M. & W. 149.

7. *Sawyer v. Price*, 6 Ala. 285; *Bray v. Libby*, 71 Me. 276; *Jacobs v. Melten*, 14 Mass. 134; *Bliss v. Connecticut*, etc., R. Co., 24 Vt. 428; *Waterbury v. Mather*, 16 Wend. (N. Y.) 613.

It is no ground for a motion to quash a writ that it was served by an officer not having the authority; it is a matter to be pleaded. *Roberts v. Beeson*, 4 Port. (Ala.) 164.

And where pleas in abatement have been abolished by statute, the defense may be made by answer.¹ An objection to the sufficiency of a summons or the service thereof should be made before any other step is taken in the cause by the defendant.²

SUNDAY.—(See also DAY, vol. 5, p. 85; ORDINARY, vol. 17, p. 272; POLICE POWER, vol. 18, p. 739; RELIGIOUS SOCIETIES, vol. 20, p. 773.)

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I. DEFINITION AND HISTORY.—Sunday is the first day of the week; a day observed by the Christian world as holy and set apart for

Where a direction of a writ, under the statute, is unlawful for want of compliance with the statute prerequisites, the defendant is not obliged to plead it in abatement, but the court may dismiss it *ex officio*; nor, if the statute contemplated a plea in abatement, would it take away the common-law remedy. *Case v. Humphrey*, 6 Conn. 130.

A party may be permitted to quash his own writ, where there is an error in it, as he can proceed no further, and it works a discontinuance. *Womsley v. Cummins*, 1 Ark. 125.

Where a writ appears to be indorsed, by having the name of a person . . . written upon the back thereof as indorser, a motion to quash for the want of a sufficient indorsement cannot prevail. In such case, if the defendant relies upon the fact that what appears to be the name of a person is not in fact so, or that such person is not an inhabitant of the state, or that his name was not placed upon the back of the writ by him or by his authority, or that he is not a responsible person, the supposed defect should be pleaded in abatement, so as to give the plaintiff

an opportunity, by the proper replication, to raise an issue upon any traversable objection to the validity of the indorsement. *Haverhill Ins. Co. v. Prescott*, 38 N. H. 398.

In an action for personal injuries the original summons correctly stated the damages at \$15,000, but by mistake of the clerk the *alias* stated them at \$1,500. It was held that the variance could be taken advantage of under section 3259 of the code by plea in abatement. *Richmond, etc., R. Co. v. Rudd*, 88 Va. 648.

1. *Barney v. Northern Pac. R. Co.*, 56 How. Pr. (N. Y.) 23.

A defendant may not have a summons set aside on motion on account of his being misnamed therein. *Miller v. Stettiner*, 7 Bosw. (N. Y.) 672.

The former practice was to raise the objection by plea in abatement. *Waterbury v. Mather*, 16 Wend. (N. Y.) 613.

But under the code the objection should be presented by answer. *Bank of Havana v. Magee*, 20 N. Y. 355; *Traver v. Eighth Ave. R. Co.*, 3 Keyes (N. Y.) 497.

2. *Dudley v. Carmolt*, 1 Murph. (N. Car.) 339; *Payne v. Grim*, 2 Munf.

the purposes of rest and worship. It was established in commemoration of the Resurrection of Christ.¹

But though Sunday has its origin in the doctrines of the Christian religion, having been adopted in the place of the old Jewish Sabbath, yet in its legal aspects it is to be regarded as a civil, not a religious, institution; as a day appointed by the law-making power on which the ordinary business of life shall be suspended, in order that thereby the physical and moral well-being of the people may be advanced.²

(Va.) 297; *Gomila v. Milliken*, 41 La. Ann. 116; *Huntley v. Henry*, 37 Vt. 165; *Pollard v. Union Pac. R. Co.*, 7 Abb. Pr., N. S. (N. Y.) 70; *Joyner v. School Dist. No. 3*, 3 Cush. (Mass.) 567; *Knott v. Pepperdine*, 63 Ill. 219.

1. American Encyclopedia (Appleton's) vol. 10, *Lord's Day*; 2 Bouv. L. Dict., *Sunday*; 2 Abb. L. Dict., *Sunday*; And. L. Dict., *Sunday*.

Sunday was first recognized officially by the Emperor Constantine, A. D. 331, in an edict ordering that all work should cease on Sunday. Next the Theodosian Code prohibited the prosecution of "all lawsuits and public business." Later, three canons of the church, promulgated respectively in A. D. 517, 895 and 932, prohibited "holding pleas and adjudging cases," and other similar procedures on Sunday. It has been said that these canons were incorporated into the common law and have become a part of it. *Swann v. Broome*, 3 Burr. 1595; 1 Wm. Bl. 496. Hence Coke's maxim, "*Dies dominicus non est juridicus*," Broom's Leg. Maxims (8th ed.), p. 21. Statutes 27 Hen. VI & 6 Edw. V (1552), 1 Jac. I (1603), (1449), 5 and 1 Car. I (1625), provided for the observance of Sunday. King James published in 1618 a "Book of Sports," which set forth the games and other amusements which might be engaged in on Sunday. (See this book referred to in *Lindenmuller v. People*, 33 Barb. (N. Y. 571.) But it was in 29 Car. II (1678) that the most important statute concerning the observance of Sunday was passed. As this statute has been a model after which most American statutes have been framed, a part of it may be quoted. It required that "no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business or work of their ordinary calling upon the Lord's Day, or any part thereof; works of necessity or charity only excepted." It further provided that

"no person or persons upon the Lord's Day shall serve or execute, or cause to be served or executed, any writ, process, order, warrant, judgment or decree, except in case of treason, felony, or breach of the peace; but the service of every such writ, process, warrant, order, judgment or decree, shall be void to all intents and purposes whatsoever." Many cases have been decided upon this statute, and its terms seem now well fixed. The tendency in the matter of legal recognition of Sunday in the *United States* has been to restrict more and more the allowance of the practice of ordinary trades and pursuits on that day, but to allow more liberality in other directions; as is seen, on the one hand, in statutes abolishing the doctrine established by the courts, that no recovery may be had for negligent injury received while violating the statute against traveling on Sunday, and in statutes forbidding the defense of Sunday contract to be set up, unless the party doing so has returned the consideration received; while, on the other hand, is seen the rigid enforcement of the statutes against opening stores or selling liquors on Sunday. The common law has but little bearing on the subject in the *United States*, since these matters are regulated by statute. See in general Appleton's American Encyclopedia, vol. 10, art., *Lord's Day*; 19 Am. Law Reg., N. S., p. 141; 2 Coke's Inst. 220, 264-5; 4 Bl. Com. 63; Broom's Leg. Maxims (8th ed.), 21 *et seq.*; note to *Coleman v. Henderson* in 12 Am. Dec. 290; note to *Ecker v. First Nat. Bank* (Md. 1885), 1 Atl. Rep. 849; 17 Am. Law Reg., N. S. 281 *et seq.*; *Campbell v. International L. Assur. Soc.*, 4 Bosw. (N. Y.) 311; 2 Am. L. Rev. 227.

2. State v. Orleans Judge, 39 La. Ann. 132; *Specht v. Com.*, 8 Pa. St. 312; *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 439; *State v. Baltimore*, etc., R.

There is no distinction made between the words "Sunday," "Sabbath," and "Lord's Day;" they are used interchangeably and to express the same meaning.¹

II. WHEN SUNDAY BEGINS AND ENDS.—Sunday properly begins at midnight between Saturday and Sunday and continues twenty-four hours.² In contemplation of some statutes, however, only the solar day is included; that is, the portion of time between sunrise and sunset; while in other cases it is considered as beginning at midnight between Saturday and Sunday and ending at sunset of Sunday.³ The exact extent of the day is specifically defined by statute in some states, and where this is true the statutory provisions control.⁴

III. CONSTITUTIONALITY OF SUNDAY STATUTES—(See also POLICE POWER, vol. 18, p. 739).—The question of the constitutionality of statutes providing for the observance of Sunday has been considered in many cases, in most of which these statutes have been attacked as attempts to infringe the right of religious liberty; but the courts have held, almost without exception, that such legislation is constitutional, and not in contravention of those clauses of

Co., 15 W. Va. 362; 36 Am. Rep. 813; *Ex p. Burke*, 59 Cal. 17. See the *dissenting* opinion of Field, J., in *Ex p. Newman*, 9 Cal. 518, which has since been adopted as the view of the *California* court. *Ex p. Burke*, 59 Cal. 19. See also 42 Alb. L. J. 261.

1. *Kilgour v. Miles*, 6 Gill & J. (Md.) 268; *Gunn v. State* (Ga. 1892), 15 S. E. Rep. 458; 2 Bouv. L. Dict. *Sunday* and cases cited; And. L. Dict., *Sunday*.

In *State v. Drake*, 64 N. Car. 589, it was held that the "Sabbath" day was the same as "Sunday," the court observing: "The words are not strictly synonymous; the one signifying Saturday, the seventh day of the week, the Jewish Sabbath; the other the first day of the week, commonly called the Lord's Day. But by common usage the terms are used indiscriminately to denote the Christian Sabbath—i. e., Sunday."

2. *Shaw v. Dodge*, 5 N. H. 462; *Kilgour v. Miles*, 6 Gill & J. (Md.) 268; *Pulling v. People*, 8 Barb. (N. Y.) 384; *Huidekoper v. Cotton*, 3 Watts (Pa.) 56; *State v. Green*, 37 Mo. 466; *Hiller v. English*, 4 Strobb. (S. Car.) 486; Bac. Abr., *Heresy*, (D); *New York Penal Code*, § 261.

It seems that Sunday in this regard would be the same as any other day. As to the ordinary day, see DAY, vol. 5, p. 81.

"The Jews, the Chaldeans, and Babylonians begin the day at the rising of

the sun; the Athenians, at the fall; the Umbri in Italy beginne at midday; the Egyptians and Romanes from midnight; and so doth the law of England in many cases." Co. Litt. 135a; 134b. The English day begins as soon as the clock begins to strike twelve p. m. of the preceding day. *Williams v. Nash*, 28 L. J. Ch. 886; 28 Beav. 93.

3. In *Connecticut*, Sunday has been held to embrace only the solar day. *Fox v. Abel*, 2 Conn. 541; *Finn v. Donahue*, 35 Conn. 216. In the former of these cases the subject is reviewed at some length.

In *Maine*, the legal Sunday begins at midnight between Saturday and Sunday and ends at sunset on Sunday. *Bryant v. Biddeford*, 39 Me. 193; *Nason v. Dinsmore*, 34 Me. 391; *Hilton v. Houghton*, 35 Me. 143.

So at one time in *Massachusetts*, by statute. *Tracy v. Jenks*, 15 Pick. (Mass.) 465.

In *Illinois*, it has been held that "Sabbath night," as used in a law prohibiting the sale of liquors at certain times, includes as well the time between midnight on Saturday and daylight on Sunday as the time between after dark on Sunday and midnight on Sunday night. *Kroer v. People*, 78 Ill. 294. See also *Kane v. Com.*, 89 Pa. St. 522; 33 Am. Rep. 787.

4. See the *New York Penal Code*, § 261, and the statutes of the various states.

the constitution of the *United States* and of the various states which guaranty full civil and religious liberty and security of life and property. So that the constitutionality of Sunday statutes may be said to be settled.¹ Such statutes do not compel the observance of Sunday as a religious, but as a civil institution, and, therefore, do not violate any fundamental law prohibiting

1. In *Bloom v. Richards*, 2 Ohio St. 391, Thurman, J., said: "Of course it is no objection, but, on the contrary, is a high recommendation to a legislative enactment based upon justice or public policy, that it is found to coincide with the precepts of a pure religion; but the fact is nevertheless true that the power to make the law rests in the legislative control over things temporal and not over things spiritual. . . . We are then to regard the statute under consideration as a mere municipal or police regulation, whose validity is neither strengthened nor weakened by the fact that the day of rest it enjoins is the Sabbath day. Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regularly recurring intervals, are too obvious to be overlooked. It is within the constitutional competency of the general assembly to require this cessation of labor and to name the day of rest. It did so by the act referred to, and in accordance with the feelings of a majority of the people, the Christian Sabbath was very properly selected. But regarding it merely as an exertion of legislative authority, the act would have had neither more nor less validity had any other day been adopted;" citing with approval *Charleston v. Benjamin*, 2 Strobb. (S. Car.) 508; 49 Am. Dec. 608; *Specht v. Com.*, 8 Pa. St. 312; 49 Am. Dec. 518.

And the doctrine of the text is that of many other leading cases. See *Frolckstein v. Mobile*, 40 Ala. 725; *Shover v. State*, 10 Ark. 259; *Scales v. State*, 47 Ark. 476; 58 Am. Rep. 768; *Warner v. Smith*, 8 Conn. 14; *Gunn v. State* (Ga. 1892), 15 S. E. Rep. 458 (statute against hunting and fishing on Sunday); *Karwisch v. Atlanta*, 44 Ga. 204; *Langabier v. Fairbury, etc.*, R. Co., 64 Ill. 243; 16 Am. Rep. 550; *Voglesong v. State*, 9 Ind. 112; *Foltz v. State*, 33 Ind. 215; *Megowan v. Com.*, 2 Metc. (Ky.) 3; *State v. Orleans Judge*, 39 La. Ann. 132; *State v. Ambs*,

20 Mo. 214; *Lindenmuller v. People*, 33 Barb. (N. Y.) 548; 21 How. Pr. (N. Y.) 156 (statute against Sunday theaters—opinion discusses the general question at length); *Neuendorff v. Duryea*, 69 N. Y. 557; 25 Am. Rep. 235; *aff'd* 6 Daly (N. Y.) 276; *Society, etc., v. Com.*, 52 Pa. St. 126; 91 Am. Dec. 139; *Nashville v. Linck*, 12 Lea (Tenn.) 499; 5 Am. & Eng. Corp. Cas. 392; *Gable v. Houston*, 29 Tex. 235; *In re King*, 46 Fed. Rep. 905; 44 Alb. L. J. 309 (Seventh-Day Adventists considered).

In *Charleston v. Benjamin*, 2 Strobb. (S. Car.) 508, and in the note in 49 Am. Dec. 616 *et seq.*, the history and constitutionality of Sunday legislation is discussed.

A Sunday statute cannot be attacked as unconstitutional on the ground that it discriminates unjustly, merely because it makes an exception in favor of drug stores. *People v. Scranton*, 61 Mich. 244. Nor are Sunday statutes objectionable as being "local laws," as prohibited by the *Texas* constitution. *Ex p. Sundstrom*, 25 Tex. App. 133. In *State v. Doyle*, 15 R. I. 325, the constitutionality of a statute requiring liquor dealers to remove obstructions to a clear view of their premises through the windows on Sunday was upheld, though the statute failed to define what constituted such obstructions.

In one case Sunday laws have been deemed unconstitutional. *Ex p. Newman*, 9 Cal. 502. The decision was that of a divided court, Terry, C. J., and Burnett, J., holding that the statute was a violation of the constitution, while Field, J., *dissenting*, expressed his views in favor of the constitutionality of the act in an opinion which has since been adopted as the view of that court. *Ex p. Andrews*, 18 Cal. 685; *Ex p. Burke*, 59 Cal. 19; *Ex p. Koser*, 60 Cal. 202.

In *Ex p. Westerfield*, 55 Cal. 550; 36 Am. Rep. 47, a Sunday statute was held unconstitutional. But the objection lay to the peculiar character of the statute, as being a special law (prohibiting baking of bread between six p. m. on Saturday and six p. m. on

the passage of laws respecting the establishment of religion or restraining the free exercise thereof.¹ They are a proper exercise of the police power of the state; are intended for the promotion of the moral and physical well-being of the people, and interfere with no vested rights.² Statutes relating to the operation of trains on Sunday have been attacked on the ground that they interfere with the exclusive right of Congress to regulate interstate commerce. There is no doubt that the state may control the operation of railroads running only within its limits.³ But whether a statute prohibiting the running of all trains within the state on Sunday can be upheld is a question on which courts have taken opposing views.⁴

Sunday) and not to the general policy of Sunday laws. *Compare Ex p. Koser*, 60 Cal. 199.

In *O'Hanlon v. Myers*, 10 Rich. (S. Car.) 128, a Sunday statute was declared to be of no force, but because of non-user.

1. *State v. Orleans* Judge, 39 La. Ann. 132; *Ex p. Burke*, 59 Cal. 19.

The freedom of Sunday legislation from objection, as being an infringement of religious liberty, is expressed in *Speclet v. Com.*, 8 Pa. St. 325, where Bell, J., says: "It (the Sunday statute) intermeddles not with the natural and indefeasible right of all men to worship Almighty God according to the dictates of their own consciences; it compels none to attend, erect, or support any place of worship, or to maintain any ministry; it pretends not to control or to interfere with the rights of conscience, and it establishes no preference for any religious establishment or mode of worship. It treats no religious doctrine as paramount in the state; it enforces no unwilling attendance upon the celebration of divine worship. It says not to the Jew or Sabbatarian, You shall desecrate the day you esteem as holy, and keep sacred to religion that we deem to be so. It enters upon no discussion of rival claims of the first and seventh days of the week, nor pretends to bind upon the conscience of any man any conclusion upon a subject which each must decide for himself. It intrudes not into the domestic circle to dictate when, where, or to what God its inmates shall address their orisons; nor does it presume to enter the synagogue of the Israelite, or the church of the Seventh Day Christians to command or even persuade their attendance in the temples of those who

especially approach the altar on Sunday. It does not, in the slightest degree, infringe upon the Sabbath of any sect, or curtail their freedom of worship. It detracts not one hour from any period of time they may feel bound to devote to this object, nor does it add a moment beyond what they choose to employ. Its sole mission is to inculcate a temporary weekly cessation from labor, but it adds not to this requirement any religious obligation."

2. **Police Power.**—*Swann v. Swann*, 21 Fed. Rep. 299; *State v. Orleans* Judge, 39 La. Ann. 132; *Minden v. Silverstein*, 36 La. Ann. 912; *State v. Bott*, 31 La. Ann. 663; 33 Am. Rep. 224; *State v. Baltimore, etc.*, R. Co., 24 W. Va. 783; 18 Am. & Eng. R. Cas. 466; *Megowan v. Com.*, 2 Metc. (Ky.) 3; *Charleston v. Benjamin*, 2 Strobb. (S. Car.) 508; 49 Am. Dec. 608; *State v. Morris County*, 36 N. J. L. 72; 13 Am. Rep. 422; *State v. Ludwig*, 21 Minn. 206; *Soon Hing v. Crowley*, 113 U. S. 703. See also **POLICE POWER**, vol. 18, pp. 750-51.

3. **Interference with Interstate Commerce.**—See *Louisville, etc.*, R. Co. v. *State*, 66 Miss. 662; 14 Am. St. Rep. 599, *aff'd* 133 U. S. 587; 41 Am. & Eng. R. Cas. 36; **RAILROADS**, vol. 19, p. 884.

4. In *State v. Baltimore, etc.*, R. Co., 24 W. Va. 783; 18 Am. & Eng. R. Cas. 466, a state law forbidding the running of trains on Sunday within the state was held constitutional, even as applied to railroads engaged in transportation through several states. *Green, J.*, said: "It (the statute) was passed for the sole purpose of promoting the mental, moral, and physical well-being of our people by providing that they should rest a seventh part of their time from labor of every description, and that

The legislature may delegate to municipal corporations authority to pass such ordinances as may be necessary to secure the quiet observance of Sunday; and ordinances passed in pursuance of this authority have, within the city limits, the effect of state statutes. But ordinances contrary to or inconsistent with the general statutes of the state are void.¹ The extent of the authority of any municipality in this regard is a question of the construction of charters, but the powers usually conferred upon municipal corporations are generally sufficient to authorize regulations for Sunday observance.²

this rest should be at regular intervals. The legislature had no sort of purpose in doing so to regulate in any way interstate commerce. It does not propose to trammel, hinder, or shackle commerce. . . . It was intended for and is only an internal policy law; and though it may have some incidental effect upon the interstate commerce of the defendant, that fact, according to all the authorities, does not make such a law unconstitutional as regulating interstate commerce; for it does not regulate it in the constitutional sense of the word." See also *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362; 36 Am. Rep. 803.

If such statutes are to be upheld, it is on the ground that, though they affect interstate commerce, it is merely incidentally and not to such an extent as to amount to a "regulation" of it. See *INTERSTATE COMMERCE*, vol. 11, p. 556; *Ficklen v. Shelly Taxing Dist.*, 145 U. S. 1.

The *Virginia* court takes a view directly opposed to that of the *West Virginia* court. In *Norfolk, etc., R. Co. v. Com.* (Va. 1891), 13 S. E. Rep. 340, it was held that § 3801 of the *Virginia* Code of 1887, prohibiting the running of all trains on Sunday, except those exclusively for the relief of wrecked or disabled trains, or for the transportation of passengers, live stock, or articles of such a perishable nature as would be necessarily impaired in value by one day's delay, was void, in so far as it applied to trains running between points in different states.

In both the leading cases just mentioned, the opinions discuss the question at length and review the authorities.

1. **Municipal Ordinances.**—*Baxter's Petition*, 12 R. I. 13; *Canton v. Nist*, 9 Ohio St. 439; *State v. Langston*, 88 N. Car. 692; 4 Am. & Eng. Corp. Cas. 257; *Chebanse v. McPherson*, 15 Ill. App. 313; *Flood v. State*, 19 Tex. App.

584; *Angerhoffer v. State*, 15 Tex. App. 613; *Bohmey v. State*, 21 Tex. App. 597; *Ginnocchio v. State* (Tex. App. 1891), 18 S. W. Rep. 82.

Thus, in *Canton v. Nist*, 9 Ohio St. 439, an ordinance was held void which prohibited the transaction of business or work on Sunday without excepting works of necessity or charity, or without exempting from its operation those who conscientiously observed another day, when the statutes provided that such exceptions should be made. *Thompson v. Mt. Vernon*, 11 Ohio St. 688.

2. **Authority of Municipal Corporations.**—Cities or villages having charter power to regulate the police of the city or village and pass and enforce all necessary police ordinances, have authority to pass ordinances prohibiting the keeping open of stores, saloons, and other places of business on Sunday. *McPherson v. Chebanse*, 114 Ill. 46; 55 Am. Rep. 857; *Nashville v. Linck*, 12 Lea (Tenn.) 499; 5 Am. & Eng. R. Cas. 392.

As to the general power of a municipality to pass ordinances relative to the observance of Sunday, see *MUNICIPAL CORPORATIONS*, vol. 15, p. 1166; *ORDINANCES*, vol. 17, p. 247 *et seq.* *State v. Morris County*, 36 N. J. L. 72; 13 Am. Rep. 422.

A mere power to pass ordinances to "secure the health, peace and improvement of the city" is said in one case not to authorize an ordinance prohibiting the keeping open of stores on Sunday. *Corvallis v. Carlile*, 10 Oregon 139. But in another case such an ordinance was considered to have been authorized by a delegated power to the municipality to "maintain the peace, good government and order of the city, and the trade, commerce, and manufactures thereof." *St. Louis v. Cafferata*, 24 Mo. 94.

But the power exists in the municipality only where such ordinances are

Ordinances prohibiting the sale on Sunday of certain specific articles of trade have been attacked as being class legislation and making unjust discriminations. The rule is that the municipality is vested with discretion as to what restrictions upon trade are necessary for the public welfare, and an exercise of this discretion will not be interfered with by the courts unless it is clearly unreasonable or oppressive.¹

IV. GENERAL SCOPE OF SUNDAY STATUTES—1. In General.—As the common law goes no further than to require that Sunday shall be *dies non juridicus*, the statutes of the various states must be referred to. Their common model is the English statute, 29 Car. II, and in their general character and outline they are not widely variant.²

2. All Worldly Pursuits.—As a general rule all worldly labor, business, or work of one's usual or ordinary calling; all buying, selling, trading, or carrying on any mercantile or similar business for profit or pleasure; the keeping open of stores, warehouses, or other establishments where such work or business is conducted, are, with a few well-defined exceptions, prohibited by the Sunday statutes.³ In some cases the word "business" is omitted from

consistent with the state statutes. Thus a state law prohibited entirely the sale of liquor on Sunday; the defendant pleaded that the city ordinance forbade the sale of liquor on Sunday only between the hours of 9 a. m. and 4 p. m., nothing being said as to the remainder of the day. The city charter conferred authority on the city to "close up all dram shops" when necessary and convenient and "to make all needful and proper regulations" concerning grogshops, saloons, etc. It was held that defendant's plea could not be sustained; that a city ordinance could not nullify the state statute upon the subject. *Angerhoffer v. State*, 15 Tex. App. 613. See also *Craddock v. State*, 18 Tex. App. 567; *ORDINANCES*, vol. 17, p. 235.

1. In *People v. Scranton*, 61 Mich. 244, a Sunday ordinance was held not to be void on the ground that it discriminated unjustly in allowing drug stores to be opened. In *Nashville v. Linck*, 12 Lea (Tenn.) 499; 5 Am. & Eng. Corp. Cas. 392, it appeared that the city had authority "to license, tax, and regulate auctioneers, grocers, merchants, retailers, taverns, brokers, peddlers, livery-stable keepers, retailers of liquors," etc., and "to pass all ordinances necessary for health, convenience and safety of the citizens," etc. An ordinance was passed forbidding all trading and trafficking on Sunday or the keeping open of stores, etc.; but

there was a proviso to the effect that "retail vendors of fruit and dealers in newspapers and periodicals" might keep open their stands for the sale of fruit, newspapers, and periodicals only from 4 to 8 o'clock a. m. It was held that the city had authority to pass an ordinance providing for the proper observance of Sunday, and the constitutionality of Sunday legislation was declared to be beyond question; that the ordinance as passed was valid since it was within the discretion of the city as to what trades should be restricted, and the exercise of this discretion in the instance under consideration was not unreasonable or unjust. See also *Lackey v. Knoxville*, 3 Head (Tenn.) 245; *State v. Welch*, 36 Conn. 215; *Megowan v. Com.*, 2 Metc. (Ky.) 3. Compare *Loeb v. Attica*, 82 Ind. 175.

2. To the point that it is not a common-law offense to break the Sabbath, see *State v. Brooksbank*, 6 Ired. (N. Car.) 73; *Sayles v. Smith*, 14 Wend. (N. Y.) 57; 27 Am. Dec. 117; *E* p. Koser*, 60 Cal. 177. See also *Brother-ton's Case*, 1 Stra. 702, where it was held that to exercise on Sunday the occupation of a butcher was no offense at common law. It was said in *Lindenmuller v. People*, 33 Barb. (N. Y.) 548, that the observance of Sunday was an obligation imposed by the common law independent of statute.

3. For instances, see *People v. Cox*,

70 Mich. 247, closing saloons; Com. v. Dextra, 143 Mass. 28; Com. v. Osgood, 144 Mass. 362, keeping open shop, etc.; *Cincinnati v. Rice*, 15 Ohio 225; *State v. Saurbaugh*, 122 Ind. 208, following usual avocation; *State v. Goff*, 20 Ark. 289, same; *Sellers v. Dugan*, 18 Ohio 489; Com. v. Nesbit, 43 Pa. St. 398; *New York Penal Code*, § 259 *et seq.*; Bishop on Crim. Law (4th ed.), §§ 939-40; *Fennell v. Ridler*, 5 B. & C. 407; 11 E. C. L. 262; *ILLEGAL SALES*, vol. 9, p. 928.

A person keeping a shop in which he sells meat and vegetables is within the *Arkansas* act which forbids any one "to keep open any store or retail any goods, wares, or merchandise on Sunday." *Petty v. State* (Ark. 1893), 22 S. W. Rep. 654.

The *New York* statute forbidding exposure of goods for sale has been held not to prohibit private transfers of property. *Boynton v. Page*, 13 Wend. (N. Y.) 425. And this notwithstanding contracts for work on Sunday are held void. *Watts v. Van Ness*, 1 Hill (N. Y.) 76.

A similar distinction prevails in *Ohio* and *California*. *Bloom v. Richards*, 2 Ohio St. 387; *Moore v. Murdock*, 26 Cal. 514.

In *Massachusetts*, Jews and other seventh-day observers are allowed to labor but not to expose to sale goods, wares, etc. *Com. v. Hyneman*, 101 Mass. 30; *Com. v. Has*, 122 Mass. 40.

In *New Hampshire*, only such work is prohibited by statute as is to the disturbance of others; and under this it is held that a pleading to be good must allege the work to be to the disturbance of others. *Varney v. French*, 19 N. H. 233; *Clough v. Shepherd*, 31 N. H. 490.

Under the *Illinois* Code it is said that labor to be punishable must constitute a disturbance of the peace and good order of society, and that in order to convict such disturbance it must be proved beyond a reasonable doubt. *Johnson v. People*, 42 Ill. App. 594.

In *Schneider v. Sansom*, 62 Tex. 201; 50 Am. Rep. 521, it was held that though the *Texas* statute prohibited sales on Sunday, a sale of partnership goods to pay a debt might be made on Sunday as a work of necessity. *Sed quare*.

Business.—For a definition of "business," within the meaning of the statutes, see *BUSINESS*, vol. 2, pp. 699, 700.

See also *infra*, this title, *Sunday Contracts*.

The loan of money is "business" within the statutes; hence if made on Sunday it is presumptively illegal and a promise to repay, whether verbal, in writing, or implied, cannot be enforced. *Troewert v. Decker*, 51 Wis. 46; 37 Am. Rep. 808; *Meador v. White*, 66 Me. 90; 22 Am. Rep. 551; *Finn v. Donahue*, 35 Conn. 216; *Tamplin v. Still*, 77 Ala. 374.

Labor.—As to what constitutes "laboring" within the meaning of the Sunday statutes, see generally the instances cited throughout this section. See also *Quarles v. State* (Ark. 1891), 17 S. W. Rep. 269; 14 L. R. A. 192; *infra*, this title, *Sunday Contracts*.

Buying and Selling.—The giving and taking a mortgage of property is not "buying or selling" within the meaning of Sunday statutes. *Wilt v. Lai*, 7 U. C., Q. B. 535. See also *Hellams v. Abercrombie*, 15 S. Car. 110; 40 Am. Rep. 684.

Drug Stores.—For reasons of public necessity an exception is usually made in favor of drug stores, so that they are allowed to be kept open a certain portion of the day. But one's keeping open a drug store does not allow him to sell other articles usually kept in a drug store besides medicines—*e. g.*, soda water as a beverage; cigars, tobacco, etc., and if a druggist sells liquors he must close his store on Sunday. *Splane v. Com.* (Pa. 1888), 12 Atl. Rep. 431; *Elkin v. State*, 63 Miss. 129; *Com. v. Marzynski*, 149 Mass. 68; *People v. Scranton*, 61 Mich. 244; *Todd v. State* (Tex. App. 1892), 18 S. W. Rep. 642, sale of Florida water. Tobacco is not a "drug" nor "medicine" within the statutory exception allowing the sale of such articles on Sunday. *State v. Ohmer*, 34 Mo. App. 115; 11 Crim. Law Mag. 378.

Saloons.—The keeping open of saloons has been made the subject of a special prohibition in most statutes regulating the observance of Sunday. See *INTOXICATING LIQUORS*, vol. 11, p. 610, 691.

Bakers.—An exception is usually made in favor of bakers, they being considered to be engaged in a work of necessity. But in order to come within the exception one must be a *bona-fide* baker, and not merely one who sells pastry, etc., not of his own making. *Com. v. Crowley*, 145 Mass. 430. See also *Crepps v. Durden*, 2 Cowp. 640; 1

Smith's L. Cas. (8th ed.) *711; *Rex v. Younger*, 5 T. R. 449.

Hotel Keepers.—Hotel keepers are usually allowed to keep open a stand for the purpose of selling cigars, tobacco, etc., to transient guests, that being a part of the duty in providing for guests. *Mueller v. State*, 76 Ind. 310; 40 Am. Rep. 245; *disapproving Carver v. State*, 69 Ind. 61; 35 Am. Rep. 205; *Com. v. Moore*, 145 Mass. 244; *Hall v. State*, 4 Harr. (Del.) 132; *Wilkinson v. State*, 59 Ind. 416; 26 Am. Rep. 84.

Travelers.—Under statutes prohibiting the sale of beer, etc., by innkeepers on Sunday, except to "travelers," and certain others, the question has arisen as to who are "travelers" within the meaning of the statute. In *Atkinson v. Sellers*, 5 C. B., N. S. 448; 94 E. C. L. 447, in defining the term, it is said: "Of course a man could not be said to be a traveler who goes to a place merely for the purpose of taking refreshment. But if he goes to an inn for refreshment in the course of his journey, whether of business or of pleasure, he is entitled to demand refreshment and the innkeeper is justified in supplying it." See *Peplon v. Richardson*, L. R., 4 C. P. 168.

In *Taylor v. Humphries*, 17 C. B., N. S. 539; 112 E. C. L. 539; 10 C. B., N. S. 429; 100 E. C. L. 429, it is held that persons walking in a town on Sunday morning to enjoy the country air and taking refreshment at an inn, though only two miles from their residence, are "travelers." See also *Fisher v. Howard*, 10 Cox C. C. 144.

As to who are travelers, within the meaning of statutes prohibiting traveling on Sunday, see *infra*, this title, *Effect of Violation of Sunday Laws*. *Leslie v. Lewiston*, 62 Me. 468.

Interstate Commerce.—It is difficult to say to what extent a state statute is operative upon carriers engaged in the transportation of goods or passengers. If the transportation is to be carried on wholly within state limits, there is no question. *Louisville, etc., R. Co. v. State*, 66 Miss. 662; *affirmed* 133 U. S. 587; 41 Am. & Eng. R. Cas. 36. But where the trains are run in more than one state, it seems well settled that the power to interfere or regulate such transportation belongs to Congress alone, and it must remain free and untrammelled until Congress acts upon it. The subject, however, is by no means free from doubt. See *INTERSTATE*

COMMERCE, vol. 11, p. 539; *EXPRESS COMPANIES*, vol. 7, p. 580; *POLICE POWER*, vol. 18, p. 761; *Carton v. Illinois Cent. R. Co.*, 59 Iowa 148; 6 Am. & Eng. R. Cas. 305; 44 Am. Rep. 672; *Dinsmore v. Board of Police*, 12 Abb. N. Cas. (N. Y.) 439; *Adams Express Co. v. Board of Police*, 65 How. Pr. (N. Y.) 72; *Philadelphia, etc., R. Co. v. Lehman*, 56 Md. 209; 6 Am. & Eng. R. Cas. 194; 40 Am. Rep. 415; *Wells v. Northern Pac. R. Co.*, 23 Fed. Rep. 469; 18 Am. & Eng. R. Cas. 441.

United States Mails.—It is upon the same principle, that a state may not interfere with a carrier engaged in carrying the *United States* mail. *Com. v. Knox*, 6 Mass. 76.

The *Mississippi Code* (1880), § 2949, prohibits the transaction of secular business within the state on Sunday, but contains a proviso "that nothing in this section shall apply to railroads or steamboat navigation in this state." It was held that the business of a wharfboat association is embraced within the proviso; also that though such an association was not bound to transact business on Sunday merely because the statute permitted it, yet if it is its custom to transact business on that day, it cannot escape liability for a failure or neglect to carry on business properly on the ground that such failure occurred on Sunday. *Wharfboat Assoc. v. Wood*, 64 Miss. 661.

Running Freight Trains.—An officer of a railroad, whose duty it was to control the running of trains, was indicted under the *Georgia Code*, § 4578, forbidding the running of freight trains on Sunday. It was held that it was no defense to the indictment to show that the company had issued general rules in accordance with the statute, without also showing that the trains in question had been run without the sanction and knowledge of the officer indicted. *Heard v. State* (Ga. 1893), 17 S. E. Rep. 857. And it was held that under this statute the burden of providing justification was upon the defendant. *Jackson v. State*, 88 Ga. 787. The statute makes an exception in favor of trains which are started on Saturday night, permitting them to continue until they reach their destination, if they do so before 8 o'clock on Sunday morning. It was held that a train started at 12:50 Sunday morning did not fall within this exception. *Jackson v. State*, 88 Ga. 787.

the prohibitions, and this is usually regarded as authorizing the making of contracts on Sunday.¹

Sunday statutes are not to be classed as penal statutes, though they are so regarded in some jurisdictions; they are remedial in their nature, being *pro bono publico*, and therefore are not to receive a strained construction. Thus, under provisions against the opening of stores and places of business on Sunday, a person may be held guilty of a violation of the statute, although but a single person may have had access to the store, and that through a private entrance.² The object of Sunday legislation is to make Sunday a day of rest, and to prevent private citizens from being

1. See *infra*, this title, *Sunday Contracts*.

2. See, as to construction of Sunday statutes, *infra*, this title, *Rule of Construction*.

To keep open, in the sense of Sunday statutes, implies a readiness to carry on the usual business in the store, shop, or saloon, and, if this business is not within the exceptions of the statute, the offense is committed, *Lynch v. People*, 16 Mich. 472. See also *Seelig v. State*, 43 Ark. 96; *Snider v. State*, 59 Ala. 64; *Kurtz v. People*, 33 Mich. 279, requirement that saloons shall be "closed" means that the sale of liquor shall stop entirely; *Dixon v. State*, 76 Ala. 89; *Com. v. Harrison*, 11 Gray (Mass.) 308; *People v. Cox*, 70 Mich. 247; *Bishop's Crim. Law* (4th ed.), § 942.

See generally on this immediate subject *State v. Fernandez*, 39 La. Ann. 538. The fact that one keeps a restaurant in his back room does not give him the right to keep open a saloon in front under the plea of entertaining guests. *People v. Cox*, 70 Mich. 247; *Warwick v. State*, 48 Ark. 27; *Pierce v. State*, 109 Ind. 535.

Under the *Massachusetts* statute making it an offense to keep open a shop or workhouse for the purpose of doing business therein, it is immaterial what the business may be. *Com. v. Osgood*, 144 Mass. 362. The offense of keeping open a store door on Sunday may be committed by leaving the door partly open or intentionally unlocked, or by opening to admit one who knocks. *Seelig v. State*, 43 Ark. 96. But merely keeping the doors open without engaging in traffic is not an offense. *Snider v. State*, 59 Ala. 64.

The offense of keeping "open store" on Sunday, in violation of section 4445, of *Alabama Code* (1876), is not shown

by proof of a single sale of liquor because of sickness in purchaser's family. *Dixon v. State*, 76 Ala. 89. Nor by the admission of a mistake when it is shown that no liquor was sold. *Miller v. State*, 68 Miss. 533.

Opening a bar-room on Sunday, not for the purpose of dispensing liquor, but in response to the knock of an officer who comes searching for a certain person, is not a violation of the Sunday statute; nor does the fact that a crowd followed the officer into the room alter the case. *Miller v. State*, 68 Miss. 533.

A saloon keeper who allows his bartender to enter the saloon on Sunday and help himself to a glass of beer is held to be guilty of the offense of "keeping open" his saloon on Sunday. *People v. Crowley* (Mich. 1892), 51 N. W. Rep. 517. So also of one who receives his friends in his office, connected by an arched way with his bar in another building. *People v. Hughes* (Mich. 1892), 51 N. W. Rep. 518. See also *People v. Ringsted* (Mich. 1892), 51 N. W. Rep. 519; *Cooper v. State* (Ga. 1892), 14 S. E. Rep. 592.

It is not essential to a conviction for keeping open a saloon on Sunday to show that the doors stood open or ajar; it is sufficient if it be shown that customers were admitted by a side door, kept closed but not locked. *Whitcomb v. State* (Tex. App. 1891), 17 S. W. Rep. 258.

In *Com. v. McNeese* (Mass. 1892), 30 N. E. Rep. 1021, it appeared that when the officers entered the defendant's premises they found four pails of freshly-drawn beer, a bottle of whisky and a glass on the counter; there were a number of persons in the room, and two bar-keepers in their shirt sleeves. The defendant offered various excuses, and said that he had instructed his

disturbed in their enjoyment of the day by others practicing their ordinary trades and pursuits or indulging in disturbing or boisterous amusements.¹

All acts of common labor and work of every character, except such as are of necessity or charity, are prohibited. It was at one time attempted to make a distinction between work of one's usual ordinary calling and that which was not, the cases holding that only work of the former kind was prohibited. But this distinction does not now generally obtain.²

bar-keepers not to sell on Sunday. It was held that a conviction should not be disturbed.

1. See *Com. v. Jeandell*, 2 Grant's Cas. (Pa.) 506; *Varney v. French*, 19 N. H. 233.

In *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803, Green, C. J., said: "While I am thus resting on the Sabbath in obedience to the law, it is right and reasonable that my rest should not be disturbed by others. Such a disturbance by others of my rest is in its nature a nuisance which the law ought to punish; and Sabbath breaking has been frequently classed with nuisances and punished as such."

As to *New Hampshire*, see *Clough v. Shepherd*, 31 N. H. 490; *Varney v. French*, 19 N. H. 233.

2. **Ordinary Calling.**—The English cases at one time made a distinction between work of one's ordinary calling and that which is not, considering only the former to be prohibited. See *ORDINARY*, vol. 17, p. 272; *Bloxsome v. Williams*, 3 B. & C. 232; 10 E. C. L. 60; *Rex v. Whitmarsh*, 7 B. & C. 596; 14 E. C. L. 100; *Drury v. Defontaine*, 1 Taunt. 131; *Swann v. Browne*, 3 Burr. 1595; *Scarfe v. Morgan*, 4 M. & W. 270; *Adams v. Gay*, 19 Vt. 365 (where Redfield, J., adverts to this distinction as made in *England*); *Amis v. Kyle*, 2 Yerg. (Tenn.) 31; 24 Am. Dec. 463. See also *Bloom v. Richards*, 2 Ohio St. 389; *Boynton v. Page*, 13 Wend. (N. Y.) 425; *Hellams v. Abercrombie*, 15 S. Car. 110; 40 Am. Rep. 684; *O'Donnell v. Sweeney*, 5 Ala. 467; 39 Am. Dec. 338.

But such a distinction is not generally recognized in the *United States*. Thus, in *Kepner v. Keefer*, 6 Watts (Pa.) 233; 31 Am. Dec. 460, it was said: "The words of our statutes are much more comprehensive than those of the statute of 29 Car. II, § 1, and are sufficient to embrace every species of worldly business not therein speci-

cally excepted whether it appertains to a person's ordinary calling or not." And this is the view sustained in many other cases. See *Splane v. Com.* (Pa. 1888), 19 Atl. Rep. 434; *Johnston v. Com.*, 22 Pa. St. 113; 2 *Parsons on Contracts* (7th ed.), 759; *Benjamin on Sales* (4th Am. ed.), § 557. Compare *Sanders v. Johnson*, 29 Ga. 526; *Swann v. Swann*, 21 Fed. Rep. 299; 24 Am. L. Reg., N. S. 378.

What constitutes such an offense must, as said by Grier, J., depend upon the peculiar legislation and customs of each state. *Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co.*, 23 How. (U. S.) 209.

Thus the making of a replevin bond has been held to be included within the term "common labor," and therefore such bond is void if made on Sunday. *Link v. Clemmens*, 7 Blackf. (Ind.) 479.

Gaming does not come within the term "common labor," nor is it work of one's usual or ordinary calling. *State v. Conger*, 14 Ind. 396.

The *New Hampshire* statute prohibits all "secular labor," and this includes all labor, whether of an ordinary calling or not, unless it be of necessity or charity. See *Frost v. Hull*, 4 N. H. 157; *Towle v. Larrabee*, 26 Me. 468.

The putting in of telegraph instruments and establishing an office on Sunday, on a railroad where the movement of trains are directed by telegraph, and fewer trains are run on Sunday than during the week, is illegal under *Mansf. (Ark.) Dig.*, § 883, imposing a penalty for laboring on Sunday, where it appears that the work might have been done on another day without any great delay or hindrance to travel. *Cleary v. State* (Ark. 1892), 19 S. W. Rep. 313.

Newspapers.—Issuing, publishing, and circulating newspapers was held in the recent case of *Com. v. Mathews*,

Horse-racing, theatricals, hunting and fishing, ball games, and card playing are prohibited on Sunday; in some jurisdictions the prohibition is extended to traveling for pleasure.¹

152 Pa. St. 166, to be a performance of a worldly employment within the meaning of the *Pennsylvania* Act of April 22, 1794. The court referred to the fact that it was nearly a hundred years since that enactment, and that it was hardly likely that the framers of the act contemplated the possibility of Sunday newspapers, but that, as they were not an exception, and were a convenience and not a charity or necessity, they fell within the purview of the act.

But as a matter of fact in almost every state there is an exception in favor of Sunday newspapers. See Laws of *New York*, 1871, ch. 702, § 1; 3 *New York* Rev. Stats. (Birdseye), 2845.

A contract for advertising in a Sunday newspaper may fall within the prohibition against contracts made on Sunday. See *infra*, this title, *Sunday Contracts*. See also *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188; *Scammon v. Chicago*, 40 Ill. 146; *Smith v. Wilcox*, 24 N. Y. 354; 82 Am. Dec. 302; *aff'd* 25 Barb. (N. Y.) 341.

1. *Sports, Theatres, etc.*—*Gunter v. State*, 1 Lea (Tenn.) 129 (hunting and fishing); *Rucker v. State*, 67 Miss. 328 (card playing); *New York* Penal Code, § 265; *Gunn v. State* (Ga. 1892), 15 S. E. Rep. 458; *Com. v. Hallahan*, 143 Mass. 167; *Menserdorff v. Dwyer*, 69 N. Y. 557 (constitutionality of law against Sunday theatres upheld). Rev. Stat. of *Missouri*, § 1580, prohibits horse-racing, cock-fighting, or playing at cards or games of any kind on Sunday. The prohibition was held to include base ball. *State v. Williams*, 35 Mo. App. 541. But not certain other athletic sports. *St. Louis Agricultural, etc., Assoc. v. Delano*, 37 Mo. App. 284, *aff'd* 18 S. W. Rep. 1101.

Baseball is "sporting" within the *Nebraska* Code. *State v. O'Rouk*, 35 Neb. 614.

It was held in *St. Joseph v. Elliott*, 47 Mo. App. 418, that a theatre was a "place of business," within a city ordinance providing that no person should keep his place of business open on Sunday.

Hunting on one's own land, it seems, is not forbidden if it be not to the disturbance of others. *State v. Peters*, 51 N. J. L. 244. Compare *State v. Car-*

penter, 62 Mo. 594. See also Sunday Law Cases, 30 Tex. 521 (hunting on Sunday held to be a misdemeanor).

Nor is riding merely for exercise prohibited. *Sullivan v. Maine Cent. R. Co.*, 82 Me. 196.

New York Penal Code, § 265, prohibits "all shooting, hunting, or fishing, playing, horse racing, gambling, or other public sports, exercises, pastimes or shows." Under this it is held that only public games are prohibited, and that, therefore, a quiet game of ball by three men without noise or disturbance was not a violation of the statute. *People v. Dennin*, 35 Hun (N. Y.) 327. But while only public games are forbidden, the inhibition extends to all hunting or fishing; therefore, one who fishes on Sunday in a private pond without creating any disturbance or attracting public attention, is nevertheless guilty of a violation of the statute. *People v. Moses*, 65 Hun (N. Y.) 161.

As to the accuracy of an indictment for the offense of card playing, see *Com. v. Hallahan*, 143 Mass. 167.

What Constitutes.—Playing at cards or dice on Sunday is not within a prohibition against farces or plays of any kind, or any games, tricks, juggling or any such like exhibition on that day. The statute refers to public exhibitions. *Mississippi* Code, 1880, § 2951; *Rucker v. State*, 67 Miss. 328.

The manager of a public theatre who sells tickets for his entertainment and superintends its performance in his theatre, is guilty of "laboring" on Sunday within the meaning of the *Arkansas* statute. *Quarles v. State* (Ark. 1891), 17 S. W. Rep. 269; 14 L. R. A. 192.

A place duly and honestly registered as a place of public worship (though that worship is not according to any established or usual form) in which no music except sacred music is performed or sung, where nothing dramatic is introduced, where the discourses delivered are intended to be instructive and contain nothing hostile to religion; where the object of the promoters may be either to advance their own views of religion, or, as they allege, "to make science the handmaid of religion," was not considered a place

A railroad company has been indicted for running its trains on Sunday.¹

The keeping open of saloons and the giving away or selling of intoxicating liquors on Sunday is made the subject of a special prohibition in most of the statutes relating to Sunday observance.²

"used for public entertainment or amusement" within an English statute (21 Geo. III, ch. 49), prohibiting the opening of such places on the Lord's Day. The fact that payment was required for a reserved seat, the doors being opened gratuitously, does not alter the case. *Baxter v. Langley*, 38 L. J. M. C. 1; L. R. 4 C. P. 21; 19 L. T. N. S. 321; 17 W. R. 254.

An incorporated company was the owner of Brighton Aquarium, a building consisting of chambers below the ground and a terrace above. The chief part was used as an aquarium, filled with glass tanks for the exhibition of marine fish and animals. It was open to the public on Sundays upon the payment of 6d. for each person. A band played sacred music on Sundays and programmes were issued stating what music the bands would play and when the fish would be fed. It was held that such was a place of public entertainment within the meaning of the Sunday statute (21 Geo. III, ch. 49, § 1). *Warner v. Brighton Aquarium Co.*, L. R. 10 Exch. 291; 14 Moak's Rep. 578; 44 L. J. Exch. 175, note; S. P. Terry v. Brighton Aquarium Co., L. R., 20 Q. B. 306; 44 L. J. M. C. 173; 32 L. T. N. S. 558.

Public Library.—It was held in *Re Granger*, 7 Phila. (Pa.) 350, that the closing of the public libraries on Sunday was in harmony with the spirit of the Sunday law of *Pennsylvania*.

1. *State v. Baltimore*, etc., R. Co., 15 W. Va. 362; 36 Am. Rep. 803 *et seq.*, where the subject is reviewed; *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 434.

Under a later Sunday statute in *West Virginia* (Code, 1887, ch. 149, §§ 16, 17) it is held that no indictment can be sustained against a railroad company for running its trains on Sunday. *State v. Norfolk*, etc., R. Co., 33 W. Va. 440; 43 Am. & Eng. R. Cas. 330.

A railroad or steamboat company is not obliged to carry passengers or freight or to transact other business on Sunday merely because the statute allows it to do so. *Merchants' Wharfeboat*, etc., Assoc. v. Wood, 64 Miss. 661; 60 Am. Rep. 76; *Walsh v. Chi-*

cago, etc., R. Co., 42 Wis. 23. And when it agrees to carry passengers on that day it acts in the capacity of a private contractor, not as a common carrier, and for a breach of duty may be sued in contract only, not in tort.

In *Walsh v. Chicago*, etc., R. Co., 42 Wis. 23; 24 Am. Rep. 376, a party contracted with a carrier to be conveyed to and from a given place on Sunday. The carrier failed to bring him back as agreed on. In a suit for damages it was held that nothing more than damages for a breach of contract could be recovered, and not damages for a tort. The carrier could not be made liable for a breach of his general duty as a public carrier, since not being obliged to carry passengers on Sunday he acted purely in a private capacity. See also *NEGLIGENCE*, vol. 16, p. 476.

2. Sale of Intoxicating Liquors — Saloons.—See Rev. Stat. *Indiana*, § 2099; *State v. Sharrer*, 2 Coldw. (Tenn.) 323; *INTOXICATING LIQUORS*, vol. 11, pp. 610, 691; *State v. Bott*, 31 La. Ann. 663; 33 Am. Rep. 224; *State v. Court of Com. Pleas*, 36 N. J. L. 72; 13 Am. Rep. 422; *State v. Ambts*, 20 Mo. 215; *Palmer v. State*, 2 Oregon 66; *State v. Francis*, 95 Mo. 44. Compare *State v. Brooksbank*, 6 Ired. (N. Car.) 173; *State v. Huffschtmidt*, 47 Mo. 73.

Under the *Wisconsin* statute, forbidding "tavern-keepers" or "other persons" to sell liquor on Sunday, the words "other persons" are construed to mean those whose business it was, in part at least, to sell liquor. *Jensen v. State*, 60 Wis. 577.

Evidence that a person entered defendant's saloon on Sunday, in defendant's sight, and went behind the bar and helped himself to a glass of whiskey, is sufficient to sustain a conviction for giving away intoxicating liquors on Sunday for beverage purposes. *Baker v. State*, 2 Ind. App. 517.

Under the *Missouri* statute the keeping open of an ale house and the selling of ale constitute two distinct offenses. *State v. Ambts*, 20 Mo. 214.

In *Cortsey v. Territory* (N. Mex. 1892), 30 Pac. Rep. 947, it was held that

3. Exceptions—*a.* WORKS OF NECESSITY OR CHARITY.—In statutes prohibiting work or labor on Sunday there is usually an exception made in favor of works of necessity or charity; an ordinance without this exception has been held invalid.¹ As to what constitutes a work of necessity or charity there have been numerous decisions; and the question, often depending, as it does, upon the peculiar circumstances of each case, cannot be determined always by the application of fixed rules, but must be left largely to the determination of the jury from the evidence.²

A definition of a work of necessity which has often been quoted and applied is that laid down by the *Massachusetts* court: “. . . by a work of necessity is not meant a physical and absolute necessity; but any labor, business, or work which is morally fit and proper to be done on that day (*i. e.*, Sunday) under the circumstances of the particular case.”³ The necessity must be a real

the sale of intoxicating liquor was prohibited by the general statute of the territory, notwithstanding the omission from that act of a provision of a prior act forbidding buying or selling or keeping open any store, etc.

1. *Canton v. Nist*, 9 Ohio St. 439. The statute of *Ohio* made an exception in favor of works of necessity or charity, and a city ordinance prohibiting all labor without exception was considered void.

In *Ex p. Westerfield*, 55 Cal. 550; 36 Am. Rep. 47, a Sunday statute was held unconstitutional because it prohibited the performance of a work of necessity (baking bread) on Sunday.

2. **Question for the Jury.**—*State v. Knight*, 29 W. Va. 343; *Ungericht v. State*, 119 Ind. 380; *Whitcomb v. Gilman*, 35 Vt. 297; *Sayre v. Wheeler*, 32 Iowa 559; 20 Am. L. Rev. 755; *Com. v. Gillespie* (Pa. 1892), 23 Atl. Rep. 393. See also *Reg. v. Silvester*, 10 Jur., N. S. 360; 33 L. J. M. C. 79; **QUESTIONS OF LAW AND FACT**, vol. 19, p. 647.

In *Johnston v. Com.*, 22 Pa. St. 108, Woodward, J., said: “It is impossible to lay down any general rule as to works of charity and necessity. If the works enumerated in the proviso of the statute be taken as a legislative sample of works of necessity, it might be said, in general, that supplying the ordinary demands of our physical natures and relieving from situations of peril and exposure are necessary acts, which incur no blame; and perhaps all would agree, that visiting and administering to the sick and destitute, and labors for the spiritual welfare of men, are works both of charity and necessity.

Certain it is, that against such there is no law, and they may be performed on any day. Still the exigencies of human life which demand works of charity and necessity are so numerous and so diversified by attending circumstances as to defy classification, and to forbid the attempt to prescribe a general rule. The best we can do is to judge of cases as they arise, and to treat them as within the prohibition, or the saving clauses of the statute according to the specific features which each presents.”

3. *Wilde, J.*, in *Flagg v. Milbury*, 4 Cush. (Mass.) 243; *approved* in *Johnston v. People*, 31 Ill. 469. See also *Morris v. State*, 31 Ind. 189; *McClary v. Lowell*, 44 Vt. 116; 8 Am. Rep. 366; *Yonoski v. State*, 79 Ind. 393; 5 Am. & Eng. R. Cas. 40; 41 Am. Rep. 615; *Hennersdorf v. State*, 25 Tex. App. 597; *Hazard v. Day*, 14 Allen (Mass.) 486; 92 Am. Dec. 790; *Doyle v. Lynn*, etc., R. Co., 118 Mass. 197; 19 Am. Rep. 431; *Nelson v. State*, 25 Tex. App. 599.

In *Com. v. Knox*, 6 Mass. 76, the court, by Parsons, C. J., observed: “By necessity there cannot be understood physical necessity, for a case in which a man is physically obliged to travel can hardly be imagined. But a moral fitness or propriety of traveling under the circumstances of any particular case may be deemed necessity within this section;” *approved* in *Morris v. State*, 31 Ind. 189.

Many other definitions of works of necessity have been given. Thus, in *McGatrick v. Wason*, 4 Ohio St. 566, Thurman, C. J., observed: “Nor will it do to limit the word ‘necessity’ to

and not a fancied one; there must not be merely an honest belief on the part of the defendant that the necessity exists, but the actual existence of the necessity must be shown.¹ Nor does the exception embrace work which is merely convenient but not necessary.²

those cases of danger to life, health, or property which are beyond human foresight or control. On the contrary, the necessity may grow out of, or, indeed, be incident to, a particular trade or calling, and yet be a case of necessity.

Hence the danger of navigation being closed may make it lawful to load a vessel on Sunday, if there is no other time to do so;" quoted and approved in *Morris v. State*, 31 Ind. 189; *Com. v. Louisville*, etc., R. Co., 80 Ky. 291; 44 Am. Rep. 475. See also *Philadelphia*, etc., R. Co. v. *Philadelphia*, etc., Towboat Co., 23 How. (U. S.) 209.

The *Kentucky* statute provides "no work, etc., shall be done . . . except the ordinary household offices, or other works of necessity or charity." It is held that the expression "or other works," etc., exempts from the penalty for violation one whose work is a necessity to others—*e. g.*, a brakeman on a railroad, an apothecary, dairyman, or hotel keeper. *Com. v. Louisville*, etc., R. Co., 80 Ky. 291; 44 Am. Rep. 475.

In *Com. v. Sampson*, 97 Mass. 409, the court, by Hoar, J., said: "To save life or prevent or relieve suffering, and this in the case of animals as well as men; to prepare needful food for man and beast; to save property, as in the case of fire, flood or tempest or other unusual peril, would unquestionably be acts falling within the exception. But it is no sufficient excuse for work on the Lord's Day that it is more convenient or profitable if then done than it would be to defer or omit it." In this case it was held that the gathering of seaweed on Sunday was not a work of necessity, although it was probable that the seaweed would have floated away and been lost if not then gathered.

1. *Johnson v. Irasburgh*, 47 Vt. 28; 19 Am. Rep. 111; *Troewerd v. Decker*, 51 Wis. 46; 37 Am. Rep. 808; *Hinckley v. Penobscot*, 42 Me. 89; *Hooper v. Edwards*, 18 Ala. 280; *Morris v. State*, 31 Ind. 189; *Wharton's Crim. Law* (8th ed.), § 88.

2. *Works of Necessity*.—In *Johnston v. Com.*, 22 Pa. St. 102, it was held

that a person who drove an omnibus on Sunday for public travel was guilty of a violation of the statute; the running of an omnibus line on Sunday might be a great convenience, but it would not be embraced within the exception in favor of works of necessity or charity. See also *Cleary v. State* (Ark. 1892), 19 S. W. Rep. 313; *Com. v. Jeandell*, 2 Grant's Cas. (Pa.) 506.

A contract by a son for the hiring of a horse in order to visit his father is one of necessity. *Logan v. Mathews*, 6 Pa. St. 417.

A maid traveling in order seasonably to prepare her master's breakfast is traveling from necessity. *Crosman v. Lynn*, etc., R. Co., 121 Mass. 301.

A woman's traveling to procure medicine for her sick but convalescing child is a necessity. *Gorman v. Lowell*, 117 Mass. 65.

Other examples of works of necessity are: Traveling to visit a friend known to be sick and believed to be in need of assistance. *Doyle v. Lynn*, etc., R. Co., 118 Mass. 195; 19 Am. Rep. 431; *Cronan v. Boston*, 136 Mass. 384; traveling to visit one's children properly away from home, *McClary v. Lowell*, 44 Vt. 116; 8 Am. Rep. 366; baking provisions for customers or for home consumption, *Rex v. Cox*, 2 Burr. 787; *Rex v. Younger*, 5 T. R. 449; *Crepps v. Durden*, 2 Cowp. 641; 1 Smith's L. C. (8th ed.) 1080.

If property be exposed to imminent danger or peril, it is a work of necessity to preserve it, and work in pursuance of such object is of necessity. *Parmalee v. Wilks*, 22 Barb. (N. Y.) 540.

Therefore, the handling or gathering of material liable to be spoiled or lost by decay—*e. g.*, maple water, hay about to be exposed to rain, ripe grain, etc., or shipping articles when they could not be received on a later day on account of the danger to navigation—is a work of necessity and may be done on Sunday. *Morris v. State*, 31 Ind. 189; *Crocket v. State*, 33 Ind. 416; *Wilkinson v. State*, 59 Ind. 416; 26 Am. Rep. 84; *Johnson v. People*, 42 Ill.

App. 594; *Whitcomb v. Gilman*, 35 Vt. 297; *McGatrick v. Wason*, 4 Ohio St. 566; *Turner v. State*, 67 Ind. 595. Compare, however, *Pate v. Wright*, 30 Ind. 476; 95 Am. Dec. 705, where it was held that the delivery of flour on board a steamboat on Sunday in order to prevent delay by the closing of navigation, was not a work of necessity. Hoeing in one's field on Sunday is not a work of necessity, *Com. v. Josselyn*, 97 Mass. 411; nor is hay-making, *Reg. v. Cleworth*, 4 B. & S. 926. Nor is the repairing of a mill on Sunday, to save a work day, a necessity, *Hamilton v. Austin*, 62 N. H. 575. Running an ice factory is a necessity, since a loss of twenty-four hours on Monday must result from its stoppage on Sunday, *Hennersdorf v. State*, 25 Tex. App. 597; so of a blast furnace, *Manhattan Iron Works Co. v. French*, 12 Abb. N. Cas. (N. Y.) 446. Shoeing stage horses used by a company in transporting *United States* mails is a work of necessity, when it is necessary in order that the trip may be made on schedule time, *Nelson v. State*, 25 Tex. App. 599. See also *Jones v. Norwich, etc., Transp. Co.*, 50 Barb. (N. Y.) 193.

Putting in a switch in a railway track in order to prevent eight hours' delay, has been held work properly done on Sunday. *Yonoski v. State*, 79 Ind. 393; 5 Am. & Eng. R. Cas. 40; 41 Am. Rep. 614.

It has been held a work of necessity for one partner to sell the entire stock of the firm on Sunday, in order to pay its debts in good faith. *Schneider v. Samson*, 62 Tex. 201; 50 Am. Rep. 521.

The lock-keeper of a canal may attend to his duties on Sunday; they are a work of necessity. *Murray v. Com.*, 24 Pa. St. 270; *People v. Lyons*, 5 Hun (N. Y.) 643.

To repair a highway, *Flagg v. Millbury*, 4 Cush. (Mass.) 243; carry the mail, *Com. v. Knox*, 6 Mass. 76; or walk or drive for exercise, *Barker v. Worcester*, 139 Mass. 74; *Sullivan v. Maine Cent. R. Co.*, 82 Me. 196; *Nagle v. Brown*, 37 Ohio St. 7; to attend a funeral; *Horne v. Meakin*, 115 Mass. 326; to contract for the relief of a sick pauper, *Aldrich v. Blackstone*, 128 Mass. 148; to pilot in a vessel, *Perkins v. O'Mahoney*, 131 Mass. 546; to bring home a cook, *Crosman v. Lyon*, 121 Mass. 301; to carry home a visitor, *Buck v. Biddeford*, 82 Me. 433; to drive one's master to church, *Com. v. Nesbit*, 34 Pa. St.

398, have been held works of necessity or charity.

In *Van Auken v. Chicago, etc., R. Co.* (Mich. 1893), 55 N. W. Rep. 971, it was held that riding peacefully from the station to the plaintiff's home was not an infraction of the *Michigan* statute.

In *Donovan v. McCarty*, 155 Mass. 543, it appeared that an assignment of certain bank accounts was executed at a hospital by a woman eighty years old who had been taken there because of severe injuries. The suit was in equity to cancel the assignment, on the ground that it was executed on Sunday. It was held that a decree dismissing the bill should not be reversed on the appeal, because a finding might rightly have been made that the execution of the assignment was a work of necessity or charity.

In *Powhatan Steamboat Co. v. Apomattox R. Co.*, 24 How. (U. S.) 247, it was held that the opening of a warehouse and the keeping and storing of goods on Sunday came within the exception of the *Virginia* statute.

Telegraphic Dispatches.—Whether the sending of a telegraphic dispatch on Sunday is a work of necessity or charity may depend upon circumstances. It has been held that a telegraph company is not bound to transmit a message on Sunday which does not on its face show that it relates to a matter of necessity or charity. *Western Union Tel. Co. v. Yopst* (Ind. 1887), 11 N. E. Rep. 16. See *infra*, this title, *Exceptions—Contracts of Necessity*. See also TELEGRAPHS AND TELEPHONES.

Running of Trains on Sunday.—Whether the running of railroad trains or of street cars is such a work of necessity as that it may be done on Sunday is still in question. The weight of authority, however, is in favor of its so being. *Com. v. Louisville, etc., R. Co.*, 80 Ky. 291; 44 Am. Rep. 475; *Augusta R. Co. v. Renz*, 55 Ga. 126.

To run trains on Sunday was at one time an indictable offense in *West Virginia*, though the rule is different now by statute. See *State v. Norfolk, etc., R. Co.*, 33 W. Va. 440; 43 Am. & Eng. R. Cas. 330; *supra*, this title, *Constitutionality of Sunday Statutes*. See also in this connection *Smith v. New York, etc., R. Co.*, 46 N. J. L. 7; 18 Am. & Eng. R. Cas. 399.

In the case of *Augusta R. Co. v. Renz*, 55 Ga. 126, it was said: "In view of the dependence of the people for

travel, in cities where street railways have been established, by that mode of conveyance in going to church, visiting the sick, etc., we are not prepared to hold that the running of street railroads in cities and in the vicinity thereof . . . on Sunday is not a work of necessity."

In Philadelphia, etc., *R. Co. v. Lehman*, 56 Md. 209; 6 Am. & Eng. R. Cas. 194; 40 Am. Rep. 415, it was held that the carrying forward of trains loaded with cattle was a work of necessity, and not illegal under the *Maryland* statute.

In *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 401, it was held that the running of trains on Sunday is not a work of necessity. So also in *Com. v. Jeandell*, 2 Grant's Cas. (Pa.) 506; 3 Phila. (Pa.) 504, and *Johnston v. Com.*, 22 Pa. St. 102, the running of an omnibus line on Sunday was held unlawful. This rule, however, has been changed by statute. See 2 Wharton's Crim. Law (8th ed.), § 1431a, note 7.

In *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 401, the subject of running trains, street cars, or other public conveyances on Sunday was considered at length. The preliminary opinion at *nisi prius* by Strong, J., the opinion of the court by Thompson, J., and the concurring opinion by Read, J., constitute a valuable contribution to the law of the subject. Although the running of trains on Sunday was in that case held unlawful under the *Pennsylvania* statute, the court evidently inclined to the opinion that in view of the beneficent effects to be derived from the operation of public conveyances on Sunday, particularly to the poorer people of crowded cities, the operation of such conveyances ought not to be inhibited.

Works Not of Necessity.—One's traveling simply in pursuance of a previous agreement is not of necessity. *Holcomb v. Danby*, 51 Vt. 438; *Jones v. Andover*, 10 Allen (Mass.) 18.

Carrying pleasure seekers to a picnic is a work neither of necessity nor charity. *Dugan v. State*, 125 Ind. 130.

Vending cigars is held not a necessity; but there is generally an exception in favor of hotel keepers. *Mueller v. State*, 76 Ind. 310; 40 Am. Rep. 245; *Anonymous*, 12 Abb. N. Cas. (N. Y.) 458. See also *Caspary v. State*, 14 Tex. App. 567. Nor is the sale of newspapers on Sunday a work of necessity. *Com. v. Matthews*, 22 Pittsb. L. J., N.

S. 309; *Com. v. Beck*, 22 Pittsb. L. J., N. S. 310.

The signing, delivering, or accepting an order, all on Sunday, in order to pay a debt due to one who wished to leave immediately, is not a necessity, and if done on Sunday is a violation of a statute which forbids the making of bargains and all kinds of trafficking on that day. *Mace v. Putnam*, 71 Me. 238. See also *Meador v. White*, 66 Me. 90; 22 Am. Rep. 551.

In *State v. Goff*, 20 Ark. 289, the defendant's grain was wasting from over-ripeness; he was too poor to buy an implement with which to cut it, and could borrow none until Saturday evening. He cut his grain on Sunday to save it. It was held that such work was not of necessity.

And it has been said that no work is one of necessity or charity, such as may be done on Sunday, when it might as easily have been done on a day previous. *Bucher v. Fitchburg R. Co.*, 131 Mass. 156; 41 Am. Rep. 216; 125 U. S. 555; *Holcomb v. Danby*, 51 Vt. 428.

A flow of two barrels of salt water per day into an oil well is not sufficiently injurious thereto to make the pumping of it out on Sunday a necessity, and to exempt the defendant from the penalty imposed by the Sunday law. *Com. v. Funk*, 9 Pa. Co. Ct. Rep. 277.

Barbers.—The business of a barber in shaving his customers is a matter of convenience and not a work of necessity or charity, and therefore it does not come within the exception. *Phillips v. Innes*, 4 C. & F. 234; 2 Rob. Prac. 400; *Com. v. Jacobus*, 1 Pa. Leg. Gaz. Rep. 491; 15 Cent. L. Jour. 145; *Com. v. Williams*, 1 Pearson (Pa.) 61; *Com. v. Waldman*, 140 Pa. St. 89; *Com. v. Dextra*, 143 Mass. 28; *State v. Schuler*, 23 Wkly. L. Bull. (N. Y.) 450; *Ungericht v. State*, 119 Ind. 379; *State v. Frederick*, 45 Ark. 347; 55 Am. Rep. 555.

A different view has been taken in *Tennessee*. *State v. Lorry*, 7 Baxt. (Tenn.) 95; 32 Am. Rep. 555. But a statute passed in April, 1891, required the closing of all barber shops on Sunday. And in *Richmond v. Moore*, 107 Ill. 439; 47 Am. Rep. 452, it is said, seemingly as a *reductio ad absurdum*: "Must a person be criminally punished for writing a letter to a friend on Sunday, or a barber for shaving his customer?"

Acts of charity are defined as those proceeding from a sense of moral duty, or kindness, or humanity; or for the relief and comfort of another and not for one's own benefit or pleasure. Under this are usually included attendance on divine services, acts to relieve the sick and suffering, and those having for their sole object the elevation of the moral and religious character of the community.¹

b. OTHER EXCEPTIONS—JEWS, SEVENTH-DAY ADVENTISTS, ETC.—Acts that are not calculated to disturb others, such as pleasure driving or riding for health, exercise, or recreation, are not

In *Stone v. Graves*, 145 Mass. 353, where an old and infirm man was shaved in his own house by a barber, it was held that there was no violation of the statute.

In *Ungericht v. State*, 119 Ind. 379, it was held that the question of whether the shaving was a work of necessity must be submitted to the jury. *Edgerton v. State*, 67 Ind. 588; 33 Am. Rep. 110.

In *State v. Frederick*, 45 Ark. 347, it was held that "The indictment need not allege that it was not a work of necessity or charity. The court will take judicial notice that the shaving of his customers by a barber is a worldly labor, or work done by him in the course of his ordinary calling, and not within the exceptions of the statute."

Repairing Mills.—In *Hamilton v. Austin*, 62 N. H. 575, it was held that repairing a mill on Sunday to prevent stoppage and loss of time on subsequent days is not a work of necessity. But a later statute of *New Hampshire*, ch. 93, Laws 1883, allows repairs to be made on Sunday "in mills and factories which could not be made on a week day without throwing many operatives out of employment."

In *McGrath v. Merwin*, 112 Mass. 467; 17 Am. Rep. 119, it was held that the clearing out of a wheel-pit on Sunday for the purpose of preventing the stoppage on a week day of mills which employed many hands, was not a work of necessity or charity under the *Massachusetts* statute.

Killing Animals.—In *State v. Knight*, 29 W. Va. 343, the defendant on Sunday drove an animal from a farm into town, and put it in a stable, intending to kill it at midnight. But while the animal was tied up in a stable, it broke one of its horns short off, and to save the meat, which he feared would become fevered, he butchered it on Sunday evening. It appeared

that the animal would not have died from such a hurt. The jury having found that such work was not of necessity, the court held that the verdict would not be disturbed, since it was fully warranted by the circumstances of the case.

1. *Doyle v. Lynn, etc.*, R. Co., 118 Mass. 195; 19 Am. Rep. 431; *McClary v. Lowell*, 44 Vt. 116; 8 Am. Rep. 366; *Bucher v. Cheshire R. Co.*, 125 U.S. 555.

Works of Charity.—The mere fact that one assists another gratuitously does not make his work one of charity. *McGrath v. Merwin*, 112 Mass. 467.

A person attending religious services is engaged in a work of charity. *Feital v. Middlesex R. Co.*, 109 Mass. 398; 12 Am. Rep. 720. In this case the meeting attended was a spiritualist camp-meeting, and the court held that whether to travel there was a work of necessity and charity or not was properly a question for the jury.

A contract by an overseer of the poor for the relief of a sick pauper is one of charity. *Aldrich v. Blackstone*, 128 Mass. 148.

In *Smith v. Watson*, 14 Vt. 331, it was held that the employment of a physician and a promise to pay him, was not unlawful because made on Sunday.

In *Doyle v. Lynn, etc.*, R. Co., 118 Mass. 195; 19 Am. Rep. 431, it was held that traveling for the purpose of visiting a friend known to be sick and thought to be possibly in need of assistance, was a work of charity.

In *Bucher v. Fitchburg R. Co.*, 131 Mass. 156, it was held that one who traveled on Sunday for the purpose of hastening a meeting with a sick sister, was not engaged in a work of charity or necessity. In this case, however, the evidence tended to show that the duty of the traveler to his sister was made subservient to his secular business. The case went to the *United States*

prohibited by the general policy of the Sunday statutes. Such riding or driving is generally not considered a violation of the prohibition against traveling on Sunday within the rule prevailing in some jurisdictions that one so traveling cannot recover for an injury caused by a defective street or a carrier's negligence.¹

As to whether Sunday laws operate equally upon all persons, not even excepting Jews, Seventh-Day Adventists, and others who believe another day to be holy and who conscientiously observe it as such, there are different usages in different states; the general rule, however, is that in the absence of specific provision therefor such persons are not excepted.² A statute making no

Supreme Court, where the judgment of the *Massachusetts* court was affirmed, on the ground that the decision of that court in regard to the construction of the local statute was conclusive. *Bucher v. Cheshire R. Co.*, 125 U. S. 555.

In *Allen v. Duffie*, 43 Mich. 1; 38 Am. Rep. 159, the court held that a church subscription made on Sunday was valid. And so in *Dale v. Knepp*, 98 Pa. St. 389; 38 Am. Rep. 165.

1. *Pleasure Riding or Driving.*—Mere walking or riding for health, recreation, or amusement, does not constitute "traveling," within the meaning of Sunday statutes. *Sullivan v. Maine Cent. R. Co.*, 82 Me. 196; *O'Connell v. Lewiston*, 65 Me. 34; 20 Am. Rep. 673; *Davidson v. Portland*, 69 Me. 116; 31 Am. Rep. 253; *Britton v. Cumington*, 107 Mass. 347; *Hamilton v. Boston*, 14 Allen (Mass.) 475. See also *Nagle v. Brown*, 37 Ohio St. 7; *Com. v. Nesbit*, 34 Pa. St. 398; *Sayre v. Wheeler*, 32 Iowa 559; *Rex v. Whitnash*, 7 B. & C. 596; 14 E. C. L. 100.

Compare *Dugan v. State*, 125 Ind. 130, where it is said that the carrying of persons to and from pleasure parties, the work in which the defendant was engaged, was not a work of necessity or charity.

2. *Sunday Laws as Affecting Jews, Seventh-Day Adventists, etc.*—In *Ohio*, *Nebraska*, *Iowa*, and some other states, persons who religiously believe another day to be holy and who observe it as such are exempt from the operation, either wholly or in part, of the Sunday laws. *Canton v. Nist*, 9 Ohio St. 439 (ordinance held void because it prohibited to Jews, etc., what state statute allowed); *Cincinnati v. Rice*, 15 Ohio 225; *Johns v. State*, 78 Ind. 332; 41 Am. Rep. 577; *Sayre v. Wheeler*, 31 Iowa 112; *Lieberman v. State*, 26 Neb. 464; *Ex p. Marx*, 86 Va. 40 (provided he does not compel an appren-

tice or servant not of his faith, to labor, and does not "disturb others").

In *Massachusetts*, Jews may labor on Sunday, but they may not keep open their trading places. *Com. v. Hyne-man*, 101 Mass. 30; *Com. v. Has*, 122 Mass. 40; *Com. v. Dextra*, 143 Mass. 28.

In order to come within the exception a person must not merely believe a day to be holy, but must observe it as such. *Lieberman v. State*, 26 Neb. 464; *Anonymous*, 12 Abb. N. Cas. (N. Y.) 455.

But in the majority of the states no exception is made, and a general prohibition against doing business on Sunday extends to all persons regardless of their religious beliefs or customs. 1 *Bishop's Crim. Law*, § 268; *Parker v. State*, 16 Lea (Tenn.) 476; *Scales v. State*, 47 Ark. 476; 58 Am. Rep. 768; *Society, etc. v. Com.*, 52 Pa. St. 135; 91 Am. Dec. 139; *Wharton on Contracts*, § 382; *In re King*, 46 Fed. Rep. 905.

In *Scales v. State*, 47 Ark. 476; 58 Am. Rep. 768, the defendant was found guilty of painting a church on Sunday; he offered on the trial to prove himself a member of the society of Seventh-Day Adventists who observe Saturday instead of Sunday. The court observed: "The appellant's argument is reduced to this; that because he conscientiously believes that he is permitted by the law of God to labor on Sunday he may violate with impunity a statute making it illegal to do so. But a man's religious belief cannot be accepted as a justification for committing an overt act made criminal by the law of the land." See *Reynolds v. U. S.*, 98 U. S. 145.

Jews are bound to observe the civil regulations made for the keeping of the Christian Sabbath. A person belonging to a certain society was tried on Sunday for an offense against the

exception in favor of such persons cannot be assailed as unconstitutional on the ground of its being a preference in favor of any one system of religion;¹ nor can a statute making the exception be declared unconstitutional as giving to certain citizens rights which do not belong equally to all.²

4. Construction.—The general rules of construction of Sunday statutes are not altogether uniform. These statutes provide a penalty for their violation; therefore some authorities view the legislation as penal and apply a strict rule of construction.³ But the more favored view seems to be that such statutes are remedial in their nature and are therefore to be liberally construed; that they were enacted *pro bono publico* and designed to promote the health and general physical well-being of the public; and that such a construction must be applied as will tend to effect their obvious purpose.⁴ In the English and in some American cases stress is laid upon the fact that Sunday statutes are enacted in recognition of a universal public religious sentiment, and for this reason are not to be subjected to a strained construction, but are

laws of such society. Such a trial is not an ecclesiastical trial concerning matters of conscience, but is an ordinary secular affair. *Quære* how far such a trial on Sunday comports with the legislation and institutions of this country. *Society, etc. v. Com.*, 52 Pa. St. 125; 91 Am. Dec. 139.

In *Stansbury v. Marks*, 2 Dall. (Pa.) 213, a Jew offered in court as a witness refused to be sworn because the day was Saturday, his Sabbath. He was fined, but the fine was subsequently remitted after the party calling him had waived the benefit of his testimony. So in *Simon v. Gratz*, 2 P. & W. (Pa.) 412; 23 Am. Dec. 33, it was held that the conscientious scruples of a Jew to appear and attend the trial of his cause on Saturday were not sufficient grounds for a continuance. The correctness of this view is, however, doubted in *Cooley's Const. Lim.* (6th ed.), p. 585, note.

1. Constitutionality.—*Scales v. State*, 47 Ark. 476; 58 Am. Rep. 768; *Com. v. Has*, 122 Mass. 40; *Frolickstein v. Mobile*, 40 Ala. 725.

On this point Judge Cooley says: "The Jew who is forced to respect the first day of the week, when his conscience requires of him the observance of the seventh also, may plausibly urge that the law discriminates against his religion, and by forcing him to keep a second Sabbath in each week, unjustly, though by indirection, punishes him for his belief. . . . It appears to us that if the benefit to the individual is alone to be considered, the argument

which he may make who has already observed the seventh day of the week, is unanswerable." *Cooley's Const. Lim.* (4th ed.), p. *476. See also *Cincinnati v. Rice*, 15 Ohio 225; *Canton v. Nist*, 9 Ohio St. 439.

2. Johns v. State, 78 Ind. 332; 41 Am. Rep. 577; *Liberman v. State*, 26 Neb. 464. An exactly opposite view is taken in *Shreveport v. Levy*, 26 La. Ann. 671; 21 Am. Rep. 553.

3. Regarded as Penal Statute.—In *Brown v. Richards*, 2 Ohio St. 405, in holding that a contract was not void because made on Sunday, Thurman, J., said: "The law is penal and is therefore to be construed strictly. Such acts are not to be extended by construction." See also *Flanagan v. Meyer*, 41 Ala. 132; *Myers v. State*, 1 Conn. 502.

4. To be Liberally Construed.—"Such statutes are remedial and to be liberally construed in respect to the mischiefs to be remedied." *Smith v. Wilcox*, 24 N. Y. 355; 82 Am. Dec. 302; *Northrup v. Foote*, 14 Wend. (N. Y.) 248; *People v. Hoym*, 20 How. Pr. (N. Y.) 76; *Brunnette v. Clark*, 1 Buff. Super. Ct. (N. Y.) 502.

In *Murphy v. Simpson*, 14 B. Mon. (Ky.) 338, it is said by Simpson, J., in holding an exchange void because made on Sunday, that "the statute should not be extended by construction to embrace cases which are not clearly within its obvious meaning, but at the same time it should be fairly construed with a view to the accom-

to be extended to embrace all cases which they are manifestly intended to comprehend.¹

V. PROCEDURE.—Persons violating Sunday laws are usually proceeded against by a criminal prosecution for the misdemeanor or by an action for the penalty.²

plishment of the objects contemplated by the legislature in its enactment." See also generally *Melvin v. Easley*, 7 Jones (N. Car.) 356; *Reid v. State*, 53 Ala. 402; 25 Am. Rep. 627 (verdict allowed to be received on Sunday).

In *Scammon v. Chicago*, 40 Ill. 149, where a notice was held invalid because published on Sunday, Lawrence, J., said: "If the wise law-giver, whatever may be his own religious opinions or habits, concurs in this setting apart of one day in seven, it would ill become the judiciary to give to such enactments a restricted operation. They should be so construed as fully to accomplish their purpose, and we think it clear that to permit officers to intrude upon families on Sundays for service of civil process would be a violation of the spirit and policy of this law, and unbecoming a Christian community." See also as to the rule of liberal construction of Sunday statutes, *State Capital Bank v. Thompson*, 42 N. H. 369; *Myers v. State*, 1 Conn. 502; *Carver v. State*, 69 Ind. 61; *Miller v. Roessler*, 4 E. D. Smith (N. Y.) 236; *Davis v. Somerville*, 128 Mass. 594; 35 Am. Rep. 399.

1. **Religious Feature of the Statute.**—In *Smith v. Sparrow*, 4 Bing. 84; 13 E. C. L. 353, Best, C. J., in discussing this point, adverts to the opinion of Bayley, J., in *Fennell v. Ridler*, 3 B. & C. 406; 11 E. C. L. 262, and says of it: "In one of the most able judgments ever delivered, he says that the most liberal construction must be put on that statute, because it is an affirmation of the religion which is the basis of the law of this country." The same view is sustained in other English cases. *Rex v. Younger*, 5 T. R. 449; *Bloxsome v. Williams*, 3 B. & C. 232; 10 E. C. L. 60. And Park, J., in *Smith v. Sparrow*, 4 Bing. 84; 13 E. C. L. 353, commended the decision in *Fennell v. Ridler* (5 B. & C. 406), saying that *Drury v. De Fontaine*, 1 Taunt. 135, was wrongly decided, in that the statute was there construed too narrowly.

In *Johnston v. Com.*, 22 Pa. St. 109, Woodward, J., said: "But we have no right to give up this institution. It has come down to us with the most solemn

sanctions, both of God and man, and if we do not appreciate it as we ought, we are at least bound to preserve it. . . . Our duty requires us to construe the statute so as to accomplish its purpose, which was to enforce the observance of Sunday, instead of obliterating it." It was held, therefore, that the driving of an omnibus on Sunday was illegal.

In *People v. Hoym*, 20 How. Pr. (N. Y.) 76, the court said: "Counsel has entered largely into the question of the origin and sanction of the Christian Sabbath. It may not be essential, but it is far from being irrelevant to sustain the Divine authority of its institution. . . . This would throw light upon the nature of legislative provisions and furnish a guide to a rigorous or expanded rule of construction." See also in this connection, *Toole v. Larrabee*, 26 Me. 469; *Mohney v. Cook*, 26 Pa. St. 348; *Satler v. Smith*, 55 Ga. 245.

2. As to penalties, see **PENALTIES**, vol. 18, p. 269; *Louisville, etc., R. Co. v. Com.* (Ky. 1891), 17 S. W. Rep. 274.

Indictment.—For general rules concerning the form and accuracy required in indictments for a violation of Sunday laws, see **INDICTMENTS**, vol. 10, p. 450 *et seq.* An indictment for playing cards on Sunday need not allege the name of the game played; though if the name is alleged it must be proved as laid. *State v. Anderson*, 30 Ark. 131.

An indictment charging that defendant "was found unlawfully at common labor and engaged in his usual avocation, to wit, then and there selling to D. one cigar and receiving from him payment therefor," sufficiently alleges that defendant's usual avocation was the selling of cigars. *Foltz v. State*, 33 Ind. 215.

An indictment charging defendant with having been found on Sunday "unlawfully at common labor and engaged in his usual avocation, to wit," etc., is not bad for duplicity. Nor need it aver what defendant's usual avocation was. *McCarthy v. State*, 56 Ind. 203. See also *Cleary v. State* (Ark.

The exercise of one's ordinary calling on Sunday in violation of law is held usually to constitute a single offense.¹

Two or more defendants joined in one complaint for doing work on Sunday may be jointly convicted upon proof of a joint act.²

Matters of defense, such, for example, as that the work engaged in was a work of necessity or charity, or that the accused was ex-

1892), 19 S. W. Rep. 313. So an indictment, one count of which charges that defendant "on Sunday did engage in the sale of spirituous and intoxicating liquors to," etc., while another count charges that defendant was "a grocer and did then and there" on Sunday trade lager beer to, etc., is not objectionable as charging two offenses. *Elsner v. State*, 30 Tex. 524.

An indictment for keeping a store open on Sunday need not aver a criminal intent. *Britten v. State*, 10 Ark. 299. Nor need it set out the name of the party to whom the defendant is accused of selling goods. The statutory prohibitions are directed against any sales to anybody. *State v. Meyer*, 1 Spear (S. Car.) 305.

Under a statute imposing a fine on "any dealer in merchandise who should sell or barter on Sunday, an allegation that defendant was then and there a liquor dealer" is sufficient; it need not be alleged that he was a "trader in lawful business." *Day v. State*, 21 Tex. App. 213. See also *Whitcomb v. State* (Tex. App. 1891), 17 S. W. Rep. 258.

See generally *Louisville, etc., R. Co. v. Com.* (Ky. 1891), 17 S. W. Rep. 274, as to the form of petition where a railroad company was charged with employing thirty hands to labor unnecessarily on Sunday.

On trial of an indictment for unlawfully selling liquor to "persons unknown" the evidence showed a sale to one person. It was held to be no variance. *State v. King*, 37 Iowa 462.

See also, as to the accuracy of indictments for violation of Sunday laws, *Lebriter v. State*, 42 Ind. 383; *Efinger v. State*, 47 Ind. 235 (time must be stated); *State v. Land*, 42 Ind. 311; *McCarthy v. State*, 56 Ind. 203; *Foltz v. State*, 33 Ind. 215; *Vogel v. State*, 31 Ind. 64; *State v. Fletcher*, 13 R. I. 522 (allegation of unlawfully selling liquor on "Sunday, the third of July" does not invalidate indictment—the word "Sunday" being mere surplus-

age); *Com. v. Josselyn*, 97 Mass. 411; *Archer v. State*, 10 Tex. App. 482 (indictment for selling liquor on Sunday must allege that seller was a merchant, grocer, or dealer, etc.); *Day v. State*, 21 Tex. App. 213 ("liquor" equivalent to "merchandise"); *Mosely v. State*, 18 Tex. App. 311; *Brink v. State*, 18 Tex. App. 344; 51 Am. Rep. 317; *People v. Harmon*, 2 N. Y. Supp. 72 (indictment alleging a sale of liquors on one Sunday and a giving of them on another Sunday is demurrable as charging two separate offenses).

In *State v. Bryson*, 90 N. Car. 747, an indictment was held sufficient though it charged the commission of an offense against the Sunday law as taking place on a certain day of the month, which day did not fall on Sunday. The same doctrine is sustained in 1 Wharton's Cr. Law, §§ 263, 275; *Frazier v. State*, 5 Mo. 536; *State v. Eskridge*, 1 Swan (Tenn.) 413; *Megowan v. Com.*, 2 Metc. (Ky.) 3; *State v. Drake*, 64 N. Car. 589.

1. *Crepps v. Durden*, 1 Cowp. 640; *People v. Cox*, 70 Mich. 247; *Friedeborn v. Com.*, 113 Pa. St. 242; 57 Am. Rep. 464; *Gunter v. State*, 1 Lea (Tenn.) 129; *Rucker v. State*, 67 Miss. 328.

It was held otherwise in *Albrecht v. State*, 8 Tex. App. 313, where each act of barter and sale on the same day was held to constitute a distinct and separate offense. See also *Voglesong v. State*, 9 Ind. 112.

In *State v. Ambo*, 20 Mo. 215, it was held that keeping open an ale-house on Sunday and selling ale on the same day were two distinct offenses under the statute of that state.

In *Pennsylvania*, it has been held that the rule stated in the text is not the law, for the reason that in that state the statute is broader than the English statute and than the statutes of some of the states, so that each separate act of sale may constitute a separate offense. See *Reiff v. Com.*, 42 Leg. Int. (Pa.) 90; *Duncan v. Com.*, 2 Pears. (Pa.) 13.

2. *Com. v. Sampson*, 97 Mass. 407.

cepted from the operation of the statute because of his observance of another day, are to be alleged and proved by the accused, and need not be negated in the indictment or complaint.¹

A master is not liable for the violation of a Sunday statute by his servant, *e. g.*, in keeping open his store or in selling merchandise on that day, unless it can be shown that it was done with his knowledge and consent, or by his direction.²

Whether or not an act is an indictable offense at common law is a matter for the determination of the courts of the state in which the question arises, and their decisions are binding upon federal courts sitting within the same jurisdiction.³

1. *Com. v. Trickey*, 13 Allen (Mass.) 559; *Com. v. Hart*, 11 Cush. (Mass.) 130; *Com. v. Shannihan*, 145 Mass. 99; *Cleary v. State* (Ark. 1892), 19 S. W. Rep. 313; *Com. v. Du Bois* (Mass.), 34 N. E. Rep. 45.

It was held in *Troewert v. Decker*, 51 Wis. 46; 37 Am. Rep. 808, that one setting up a contract made on Sunday must prove it to be a contract of necessity or charity. But compare *Jensen v. State*, 60 Wis. 577, where it was held that an indictment or complaint was not sufficient, in the absence of an allegation that the work or labor relied on as constituting the offense was not a work or labor of necessity or charity.

2. **Liability of Master for Acts of Servant.**—In *Seaman v. Com.*, 11 W. N. C. (Pa.) 14; 21 Am. L. Reg., N. S. 245, the defendant was convicted upon evidence showing that his place of business was kept open on Sunday and that an employé was selling cigars, and that the defendant was present during a part of the day. Both he and his clerk were held guilty of a violation of the statute. See also *Com. v. Gillespie*, 7 S. & R. (Pa.) 469; 10 Am. Dec. 475.

But in *People v. Utter*, 44 Barb. (N. Y.) 170, where the evidence showed only a sale by defendant's bartender, it was held error to refuse to charge that to justify a conviction it was not sufficient to prove that liquor had been sold in defendant's shop on Sunday, but that it must be shown that the defendant did the act personally or that it was done by his direction or with his consent. See *State v. Burke*, 15 R. I. 325. See also MASTER AND SERVANT, vol. 14, p. 826; CRIMINAL LAW, vol. 4, pp. 703-4.

3. **Jurisdiction—Federal Courts—Fourteenth Amendment.**—In *Re King*, 46 Fed. Rep. 905, the petitioner sought to be released on *habeas corpus* in the fed-

eral court, on the ground that he was deprived of his liberty without due process of law. He had been duly indicted by the grand jury of his county for a nuisance (constantly plowing his fields on Sunday) and after a trial by jury, in which his defense that he observed the seventh day as holy had not availed, was convicted and sentenced to imprisonment. It was held that the fourteenth amendment of the federal constitution has not abrogated the Sunday laws of the states, and that whatever opinion as to the guilt or innocence of the accused the court might have, it had no authority to discharge him if he had been regularly convicted; and that the holding of the state court that the acts of the accused were indictable at common law was conclusive upon the federal court.

Miscellaneous Matters.—*Com. v. Trickey*, 13 Allen (Mass.) 559, was an indictment for keeping open a store on Sunday. The defendant contended that, as it was shown by the evidence that the store was kept open for the sale of liquors, his offense was against another statute concerning liquor selling, and that he could not be punished under both statutes. But it was held that the same act might be an offense against several statutes, and punishable under them all. See *Com. v. Harrison*, 11 Gray (Mass.) 308; *Com. v. Hudson*, 14 Gray (Mass.) 11.

A justice of the peace who has an imperfect view of persons at work on Sunday, cannot forcibly enter the premises of another so as to get a better view, merely in order to obtain evidence to convict the offenders. *Com. v. Eyre*, 1 S. & R. (Pa.) 347.

A magistrate who issues a warrant under which a person is arrested for a violation of the Sunday statute, is not liable as a trespasser, neither is the

VI. EFFECT OF VIOLATION OF SUNDAY LAWS IN CASE OF NEGLIGENCE INJURY.—Statutes providing for the observance of Sunday frequently contain prohibitions against traveling on Sunday, and the question has arisen as to the effect of a violation of these provisions upon one's right to recover for injuries sustained while so traveling. It is a well-accepted principle governing the law relating to recovery for negligent injury that when the negligence of the defendant has been established as a proximate cause of the injury, the plaintiff will not be precluded from recovery unless it can be shown affirmatively that his own conduct actually and approximately contributed to the injury.¹ It would seem, therefore, that the mere fact that one was traveling in violation of the Sunday statute will not alone and of itself bar his right to recover for injuries received while so traveling. And this is the doctrine generally announced.² The same principle applies whether

constable who makes the arrest, merely because the facts as alleged were not an offense under the statute. *Stewart v. Hawley*, 21 Wend. (N. Y.) 552.

1. CONTRIBUTORY NEGLIGENCE; vol. 4, p. 50; CROSSINGS, vol. 4, p. 921 *et seq.*; Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co., 23 How. (U. S.) 209.

2. *Sutton v. Wauwatosa*, 29 Wis. 21; 9 Am. Rep. 534; *Platz v. Cohoes*, 89 N. Y. 219; 42 Am. Rep. 286; *aff'g* 24 Hun (N. Y.) 101; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126; 17 Am. Rep. 221; *aff'g* 65 Barb. (N. Y.) 31; *Baldwin v. Barney*, 12 R. I. 392; 34 Am. Rep. 670; *Dutton v. Weare*, 17 N. H. 34; 43 Am. Dec. 590; *Morris v. Litchfield*, 35 N. H. 271; 69 Am. Dec. 546; *Johnson v. Missouri Pac. R. Co.*, 18 Neb. 690; 23 Am. & Eng. R. Cas. 429; *Schmid v. Humphrey*, 48 Iowa 652; 30 Am. Rep. 414; *Smith v. New York, etc., R. Co.*, 46 N. J. L. 7; 18 Am. & Eng. R. Cas. 399; Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co., 23 How. (U. S.) 209; *Powhatan Steamboat Co. v. Appomattox R. Co.*, 24 How. (U. S.) 247; *Chicago, etc., R. Co. v. Graham* (Ind. App. 1892), 29 N. E. Rep. 170; *Houston, etc., R. Co. v. Rider*, 62 Tex. 267; *Cooley on Torts* 156; 2 Wood on Railways 1248; *Beach on Contributory Neg.*, §§ 61, 81; *Bigelow on Torts*, p. 309; *Shearm. & Red. on Neg.*, § 104; *Wharton on Neg.*, § 321.

In *Mohney v. Cook*, 26 Pa. St. 349; 67 Am. Dec. 422, the court, by Lourie, J., said: "We should work a confusion of relations, and lend doubtful assistance to morality, if we should allow one offender against the law to set

off against the plaintiff that he is a public offender." *Hendrick v. Jones*, 5 Port. (Ala.) 208.

A steamboat illegally running on Sunday came in contact with pilings unlawfully left in navigable waters and was damaged. In a suit against the company through whose negligence the pilings had been left there the plaintiff was allowed to recover, the court, by Grier, J., saying: "The law relating to the observance of Sunday defines the duty of a citizen to his state and to his state only. For a breach of this duty he is liable to the fine or penalty imposed by the statute and nothing more. Courts of justice have no authority to add to this penalty the loss of the ship by the tortious conduct of another against whom the owner has committed no offense." *Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co.*, 23 How. (U. S.) 209. This case has been followed in *Powhatan Steamboat Co. v. Appomattox R. Co.*, 24 How. (U. S.) 247; *Mohney v. Cook*, 26 Pa. St. 342; 67 Am. Dec. 419; *Com. v. Rees*, 10 Pa. Co. Ct. Rep. 545; 22 Pitts. L. J., N. S. 189; *Louisville, etc., R. Co. v. Buck*, 116 Ind. 566; 38 Am. & Eng. R. Cas. 152, and the doctrine therefore seems firmly established. See also *McDonough v. Metropolitan R. Co.*, 137 Mass. 210.

The liability of a railroad or other company for injuries inflicted while running on Sunday is to be determined by the same rules as if the accident had occurred on a secular day. *Tingle v. Chicago, etc., R. Co.*, 60 Iowa 333. And this seems to state the correct

the injury be received through the negligence of a common carrier, a municipal corporation, or a private person or corporation.¹

The rule that one cannot recover damages for a breach of contract when such contract is made or to be performed on

doctrine. See *CROSSINGS*, vol. 4, pp. 921, 932; *NEGLIGENCE*, vol. 16, p. 420.

But a very proper modification is stated in *Hyde Park v. Gay*, 120 Mass. 589, where it is said that a railroad company running its train on Sunday in violation of the statute is held to a stricter accountability for accidents at crossings of highways, for the reason that the public is entitled to presume that the company will obey the law and not run its trains. See also this subject discussed in *NEGLIGENCE*, vol. 16, p. 420.

A common carrier is not relieved from liability because the contract for carriage was made on Sunday. His liability does not rest in contract alone, but is one imposed by law. *Merritt v. Earle*, 29 N. Y. 115; 31 Barb. (N. Y.) 38; 86 Am. Dec. 292.

1. In case of injuries received owing to the negligence of a common carrier or of a railroad company: *Carroll v. Staten Island R. Co.*, 58 N. Y. 126; 17 Am. Rep. 221; *Kerwhacker v. Cleveland, etc., R. Co.*, 3 Ohio St. 172; 62 Am. Dec. 246; *Smith v. New York, etc., R. Co.*, 46 N. J. L. 7; 18 Am. & Eng. R. Cas. 399; *Louisville, etc., R. Co. v. Frawley*, 110 Ind. 18; 28 Am. & Eng. R. Cas. 308; *Louisville, etc., R. Co. v. Buck*, 116 Ind. 566; 38 Am. & Eng. R. Cas. 152; *Knowlton v. Milwaukee City R. Co.*, 59 Wis. 278; *Illinois Cent. R. Co. v. Dick* (Ky. 1891), 15 S. W. Rep. 665 (plaintiff injured while returning from work being done by him in violation of Sunday law—recovery allowed). The fact that the plaintiff was ejected from the train on Sunday is no defense where the action is not based on the breach of contract, but upon the violation of a personal right assured by the law to the plaintiff upon his compliance with the defendant's regulations. *Chicago, etc., R. Co. v. Graham* (Ind. App. 1891), 29 N. E. Rep. 170.

In case of injuries received by defect in a highway: *Platz v. Cohoes*, 89 N. Y. 219; 42 Am. Rep. 286; *Sutton v. Wauwatosa*, 29 Wis. 21; 9 Am. Rep. 534; *Sewell v. Webster*, 59 N. H. 586; *Wentworth v. Jefferson*, 60 N. H. 158; *Black v. Lewiston* (Idaho, 1887), 13 Pac. Rep. 80; *Dillon's Mun. Corp.*, § 778.

In cases of other injury: *Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co.*, 23 How. (U. S.) 209; *Baldwin v. Barney*, 12 R. I. 392; 34 Am. Rep. 670; *Mohney v. Cook*, 26 Pa. St. 342; 67 Am. Dec. 419; *Opsahl v. Judd*, 30 Minn. 126; *Stewart v. Davis*, 31 Ark. 518; 25 Am. Rep. 576; *Sharp v. Evergreen*, 67 Mich. 443.

The *Massachusetts* cases held, until recently, that traveling on Sunday in violation of the statute cut off the right of recovery of one negligently injured. The decisions of that state denied recovery, where the action was upon contract, on the ground that the contract of carriage was void as being in violation of law; and where the action was in tort, it was said that the fact that the plaintiff was traveling in violation of the statute constituted of itself such contributory negligence as to bar his right of recovery. See *Com. v. Knox*, 6 Mass. 502; *Bosworth v. Swansey*, 10 Met. (Mass.) 353; 43 Am. Dec. 441; *Jones v. Andover*, 10 Allen (Mass.) 8; *Connolly v. Boston*, 117 Mass. 64; 19 Am. Rep. 396; *Davis v. Somerville*, 128 Mass. 594; 35 Am. Rep. 399; *Crosman v. Lynn*, 121 Mass. 301; *Hamilton v. Boston*, 14 Allen (Mass.) 475; *Gorman v. Lowell*, 117 Mass. 65; *Stanton v. Metropolitan R. Co.*, 14 Allen (Mass.) 485; *Doyle v. Lynn, etc., R. Co.*, 118 Mass. 195; 19 Am. Rep. 431; *Feital v. Middlesex R. Co.*, 109 Mass. 398; 12 Am. Rep. 720; *Smith v. Boston, etc., R. Co.*, 120 Mass. 490; 21 Am. Rep. 538; *Bucher v. Fitchburg R. Co.*, 131 Mass. 156; 41 Am. Rep. 216; *Day v. Highland Street R. Co.*, 135 Mass. 113; 44 Am. Rep. 447; *Bucher v. Cheshire R. Co.*, 125 U. S. 555; *Wallace v. Merrimac River Nav., etc., Co.*, 134 Mass. 95; 45 Am. Rep. 301; *McGrath v. Merwin*, 112 Mass. 467; 17 Am. Rep. 119; *Lyons v. Desotelle*, 124 Mass. 387; *Pearce v. Atwood*, 13 Mass. 324.

A party who had been illegally traveling on Sunday stopped at a hotel, left his horse, wagon, and buffalo robe in charge of the landlord's servant, and remained at the hotel overnight. The next morning (Monday) the robe could not be found. It was held that an action might be maintained for the con-

Sunday remains the same, since, as will be seen, such contracts are considered void as being against public policy.¹ These principles find a frequent application in the law of bailments, particularly where horses are hired on Sunday, and the person hiring them injures them by over-driving. In such cases the contract of hiring is void, but the owner is not precluded from recovering for the tort.²

version of the robe, after demand therefor. *Cox v. Cook*, 14 Allen (Mass.) 165.

But in *Lyons v. Desotelle*, 124 Mass. 387, recovery was refused where it was shown that one, while traveling in violation of the statute, fastened his horse at the side of the road, and that the horse was injured by the negligent act of another in driving against it. The unlawful traveling was said to so contribute to the injury as to prevent recovery.

In *McDonough v. Metropolitan R. Co.*, 137 Mass. 210, a boy was injured on Sunday in an attempt to get on a street car while it was in motion. Recovery was denied on the ground that the boy was "traveling," within the meaning of the statute forbidding traveling on Sunday.

In *Maine* the doctrine was like that of *Massachusetts*. See *Cratty v. Bangor*, 57 Me. 423; 2 Am. Rep. 56; *Hinckley v. Penobscot*, 42 Me. 89; *O'Connell v. Lewiston*, 65 Me. 34; 20 Am. Rep. 673; *Wheelden v. Lyford* (Me. 1891), 24 Atl. Rep. 793. Compare *Bryant v. Biddeford*, 39 Me. 193; *Norton v. Gloster*, 46 Me. 520.

In *Vermont*.—The decisions of *Vermont* are similar. *Johnson v. Irasburgh*, 47 Vt. 28; 19 Am. Rep. 111; *McClary v. Lowell*, 44 Vt. 116; 8 Am. Rep. 366; *Holcomb v. Danby*, 51 Vt. 428.

The *Vermont* court attempted to pursue a middle course, and explains the decision in *Johnson v. Irasburgh*, 47 Vt. 28, 19 Am. Rep. 111, on the ground that a municipal corporation is not bound to maintain a safe and sufficient highway for unlawful traveling on Sunday or any other day, and that there was no duty owing to such persons by the corporation upon which an action for any injuries could be based. *Duran v. Standard L., etc., Ins. Co.*, 63 Vt. 437.

Vermont Rev. Laws, §§ 4315-16, forbade traveling or hunting on Sunday, except from necessity, etc. It was held that a person injured by slipping on frozen ground while returning from

hunting on Sunday, could not recover under an accident insurance policy exempting the insurance company from liability where a "violation of the law" is the act, cause, or condition "wholly or partially, directly or indirectly" producing the injury, or where the injury is "effected by any such act, cause, or condition, or under its influence." *Duran v. Standard L., etc., Ins. Co.*, 63 Vt. 437.

See the *Massachusetts* doctrine criticized in *Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co.*, 23 How. (U. S.) 218; *Mohney v. Cook*, 26 Pa. St. 342; 67 Am. Dec. 419; *Sutton v. Wauwatosa*, 29 Wis. 21; *Bucher v. Cheshire R. Co.*, 125 U. S. 555. But the statute has now introduced a change in the law of that state.

Massachusetts Pub. Stat., ch. 98, § 3, while providing that there shall be no traveling on the Lord's day except as aforesaid, declares that the provisions of the statute "shall not constitute a defense to an action against a common carrier of passengers for a tort or injury suffered by a person so traveling." See *McDonough v. Metropolitan R. Co.*, 137 Mass. 210; *Barker v. Worcester*, 139 Mass. 74.

In *Read v. Boston, etc., R. Co.*, 140 Mass. 200, it was held that this provision was not applicable to the case of an injury which occurred before the enactment. So section 1 of the *Massachusetts* Statute 1884, ch. 37, provides that the chapter relating to the observance of Sunday, "shall not constitute a defense to an action for a tort or injury suffered by a person on that day." See note to *Read v. Boston, etc., R. Co.*, 140 Mass. 200. See also *Wheelden v. Lyford* (Me. 1891), 24 Atl. Rep. 793, in which it is held that the statute forbidding the defense of the "Sunday Law" to be set up unless the consideration is restored, does not apply to cases of negligent injury.

1. See *infra*, this title, *Sunday Contracts*.

2. *Horses Hired on Sunday*.—It was once considered that the owner of a

The violation of statutes for Sunday observance is usually made a misdemeanor, and in most cases a penalty is attached; it has never yet been made a crime.¹

horse who hired it on Sunday in violation of the statute could maintain no action, either on contract or in tort, for an injury to it caused by its being immoderately driven, etc., by the bailee, or by being used in any manner different from that contemplated in the contract of hiring. *Gregg v. Wyman*, 4 Cush. (Mass.) 322; *May v. Foster*, 1 Allen (Mass.) 408; *Whelden v. Chappel*, 8 R. I. 230; *Smith v. Rollins*, 11 R. I. 464; 23 Am. Rep. 509.

And this rule, so far as it forbids a recovery upon the contract of hiring, is still the universally accepted doctrine, since all contracts made or to be performed on Sunday are held void. See *infra*, this title, *Contracts Executory*; *Nodine v. Doherty*, 46 Barb. (N. Y.) 59; *Stewart v. Davis*, 31 Ark. 518; 25 Am. Rep. 576; *Berrill v. Smith*, 2 Miles (Pa.) 402; 11 Pa. L. Jour. 313; *Chenette v. Teehan*, 63 N. H. 149; *Morton v. Gloster*, 46 Me. 520; *HORSES*, vol. 9, p. 770.

If the hiring on Sunday be for an indefinite time, the mere fact that the horse was used to carry a young lady home from church, will not render the contract legal, on the ground of such being a work of necessity or charity, and no recovery can be had upon a note given for such hiring. *Tillock v. Webb*, 56 Me. 100.

But that part of the rule which forbids a recovery on an action in tort merely because the horse was injured on Sunday is repudiated everywhere (except in *Rhode Island*), even in the state of its nativity. *Hall v. Corcoran*, 104 Mass. 251; 9 Am. Rep. 30 (*overruling* *Gregg v. Wyman*, 4 Cush. (Mass.) 322); *Woodman v. Hubbard*, 25 N. H. 67; 57 Am. Dec. 312; *Frost v. Plumb*, 40 Conn. 111; 16 Am. Rep. 18; *Fisher v. Kyle*, 27 Mich. 454; *Morton v. Gloster*, 46 Me. 520; *Stewart v. Davis*, 31 Ark. 518; 25 Am. Rep. 576.

Contra in *Rhode Island*. *Smith v. Rollins*, 11 R. I. 464; 23 Am. Rep. 509; *Whelden v. Chappel*, 8 R. I. 230.

In *Parker v. Latner*, 60 Me. 528, 11 Am. Rep. 210, it was held that an action for tort would not lie for the immoderate driving of a horse during a pleasure drive on the Lord's Day for which he was hired. The court distinguished the case from those above cited

(*Morton v. Gloster*, 46 Me. 520, and *Woodman v. Hubbard*, 25 N. H. 67; 57 Am. Dec. 312), saying that in those cases "the contract between the parties was at an end. The suits were for the conversion of the property bailed after the bailment had terminated. They were for acts committed after the expiration of the hiring. Here the injury arose during the continuation of the bailment and in carrying out the very purpose for which the property injured was bailed." See also *BAILMENT*, vol. 2, p. 58 *et seq.*

Statutory Prohibition of Defense of Sunday Law.—*Maine* Rev. Stat., ch. 82, § 116, prohibits any party to a contract to set up the defense that the contract was made on Sunday, unless the consideration be restored; and this prohibition applies even if the consideration in the nature of things cannot be restored. But it does not apply to actions for negligence; it leaves the Sunday law in full operation as to them. *Wheelenden v. Lyford* (Me. 1891), 24 Atl. Rep. 793. This case involved two actions, one on account for horse hire, and the other in tort for damages to the team. The defendant invoked in defense of both actions the Sunday law (Rev. Stat. of *Maine*, ch. 124, § 20). The court held that before the enactment of the statute just referred to (Rev. Stat., ch. 82, § 116), the plaintiff could not have maintained either action; the contract itself was void under the old law and the case of *Parker v. Latner*, 60 Me. 528, expressly decides that on such facts an action for negligence could not be maintained. But in view of the statutory modification the plaintiff was allowed to recover upon the contract, though he was still barred from his action for negligence. See also *First Nat. Bank v. Kingsley* (Me. 1891), 24 Atl. Rep. 794.

Bailees Generally.—A necessary consequence of the principles above stated is the rule that a bailee's breach of his Sunday contract for the exercise of care in his use of the thing bailed on Sunday is not actionable. *Chenette v. Teehan*, 63 N. H. 149.

1. The various statutes must be consulted.

A charge of bad moral character, if made generally, is not fully supported

VII. SUNDAY CONTRACTS—1. In General.—At common law Sunday contracts were not invalid. As a rule the statutes do not prohibit in terms the making of contracts on Sunday; that such contracts are embraced within prohibitions against all "work, business or labor" on that day has been established by judicial construction.¹

2. Contracts Executed—Sales, etc.—In the case of executed contracts, such, for example, as deeds and mortgages, it may be said that, strictly speaking, they violate the law and public policy when made on Sunday. But courts as a rule do not interfere with them, for the reason that a party to such contract is deemed *in pari delicto* and not in a position to invoke the interposition of the law.² And it is the same with sales made and executed on Sunday.³

by proof of profanity and Sabbath breaking. *Weiman v. Mabree*, 45 Mich. 484; 40 Am. Rep. 477.

1. *McKalley's Case*, Cro. Jac. 280; 9 Coke 666; *Comyns v. Boyer*, Cro. Eliz. 485; *Rex v. Brotherton*, 1 Stra. 702; *Rex v. Whitnash*, 7 B. & C. 596; 14 E. C. L. 100; *Bloxsome v. Williams*, 3 B. & C. 232; 10 E. C. L. 60; *Bloom v. Richards*, 2 Ohio St. 389; *Boynton v. Page*, 13 Wend. (N. Y.) 425; *Adams v. Gay*, 19 Vt. 365; *O'Rourke v. O'Rourke*, 43 Mich. 58; *Horacek v. Keebler*, 5 Neb. 355; *Batsford v. Every*, 44 Barb. (N. Y.) 618; *Amls v. Kyle*, 2 Yerg. (Tenn.) 31; 24 Am. Dec. 346; *Bailey's Conf. of Jud. Dec.*, p. 54 *et seq.* Compare, however, *Smith v. Sparrow*, 2 C. & P. 534; 12 E. C. L. 253; *Morgan v. Richards*, 1 Browne (Pa.) 173; *Broom's Leg. Max.* (8th ed.) 24.

A sale on Sunday was not invalid at common law. *Drury v. Defontaine*, 1 Taunt. 131; *Fennell v. Redler*, 5 B. & C. 408; 11 E. C. L. 262.

In 2 *Parsons on Contracts* (7th ed.), 757 note, it is said: "But as to the making of contracts, and all other acts not judicial, the common law made no distinction between Sunday and any other day."

In *Bishop on Contracts* (Enlarged ed.), § 537, it is said: "The statutes . . . constitute the sole basis of the invalidity of Sunday contracts."

2. Deeds, Mortgages, etc., Made on Sunday.—*Greene v. Godfrey*, 44 Me. 25; *Ellis v. Higgins*, 32 Me. 34; *Schneider v. Sansom*, 62 Tex. 203; 50 Am. Rep. 521; *Shuman v. Shuman*, 27 Pa. St. 90; *Baker v. Lukens*, 35 Pa. St. 146; *Chestnut v. Harbaugh*, 78 Pa. St. 493; *Ellis v. Hammond*, 57 Ga. 179 and cases cited; *Huckins v. Hunt*, 138

Mass. 366; *Cranson v. Goss*, 107 Mass. 439; 9 Am. Rep. 45; *Faxon v. Folvey*, 110 Mass. 396; *Horton v. Buffinton*, 105 Mass. 399; *Levet v. Creditors*, 22 La. Ann. 105; *Kinney v. McDermott*, 55 Iowa 674; 39 Am. Rep. 191; *Moore v. Kendall*, 2 Pinney (Wis.) 99; 1 Chand. (Wis.) 33; 52 Am. Dec. 145; *Beauchamp v. Comfort*, 42 Miss. 97; *Wilt v. Lai*, 7 U. C., Q. B. 535.

Other cases have held such contracts valid irrespective of the reason given in the text. *Lucas v. Larkin*, 85 Tenn. 355; *Hellams v. Ambercrombie*, 15 S. Car. 110; 40 Am. Rep. 684.

Where one has entered upon land under a deed made on Sunday, the courts will not interfere with his possession. *Ellis v. Hammond*, 57 Ga. 179. *Bishop on Contracts*, section 545.

A deed signed and acknowledged on Sunday but delivered on Monday is valid, since such an instrument only takes effect from the time of delivery. 2 *Parsons on Contracts* (7th ed.) 762; *Love v. Wells*, 25 Ind. 503; 87 Am. Dec. 375; *Schwab v. Rigby*, 38 Minn. 395; *Flanagan v. Meyer*, 41 Ala. 132.

So a bond executed on Sunday, but dated and made to take effect on a week day, is valid in the hands of an innocent obligee. *Hall v. Parker*, 37 Mich. 590; 26 Am. Rep. 540.

A gift completely executed is not invalid, though made on Sunday. *Wheeler v. Glasgow* (Ala. 1892), 11 So. Rep. 758.

3. Sales on Sunday.—Sales made on Sunday are in violation of the statute; they constitute a transaction of business acts, of common labor, or work of one's ordinary calling, or an exposure of goods for sale, etc., and make the parties liable to the penalty provided. *Lyon*

v. Strong, 6 Vt. 219; *Benjamin on Sales* (4th Am. ed.), § 557; *Cameron v. Peck*, 37 Conn. 556; *Thompson v. Williams*, 58 N. H. 248; *Mueller v. State*, 76 Ind. 310; 40 Am. Rep. 245; *Calhoun v. Phillip* (Ga. 1891), 13 S. E. Rep. 593; *Brazee v. Bryant*, 50 Mich. 140; *Tucker v. Mowrey*, 12 Mich. 378; *Fennell v. Ridler*, 5 B. & C. 406; 11 E. C. L. 261; *Bloxsome v. Williams*, 3 B. & C. 232; 10 E. C. L. 60; *Story on Sales* (4th ed.), §§ 500-502; *ILLEGAL CONTRACTS*, vol. 9, p. 882; *ILLEGAL SALES*, vol. 9, p. 928. *Compare* as to *California*, *Moore v. Murdock*, 26 Cal. 514.

Since such sales are illegal they are void if not executed, and a sale on Sunday without delivery of the property sold is of no effect, even though the parties may have intended to waive delivery. The law will not recognize or enforce such an agreement; nor is the sale validated by ratification on a week day by allowing the vendor a credit on his account where it does not appear the credit was ever claimed or received. *Calhoun v. Phillips* (Ga. 1891), 13 S. E. Rep. 593. See also *Clements v. Yturria*, 81 N. Y. 285, where it was held that the buyer could not maintain trover until he had possession.

The *New York* statute provides that "no person shall expose to sale any wares, merchandise," etc., on Sunday. A private sale of a span of horses on Sunday is not void at common law nor under this statute. Such a contract is not necessarily an exposure of goods, etc., and the jury is to say whether it was or was not such an exposure. An action may therefore be maintained for a breach of warranty in such a case. *Batsford v. Every*, 44 Barb. (N. Y.) 618; *Eberle v. Mehrback*, 55 N. Y. 683; *Miller v. Roessler*, 4 E. D. Smith (N. Y.) 234.

Although a bill of sale was made on Sunday, one who was not a party to the sale and who had no interest in the property which was sold, cannot prevent a recovery by the purchaser by showing that he violated the Sunday statute in acquiring his title. *Richardson v. Kimball*, 28 Me. 475.

But such sales are virtually binding if executed. *Benjamin on Sales* (4th Am. ed.), § 557, n. 2; *Block v. McMurry*, 56 Miss. 217; 31 Am. Rep. 357; *Foster v. Wooten*, 67 Miss. 540; *Greene v. Godfrey*, 44 Me. 25.

That property which has been de-

livered to a vendee in pursuance of a sale on Sunday cannot be recovered, see *Myers v. Meinrath*, 101 Mass. 366; 3 Am. Rep. 368, n.; *Horton v. Buffington*, 105 Mass. 400; *Foster v. Wooten*, 67 Miss. 540; *Thompson v. Williams*, 58 N. H. 248; *Block v. McMurry*, 56 Miss. 217; 31 Am. Rep. 357.

In *Cranston v. Goss*, 107 Mass. 441; 9 Am. Rep. 45, the court, by Gray, J., said: "If a chattel has been sold and delivered on Sunday without payment of the price, the seller cannot recover either the price or the value; not the price agreed on on that day, because the agreement is illegal; not the value, because, whether the property is deemed to have passed to the defendant, or to be held by him without right, there is no ground upon which a promise to pay for it can be implied;" citing *Simpson v. Nichols*, 3 M. & W. 240; 5 M. & W. 702; *Ladd v. Rogers*, 11 Allen (Mass.) 209.

The vendee may maintain his possession under the void contract, both as against the vendor and his creditors. *Benjamin on Sales* (4th Am. ed.), § 557; *Smith v. Bean*, 15 N. H. 577.

Vendee May Replevy.—The vendee may even maintain replevin to recover the property, if taken from him by the vendor, and this although he has not paid the price. *Kinney v. McDermot*, 55 Iowa 674; 39 Am. Rep. 191; *Smith v. Bean*, 15 N. H. 557. In *Pike v. King*, 16 Iowa 49, it was held that if there was a contract to pay for property bought and sold on Sunday, the plaintiff could not recover the price. *Compare* *Tucker v. West*, 29 Ark. 386; *Dodson v. Harris*, 19 Ala. 566; *Brazee v. Bryant*, 50 Mich. 140.

Miscellaneous Cases of Sales.—In *Miller v. Roessler*, 4 E. D. Smith (N. Y.) 234, the sale of a horse on Sunday was held not to be void unless it should appear affirmatively that the animal was exposed publicly for sale in violation of the statute.

The legality or validity of a sale made on a secular day is not affected by the fact that previous and independent negotiations were made on Sunday. *Winchell v. Carey*, 115 Mass. 560; 15 Am. Rep. 151; *Sayles v. Williams*, 10 R. I. 465; *Foster v. Wooten*, 67 Miss. 540.

The doctrine was stated in *Thompson v. Williams*, 58 N. H. 248, where the court said: "It [the law] leaves the parties where their illegal contract left them; when executed it will not assist

But where the sale is made on Sunday, but no property is delivered in pursuance of it until a secular day, the vendor may recover the value of the property delivered upon the implied contract to pay what it was worth. Neither party, however, can set up the terms of the agreement to sell made on Sunday; so much as was done on that day is invalid.¹ As sales made on Sunday are illegal, it follows that no action can be maintained by one party thereto for fraud or deceit practiced on him by

the party who has parted with his money or property to recover it back; when executory it will not compel performance. It would not leave the parties where their illegal contract left them if it did not maintain the title acquired by the contract." The decision was that the vendor of goods sold on Sunday could not recover the price, and that a vendee, who had asserted and maintained his title to the goods in an action against the vendor for taking the same from his possession, was not estopped to set up the defense of Sabbatical illegality in an action by the vendor to recover the price. See also *Smith v. Bean*, 15 N. H. 579, and *Ladd v. Rogers*, 11 Allen (Mass.) 209, holding that the price of an article sold on Sunday cannot be recovered, the remedy being an action of tort in the nature of trover.

In *Cranson v. Goss*, 107 Mass. 441; 9 Am. Rep. 45, Gray, J., said: "If a chattel has been delivered by its owner to another person on the Lord's Day by way of bailment or pledge, the latter may retain it for the special purposes for which he received it; or if it has been delivered to him on the Lord's Day by way of sale or exchange, it cannot, at least if he has at the same time paid or delivered the consideration on his part, be recovered back at all." See also *King v. Greene*, 6 Allen (Mass.) 139.

In *Williams v. Paul*, 6 Bing. 653; 19 E. C. L. 102, where a party bought a heifer on Sunday and afterwards made a promise to pay for it, it was held that, having kept the animal, he was liable at all events on a *quantum meruit*. But in *Simpson v. Nichols*, 3 M. & W. 240; 5 M. & W. 702, Parke, B., expressed the opinion that this decision could not be sustained in law. In this case the doctrine of the text was laid down.

In *Foreman v. Ahl*, 55 Pa. St. 323, F. bought of A. fifteen mules on Sunday and gave his note for the price on the same day. Two of the mules were de-

livered on Monday, the remainder on Sunday. It was held that the note being executed on Sunday was void, and that the price of the thirteen delivered on Sunday could not be recovered; but that recovery on a *quantum valebant* might be had for the two delivered on Monday.

A contract of sale of a horse provided that the vendee might return it if unsatisfactory. It was held that though the sale was made on Sunday, yet the vendee might return the horse and sue for the purchase price. *Maurer v. Wolf*, 21 N. Y. Supp. 202.

Exchange on Sunday.—In accordance with the principles just reviewed an action will not lie for the conversion of a chattel delivered on Sunday in exchange for another, and retained by the deliverer afterwards, notwithstanding the return of the other chattel for which the exchange was made. *Myers v. Meinrath*, 101 Mass. 366; 3 Am. Rep. 368n; *Robeson v. French*, 12 Met. (Mass.) 24; 45 Am. Dec. 236; *Kelley v. Cosgrove* (Iowa, 1891), 48 N. W. Rep. 979. See also *Murphy v. Simpson*, 14 B. Mon. (Ky.) 337. Compare *Adams v. Gay*, 18 Vt. 358, where a party was allowed an action for fraud in an exchange of horses which took place entirely on Sunday.

1. *Bradley v. Rea*, 14 Allen (Mass.) 22; 103 Mass. 188; 4 Am. Rep. 524; *Wharton on Contracts*, §§ 383-4; *Tucker v. West*, 29 Ark. 386.

But if the property be sold and delivered on Sunday there can be no recovery either for its price or its value. *Cranson v. Goss*, 107 Mass. 442; 9 Am. Rep. 45.

Goods were sold and delivered on Sunday by A to B, the sale being induced by fraudulent representations by B on a previous day. At a subsequent day, not Sunday, A demanded the price of B, who promised to pay it. It was held that B was liable to an action for the price. *Winchell v. Carey*, 115 Mass. 560; 15 Am. Rep. 151.

the other party during the course of the sale, nor for breach of warranty.¹

The doctrine set forth above is sanctioned by the great weight of authority. There is, however, authority for the view that a sale or other executed contract made on Sunday in violation of law is void absolutely, and that either party may enforce a demand to be restored to the original status; that is, that the seller, on returning the price received by him, may recover back his chattel, or the buyer may recover back the price paid on returning the chattel to the seller.²

3. Contracts Executory—*a*. VALIDITY.—Here belong two classes of contracts executory, viz.: those to be performed on Sunday and those which are entered into on Sunday. Under the rule that contracts to do a thing prohibited by statute are void, it is held that all contracts for work or labor to be performed on Sunday are void, unless such work comes within the exception of necessity or charity.³ So a contract, of which the sole considera-

1. *Robeson v. French*, 12 Met. (Mass.) 24; 45 Am. Dec. 236; *Murphy v. Simpson*, 14 B. Mon. (Ky.) 337, case of "swapping" horses; *Finley v. Quirk*, 9 Minn. 195; 86 Am. Dec. 93; *Lyon v. Strong*, 6 Vt. 219; *Hulet v. Stratton*, 5 Cush. (Mass.) 539; *Sellers v. Dugan*, 18 Ohio 489; *Plaisted v. Palmer*, 63 Me. 576; *Gunderson v. Richardson*, 56 Iowa 56; 41 Am. Rep. 81; *Benj. on Sales* (4th Am. ed.), § 553, note k; *Grant v. McGrath*, 56 Conn. 333; *Fennell v. Ridler*, 15 B. & C. 406; 11 E. C. L. 261. Compare *Adams v. Gay*, 19 Vt. 358; *Melvin v. Easley*, 7 Jones (N. Car.) 356 (recovery allowed); *McKee v. Jones*, 67 Miss. 405 (sale made in Louisiana).

2. This is the view of the *Michigan* court as stated in *Tucker v. Mowrey*, 12 Mich. 378, and *Brazee v. Bryant*, 50 Mich. 140. In the first case, the court said: "Whether the supposed contract has been executed or remains executory, we think the rights of the parties are to be determined in the same manner as if no such contract had ever been made. The contract as such can neither be set up as the basis of an action, nor as a ground of defense. If it be a contract of sale accompanied by payment and delivery, as supposed in the present case, no property passes and the vender, by tendering back what he has received, may claim the property, and the vendee, on tendering back the property, may recover the money or property given in payment or exchange as if no pretense of such contract existed." And these views were approved in *Brazee v. Bryant*, 50 Mich.

140, and the doctrine that both parties being equally in the wrong will be left by the law to themselves, was repudiated. See also *Calhoun v. Phillips* (Ga. 1891), 13 S. E. Rep. 593; *Tucker v. West*, 29 Ark. 386; *Dodson v. Harris*, 10 Ala. 566.

Maine Rev. St. ch. 82, § 116, prohibits the setting up of the defense that the contract was made on Sunday, unless the party claiming the defense has restored the consideration received; and this statute applies, though the consideration, in the nature of things, cannot be restored. *Wheelden v. Lyford* (Me. 1891), 24 Atl. Rep. 793; *First Nat. Bank v. Kingsley* (Me. 1891), 24 Atl. Rep. 794.

3. *Hazard v. Day*, 14 Allen (Mass.) 487; 92 Am. Dec. 790; *Waters v. Richmond*, etc., R. Co. (N. Car. 1892), 14 S. E. Rep. 802; *Burkholder v. Beetam*, 65 Pa. St. 496; *Steele v. Curle*, 4 Dana (Ky.) 384.

A note given on Saturday to take effect on the Sunday following has been held valid. *Staly v. Kemp*, 97 Mass. 166.

Contracts to be performed on Sunday are void. *Peate v. Dicken*, 1 C. M. & R. 422; *Ganthier v. Cole*, 17 Fed. Rep. 716; *Johnson v. Brown*, 13 Kan. 529; *Pate v. Wright*, 130 Ind. 476; 95 Am. Dec. 705; *Smith v. Wilcox*, 25 Barb. (N. Y.) 341; *aff'd* 24 N. Y. 353; 82 Am. Dec. 305; contract for publication of an advertisement in a Sunday newspaper—void, *Brunnette v. Clark*, 1 Buff. Super. Ct. (N. Y.) 500; contract to make balloon ascension on Sunday, *Bilordeaux v. Bencke*

tion is past services rendered on Sunday in violation of the statute, is without a valid consideration, and, therefore, is void.¹

Lith. Co., 9 N. Y. Supp. 507; contract to give instructions in photography on Sunday—void, *Slade v. Arnold*, 14 B. Mon. (Ky.) 232; *Allen v. Duffie*, 43 Mich. 5; 38 Am. Rep. 159; *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188; *Watts v. Van Ness*, 1 Hill (N. Y.) 76.

It was held in an early case in *New York* that a contract by a theatre manager for exhibitions to be given on Sunday was void, as contrary to the intent and purpose of the statute. *Lindemuller v. People*, 33 Barb. (N. Y.) 548.

A request for the services of a stalion was made on Sunday, but was not shown to have been acceded to at the time, afterwards the service requested was rendered on a week day. It was held that there was no violation of the statute and that the party rendering the services might recover therefor. *Dickinson v. Richmond*, 97 Mass. 45.

In *Watts v. Van Ness*, 1 Hill (N. Y.) 76, an attorney's clerk employed at a weekly salary sued for compensation for extra work performed on Sunday. But it was held that there could be no recovery, since such work was in violation of the Sunday statute.

In *Johnson v. Com.*, 22 Pa. St. 102, it was held that a contract of hiring by the month does not in general bind the person hired to work on Sunday; and that if the work is such as is forbidden to be done on Sunday an express agreement to perform it on that day will not bind him, since such a contract is void.

Where there is a contract for services to be rendered on Saturday, Sunday, and Monday, there can be no recovery at all for compensation if the contract was an entire one. If the contract is not an entire one the rule may be otherwise, and recovery may be had upon a *quantum meruit*. But the contract itself would be void as contemplating a part performance on Sunday. *Williams v. Hastings*, 59 N. H. 373.

For a contract to be void, under the rule of the text, in *New York*, it must be one for servile labor to be performed exclusively and expressly on Sunday and on no other day. Hence a contract to transport property on a steamer is not void because made on Sunday, or because the voyage is to commence on that day. *Merritt v. Earle*, 31 Barb. (N. Y.) 38; *aff'd* 29 N. Y. 115; 86 Am. Dec. 292.

A seaman shipped for a voyage from

San Francisco to Alaska and back. He refused to perform his ordinary duty on the ground that such duty was required of him on Sunday. The articles of agreement contained no agreement for exemption from work on Sunday. It was held that from the very nature of his service he was bound to work on Sunday, and that the master of the vessel might require such service of him. *The Cyane*, 4 Am. L. Rev. 769-770; *Ulary v. The Washington*, *Crabbe* (U. S.) 204. See generally *SEAMAN*, vol. 21, p. 915.

In a suit for services in washing towels, the plaintiff's statement that she washed the towels in lots sufficient to have five clean ones for use in the saloon each day, including Sunday, does not necessarily show that she was suing for services performed in violation of the Sunday law. *Cornelius v. Reiser*, 18 N. Y. Supp. 113.

A contract for services in examining lands in a distant state, paying taxes on it, etc., which provides that the party employed shall receive as compensation two dollars per day "for every day consumed in such services," dating from the day he started and until he returns, "Sundays and all," is not invalid as a contract for work to be performed on Sunday. *Alfree v. Gates* (Iowa, 1891), 47 N. W. Rep. 993; *Porter v. Sanderson*, 37 Wis. 41.

A party made a contract to pay a vessel owner a certain sum per day for unloading, etc. It was held that the court would not presume that the labor was intended to be done on Sunday. *Rigney v. White*, 4 Daly (N. Y.) 400.

Where, in an action for failure to provide a car to transport stock to be sold in another state on Sunday, it is proved that Sunday sales are made unlawful by the statutes of the state in which the cattle were to be sold, it is proper to refuse a charge that the contract between plaintiff and defendant "was based upon an illegal consideration, and was void," as the contract is valid, though plaintiff's purpose may have been illegal. *Waters v. Richmond*, etc., R. Co., 108 N. Car. 349; 49 Am. & Eng. R. Cas. 166, note; *McAbsher v. Richmond*, etc., R. Co., 108 N. Car. 344.

1. *Bernard v. Luppig*, 32 Mo. 341; *Gauthier v. Cole*, 17 Fed. Rep. 716; *Slade v. Arnold*, 14 B. Mon. (Ky.) 232;

Since statutes providing for the observance of Sunday exist in every state, these doctrines are of universal application.¹

In the case of work or labor performed partly on Sunday and partly on secular days, it seems that there may be a recovery in *assumpsit* for the work performed on the secular days, even though the contract is void.²

Concerning executory contracts entered into on Sunday there is much conflict of opinion and authority, and it is necessary to examine the reasoning adopted in the several jurisdictions. In *England*, it was at one time considered that such contracts were not invalid unless made in pursuance of one's usual and ordinary calling.³ But this is no longer the rule. The doctrine now accepted is that in all contracts entered into on Sunday, as both parties are *in pari delicto*, neither can assert rights under the contract; the policy of the law is that of absolute non-action; it leaves the parties exactly where they happen to be. The result is that the contract, being executory, is for all practical purposes void; the maxims in *pari delicto potior est conditio defendentis* and *ex turpe causa non oritur actio* preclude recovery by either party in an action based upon the contract.⁴ And this English

Williams v. Hastings, 59 N. H. 373; *Nodine v. Doherty*, 46 Barb. (N. Y.) 59, contract of hiring a horse to travel on Sunday, void; *Towle v. Larrabee*, 26 Me. 464, note given for goods bought on Sunday; 4 Minor's Insts. (2d ed.) 16, 17; *O'Donnell v. Sweeney*, 5 Ala. 467; 39 Am. Dec. 336.

In *Melchoir v. McCarty*, 31 Wis. 252; 11 Am. Rep. 605, a contract, the consideration for which was liquor sold on Sunday, in violation of the statute, was held valid.

1. As to the validity of contracts entered into on Sunday there is a great diversity of judicial opinion in the various states. The subject of such contracts is not to be confused with that of those under consideration, as to which there is but one opinion. See *Smith v. Wilcox*, 24 N. Y. 353; 82 Am. Dec. 305. Compare *Merritt v. Earle*, 29 N. Y. 115; 86 Am. Dec. 292.

2. Labor Performed Partly on Sunday and Partly on Secular Day.—One may recover for a *quantum meruit* upon the implied contract. *Merritt v. Earle*, 31 Barb. (N. Y.) 38; *Clark v. U. S.*, 95 U. S. 539; *Merriwether v. Smith*, 44 Ga. 541.

3. See *Drury v. Defontaine*, 1 Taunt. 135.

In *Rex v. Whitnash*, 7 B. & C. 596; 14 E. C. L. 100, it was held that a contract of hiring between a farmer and a laborer, made on Sunday, was not void.

4. Doctrine in England—General Doc-

trine.—In *Smith v. Sparrow*, 4 Bing. 84; 13 E. C. L. 354; 2 C. & P. 534; 12 E. C. L. 253, Park, J., speaking of the judgment of Lord Mansfield in *Drury v. Defontaine*, 1 Taunt. 135, said: "I think the construction put upon the statute in that case too narrow. The expression 'any worldly labor' cannot be confined to a man's ordinary calling, but applies to any business he may carry on." The same view is sustained in other English cases. *Fennell v. Ridler*, 5 B. & C. 406; 11 E. C. L. 262; *Bloxam v. Williams*, 3 B. & C. 232; 10 E. C. L. 60; *Scarfe v. Morgan*, 4 M. & W. 270. See also *Benj. on Sales* (4th Am. ed.), §§ 552-3; *Wharton on Contracts*, § 385; *Bishop on Contracts* (Enlarged ed.), § 538; *George v. George*, 47 N. H. 27; *Day v. McAllister*, 15 Gray (Mass.) 433.

Lord Mansfield, in *Holman v. Johnson*, Cowp. 343, observes: "It sounds very ill in the mouth of a defendant that a contract is immoral or illegal as between him and a plaintiff. But it is not for him that the objection is allowed. It is because the court will not lend its aid to one who founds his cause of action upon an 'illegal act.' This language was quoted and approved in *Finn v. Donahue*, 35 Conn. 218; *Whelden v. Chappel*, 8 R. I. 233.

A party cannot be heard to allege his own unlawful act, and if such act be one of a series of facts necessary to support his claim, that claim must fail.

doctrine is that adopted in most of the states of the Union.¹ In other states it is considered that, under their peculiar Sunday statutes, entering into contracts on Sunday is not forbidden, and therefore such contracts are as valid and binding as if entered

Pope v. Linn, 50 Me. 83; Gregg v. Wyman, 4 Cush. (Mass.) 326.

In 1 Story on Contracts, § 754, it is said: "In all these cases, however, it must be understood that the act done must come fairly and reasonably within the terms [of the statute] forbidding it; for, as the common law did not render contracts void because made on Sunday, the case must be brought directly within the provisions of the act."

1. Doctrine in Most of the States—Arkansas.—The statute imposes a penalty upon any one "found laboring or performing other services, not of necessity or charity," on Sunday. Contracts executed on Sunday are void in this state, not at common law, but by virtue of the statute, Tucker v. West, 29 Ark. 386; Stewart v. Davis, 31 Ark. 518; 25 Am. Rep. 576; hiring a horse, Edwards v. Probst, 38 Ark. 661.

An offer on Sunday to rescind a contract is void. Merritt v. Robinson, 35 Ark. 483.

Connecticut.—The statute prohibits "secular business, work, or labor." In Finn v. Donahue, 35 Conn. 219, the principle as to Sunday contracts was laid down as "*ex turpi causa non oritur actio*." The court said: "The principle that a party cannot recover, who is obliged to trace his title through an illegal act, was fully recognized in Phalen v. Clark, 19 Conn. 421, and it was there said to be well settled that if a plaintiff requires any aid from an illegal transaction to establish his demand, he cannot recover." A contract entered into on Sunday is therefore void. See also Gladwin v. Lewis, 6 Conn. 49; 16 Am. Dec. 33; Wight v. Geer, 1 Root (Conn.) 474; Greathead v. Walton, 40 Conn. 235; Cameron v. Peck, 37 Conn. 556, when an order for goods was written and signed on Sunday, but dated, delivered, and filed on a secular day, and it was held that the maker could not defend, on the ground that such order was void.

Indiana.—The statute prohibits "common labor" on Sunday. Contracts made on Sunday are considered to come within the prohibition, and are therefore invalid. They may be ratified, however, on a secular day.

Link v. Clemmens, 7 Blackf. (Ind.) 479, replevin bond; Reynolds v. Stevenson, 4 Ind. 619, promissory note; Banks v. Werts, 13 Ind. 203; Perkins v. Jones, 26 Ind. 499; Catlett v. M. E. Church, 62 Ind. 365; 30 Am. Rep. 197; Evansville v. Morris, 87 Ind. 277; 44 Am. Rep. 763; Western Union Telegraph Co. v. Eskridge (Ind. App. 1893), 33 N. E. Rep. 238; Williamson v. Brandenburg (Ind. App. 1893), 32 N. E. Rep. 1022.

Iowa.—The statute prohibits the doing of "business" or the engaging in acts of "common labor" on Sunday. Contracts entered into on Sunday are therefore void. Clough v. Goggins, 40 Iowa 325; Sayre v. Wheeler, 31 Iowa 112; 32 Iowa 559.

In Gunderson v. Richardson, 56 Iowa 56; 41 Am. Rep. 81, it was held that no action could be maintained for fraudulent representations made in connection with a Sunday contract.

The defense that a contract was made on Sunday must be specially pleaded. Riech v. Bolch, 68 Iowa 526.

Maine.—The statute prohibits any "labor or business" on Sunday. Under the Maine statute a note or other contract entered into on Sunday is void absolutely. Bank of Cumberland v. Mayberry, 48 Me. 198; Hilton v. Houghton, 35 Me. 143; Pope v. Linn, 50 Me. 83; First National Bank v. Kingsley (Me. 1892), 24 Atl. Rep. 794. A note signed on Sunday and delivered on Monday is valid. Hilton v. Houghton, 35 Me. 143.

The Maine statute provides that "no person who receives a valuable consideration for a contract, express or implied, made on the Lord's Day, shall defend any action upon such contract on the ground that it was so made until he restores such consideration." In Wheel- den v. Lyford, 84 Me. 114, it was held that where one had hired a team upon Sunday, he could not defend an action for the hire thereof, although the contract was void under the Sunday law, as the consideration, in the nature of things, could not be returned.

In First Nat. Bank v. Kingsley, 84 Me. 111, it was held that a demurrer to a complaint in an action against the indorser of a note was properly overruled where the demurrer was based

upon the ground that the indorsement was made upon Sunday and therefore void, but it did not appear that the defendant had restored the consideration for the indorsement.

Massachusetts.—The statute prohibits "any manner of labor, business, or work, except only works of necessity or charity." Contracts entered into on Sunday are void absolutely and not susceptible of ratification. *Day v. McAllister*, 15 Gray (Mass.) 434; *Merriam v. Stearns*, 10 Cush. (Mass.) 257, guaranty for fulfillment of lease is void if made on Sunday, though the lease itself may not be executed until a subsequent week day; *Pattee v. Greely*, 13 Met. (Mass.) 284, bond; *Wheeler v. Russell*, 17 Mass. 258. See also *Cranston v. Goss*, 107 Mass. 440; 9 Am. Rep. 45; *Hazard v. Day*, 14 Allen (Mass.) 487; 92 Am. Dec. 790.

In an old case it was said: "A note executed on Sunday is not necessarily void." *Geer v. Putnam*, 10 Mass. 317.

Michigan.—The statute prohibits "any manner of labor, business, or work." A contract entered into on Sunday is void. *Adams v. Hamell*, 2 Dougl. (Mich.) 73; 43 Am. Dec. 455, parties exchanged horses on Sunday—note given for "boot" held void; *Tucker v. Mowrey*, 12 Mich. 378; *Searles v. Reed*, 63 Mich. 485; *Winfield v. Dodge*, 45 Mich. 355; 40 Am. Rep. 476, no ratification; *Saginaw, etc., R. Co. v. Chappell*, 56 Mich. 190, railroad aid subscription void because signed on Sunday. See also *Vinton v. Peck*, 14 Mich. 287; *Van Sickle v. People*, 29 Mich. 6, forgery of acknowledgment on Sunday; *Costello v. Ten Eyck*, 86 Mich. 348.

Minnesota.—The statute forbids "labor, business, or work," and a contract made on Sunday being in violation of the statute and *contra bonos mores* is void. *Brimhall v. Van Campen*, 8 Minn. 13; 82 Am. Dec. 118; *Finney v. Callendar*, 8 Minn. 41; *Finley v. Quirk*, 9 Minn. 194; 86 Am. Dec. 93; *Webb v. Kennedy*, 20 Minn. 419, contract of hiring; *Hanchett v. Jordan*, 43 Minn. 149. In *Durant v. Rhener*, 26 Minn. 362, the formation of a partnership on Sunday was held void. See also *State v. Young*, 23 Minn. 551.

In *Finley v. Quirk*, 9 Minn. 194; 86 Am. Dec. 93, it was held in an action upon a warranty in the sale of a horse, where the answer admitted the sale but denied the warranty, that the defendant was not entitled to show that

the contract was void because consummated on Sunday without pleading that fact as a defense.

Mississippi.—All "business" is prohibited by section 2949 of the Code of 1880. Under this, contracts made on Sunday are held void. *Miller v. Lynch*, 38 Miss. 346; *Herndon v. Henderson*, 41 Miss. 584. In the latter case it was held that evidence that the contract was made on Sunday was not admissible under the general issue.

It is also held that if a contract has its inception on Sunday and is completed on a secular day it is valid; but that if the terms of the contract are settled on Sunday and the execution of it deferred to some other day, it is void. A contract resting upon the illegal consideration or carrying into effect the illegal agreement is illegal. *Kountz v. Price*, 40 Miss. 341. See also *Foster v. Wooten*, 67 Miss. 540; *Block v. McMurry*, 56 Miss. 220; 31 Am. Rep. 357.

Nevada.—In *State v. California Min. Co.*, 13 Nev. 203, it was held that an appeal bond may be valid though executed on Sunday. The only ground of invalidity urged, however, was that such a bond was "judicial business," which is prohibited by statute. The court held that it was not "judicial business."

New Hampshire.—The statute prohibits any person to do "any work, business, or labor of his secular calling." Contracts entered into on Sunday are void. *Woodman v. Hubbard*, 25 N. H. 67; 57 Am. Dec. 312; *Allen v. Deming*, 14 N. H. 133; 40 Am. Dec. 179, execution and delivery of a promissory note is business of one's secular calling; *Smith v. Foster*, 41 N. H. 220, ordinary and secular calling distinguished. See also *Gilman v. Berry*, 59 N. H. 62.

"It is a matter of law that whether any one besides the plaintiff and defendant were present or not, the sale was 'business' of plaintiff's secular calling done to the disturbance of others." *Varney v. French*, 19 N. H. 233.

As to contracts of bailment made on Sunday, see *Chenette v. Teehan*, 63 N. H. 149; *Woodman v. Hubbard*, 25 N. H. 67; 57 Am. Dec. 312.

New Jersey.—Here every contract entered into on Sunday is a violation of the statute forbidding "worldly labor or business" on that day, and therefore void. Nothing short of an express promise on a secular day will be sufficient to maintain a suit on such a contract. The contract is therefore not

into on any other day. This is the view taken in *Illinois, Nebraska*, and some other jurisdictions where "common labor" is prohibited on Sunday, but where there is no prohibition as to "business" on that day.¹

really ratified; the suit stands solely on the new promise. *Reeves v. Butcher*, 31 N. J. L. 224, payment of interest not sufficient new promise; *Steffens v. Earl*, 40 N. J. L. 128; 29 Am. Rep. 214; *Nibert v. Baghurst*, 47 N. J. Eq. 201; *Ryno v. Darby*, 20 N. J. Eq. 231; *Rush v. Rush* (N. J. 1889), 18 Atl. Rep. 221, parol agreement on Sunday extending time of payment, void. In *Crocket v. Vanderveer*, 3 N. J. L. 422, it was said that the court would not aid a contract made on Sunday, but the justice was "not prepared to say that all contracts made on Sunday are void."

Oregon.—The statute provides: "If any person shall do secular business or labor on Sunday he shall be fined," etc. A note executed on Sunday is in violation of the statute, void, and cannot be enforced. *Smith v. Case*, 2 Oregon 192. In this case S. lent to C. three hundred dollars, for which C. executed and delivered his promissory note on Sunday. On a week day he subsequently made a promise to pay S. the money so received. It was held that though the note made on Sunday was void, yet the subsequent promise made C. liable in *assumpsit* for money had and received. The retention of the money constituted a sufficient consideration for the promise.

Pennsylvania.—The statute prohibits, under penalty, "any worldly employment or business" on Sunday. Under this, contracts entered into on Sunday are void. *Kepner v. Keefer*, 6 Watts (Pa.) 231; 31 Am. Dec. 460, correcting expressly the error of *Morgan v. Richards*, 1 Browne (Pa.) 171, which holds that such contracts were void at common law; *Foreman v. Ahl*, 55 Pa. St. 325; *Uhler v. Applegate*, 26 Pa. St. 140. See also *Com. v. Kendig*, 2 Pa. St. 449, note signed on Sunday but delivered subsequently—valid; *Wiley v. Wildeemuth*, 4 W. N. C. (Pa.) 462, 560. But in *Lee v. Drake*, 10 Pa. Co. Ct. Rep. 276, it is said that a judgment entered upon a confession contained in a note made on Sunday will not be set aside.

Texas.—The statute imposes a penalty upon any one who shall "labor, or compel or force his employes, etc., to labor on Sunday," and upon any merchant, grocer, or dealer "who shall barter or sell on Sunday." In *Gulf*,

etc., *R. Co. v. Levy*, 59 Tex. 542; 46 Am. Rep. 278, a contract was upheld though made on Sunday, but it was on the ground that it was one of necessity or charity. In *Schneider v. Sansom*, 62 Tex. 203; 50 Am. Rep. 521, the doctrine of *in pari delicto* was applied to a contract completed on Sunday.

Vermont.—The statute prohibits every species of "secular labor, business or employment." In *Lyon v. Strong*, 6 Vt. 219, it was held that a sale or exchange of horses on Sunday was void; and in *Lovejoy v. Whipple*, 18 Vt. 379; 46 Am. Dec. 157, that a promissory note executed upon Sunday in consummation of a contract previously made was void.

Virginia.—The statute imposes a penalty upon every one "found laboring at his trade or calling." It is settled that "a contract founded on an act forbidden by statute under penalty, is void, though not expressly declared to be so, and no action lies to enforce it." *Willson v. Spencer*, 1 Rand. (Va.) 76; 10 Am. Dec. 491; *Middleton v. Arnolds*, 13 Gratt. (Va.) 489.

West Virginia.—Here the statute is similar to that of *Virginia*. See *State v. Knight*, 29 W. Va. 341.

Wisconsin.—The statute prohibits the transaction of any "labor, business or work" on Sunday. Hence contracts made on Sunday are void. *Thomas v. Hatch*, 53 Wis. 296; *De Forth v. Wisconsin, etc.*, R. Co., 52 Wis. 320; 5 Am. & Eng. R. Cas. 28; 38 Am. Rep. 737; affixing one's name to a bond is "business"; *Troewert v. Decker*, 51 Wis. 46; 37 Am. Rep. 808; lending money; *Hill v. Sherwood*, 3 Wis. 346; *Vinz v. Beatty*, 61 Wis. 648; *Walsh v. Blatchley*, 6 Wis. 422; 70 Am. Dec. 469, good defense that an indorsement was made on Sunday; *Smith v. Chicago, etc.*, R. Co., 79 Wis. 259, agreement consenting to laying railroad tracks across land—void when made on Sunday. See also *Blakesley v. Johnson*, 13 Wis. 530, relief in equity against hardship of holding a Sunday contract void.

1. It was said in *Rex v. Whitnash*, 7 B. & C. 596; 14 E. C. L. 100, by Bayley, J., that "if the true construction of the act be that every species of business

is prohibited, then all contracts whatever, made on Sunday, will be void."

Illinois.—In this state there is no prohibition of the transaction of business on Sunday, but only of the disturbance of "the peace and good order of society by labor." A contract, the only objection to which is that it was entered into on Sunday, is valid and binding. *Richmond v. Moore*, 107 Ill. 429; 47 Am. Rep. 445; *Johnston v. People*, 31 Ill. 469, recognizance executed on Sunday. See also *King v. Fleming*, 72 Ill. 21; 22 Am. Rep. 131; *Moore v. Clymer*, 12 Mo. App. 14, contract made in *Illinois*.

The opinion of the court in *Richmond v. Moore*, 107 Ill. 429; 47 Am. Rep. 445, contains an extended review of the law of Sunday as it exists in *Illinois*.

Nebraska.—The statute prohibits all acts of "common labor" on Sunday. A contract entered into on Sunday is not an act of "common labor" and is therefore not objectionable merely because entered into on that day. *Horacek v. Kubler*, 5 Neb. 355; *Fitzgerald v. Andrews*, 15 Neb. 52, execution of a bill of sale on Sunday.

Ohio.—Here the same doctrine prevails as in *Nebraska*. In *Bloom v. Richards*, 2 Ohio St. 387, it was held that a contract was not "common labor."

California.—The Sunday statute is "not designed to prohibit the making of contracts [on Sunday], but the keeping open of a house or place of business on Sunday." A contract is therefore not objectionable merely on the ground that it was entered into on Sunday. *Moore v. Murdock*, 26 Cal. 526.

Kansas.—"Our statute simply prohibits labor [or work] on that day" (Sunday). A contract may therefore be valid though entered into on Sunday. *Birks v. French*, 21 Kan. 238; *Johnson v. Brown*, 13 Kan. 529. But a contract to perform work or labor on Sunday is void. *Johnson v. Brown*, 13 Kan. 529. See *Hill v. Wilker*, 41 Ga. 449; 5 Am. Rep. 540, where a *Kansas* contract was held void on the presumption that the law of *Kansas* was the same as that of *Georgia*.

Kentucky.—The statute provides for a penalty to be imposed upon every one "found laboring at his own or any other trade or calling, whether for profit or amusement." There is no case under this statute directly adjudicating the point, but it seems that the mere fact that a contract was entered into on Sunday does not invalidate it. Making a contract is not usually considered to be labor. In *Ray v. Catlett*, 12 B. Mon. (Ky.) 535, the court, by Marshall, J., said: "We are not prepared to say that the mere execution and delivery of a note or its mere acceptance on Sunday is laboring at any trade or calling, unless it be part of some other transaction done also on Sunday, which may be regarded as labor at some trade or calling. And if the mere extension and delivery of a note would be deemed such labor, we are satisfied its acceptance could not, and the person accepting it would not be involved in any consequence of a breach of the law unless he knew that the note had been made as well as delivered on Sunday." So that in an action upon a Sunday contract, a plea by defendant that such contract is void is not good unless it avers that the payer knew the facts, or that the transaction which induced the giving of the note took place on Sunday. See also *Rice v. Com.*, 3 Bush (Ky.) 14, where it was held that a bail bond was valid though executed on Sunday; *Watts v. Com.*, 5 Bush (Ky.) 309, same; *Prather v. Harlan*, 6 Bush (Ky.) 187, where it was held that a replevin bond was valid though executed on Sunday; *Dehoney v. Dehoney*, 7 Bush (Ky.) 221, where a note signed on Sunday, and delivered on Monday, was held valid.

Missouri.—The statute forbids any person to "labor or perform any work" on Sunday. Under this it is held that a promissory note made and executed on Sunday is not invalid. It is not labor or work and is not invalid at common law or under the statute. *Glover v. Cheatham*, 19 Mo. App. 656; *Moore v. Clymer*, 12 Mo. App. 14, *Illinois* contract; *Kaufman v. Hamm*, 30 Mo. 387, promissory note given on Sunday for antecedent debt. Compare *Gwinn v. Simes*, 61 Mo. 335, point left *quare*; *Sayre v. Wheeler*, 31 Iowa 112, contract made in *Missouri*.

In *Glover v. Cheatham*, 19 Mo. App. 661, the court adverts to the fact that the legislature had remained silent since the decision in *Kaufman v. Hamm*, 30 Mo. 387.

New York.—The statute merely says that "all labor on Sunday is prohibited." It is therefore held that a contract entered into on Sunday is not void and does not violate the statute

In *Alabama* it is provided that all contracts entered into on Sunday shall be void, unless for the advancement of religion, or for purposes of necessity or charity.¹

In a few states the distinction is made between contracts which are of one's usual and ordinary calling, and those which are not, and those of the former class are declared to be invalid.²

providing for Sunday observance, unless it is to perform work on Sunday. *Merritt v. Earle*, 29 N. Y. 115; 86 Am. Dec. 292; *Boynton v. Page*, 13 Wend. (N. Y.) 425; *Watts v. Van Ness*, 1 Hill (N. Y.) 76; *Smith v. Wilcox*, 24 N. Y. 353; 82 Am. Dec. 305, contract for advertising in paper issued on Sunday—void; *Greenbury v. Williams*, 9 Abb. Pr. (N. Y.) 206 n.

All acts in the transaction of business done on Sunday are valid unless prohibited by common law or by statute. *Sayles v. Smith*, 12 Wend. (N. Y.) 57; 27 Am. Dec. 117; *Morris v. Crane*, 4 Sent. Ch. (N. Y.) 6. See also *Batsford v. Every*, 44 Barb. (N. Y.) 618; *Eberle v. Melerback*, 55 N. Y. 682.

Where a contract made upon Sunday is performed upon secular days by one party at the instance of the other, who derives a benefit therefrom, it is enforceable against the latter. *Christie v. Cornelius Callahan Co.*, 22 N. Y. Supp. 37.

1. *Alabama*.—*Alabama Code* (1876), §§ 1749, 2138. See *O'Donnell v. Sweeney*, 5 Ala. 467; 39 Am. Dec. 336; *Butler v. Lee*, 11 Ala. 885; 46 Am. Dec. 231; *Shippey v. Eastwood*, 9 Ala. 198. In *Anders v. Bellenger*, 87 Ala. 338, a statutory claim bond accepted by the sheriff on Sunday was held absolutely void.

But under this section a contract consummated by a telegram sent late Saturday evening to Bremen, Germany, cannot be declared void merely because the message must be delivered on Sunday in order to bind the party to whom it is sent, there being no evidence as to the German law on the subject. *Western Union Tel. Co. v. Way*, 83 Ala. 562.

2. *Georgia*.—In this state, the distinction adverted to in the text is observed. So that if a farmer, whose business is to cultivate and purchase land, buys land on Saturday agreeing to sign the papers the next day, a note for the price signed accordingly on Sunday cannot be sued on. *Morgan v. Bailey*, 59 Ga. 683; *Sanders v. Johnson*, 29 Ga. 526, note executed on Sunday—bur-

den of proof rests upon party setting up the statute to show that contract was within ordinary calling of the maker.

One cannot be obliged to criminate himself by testifying that he labored at his common avocation on Sunday. *Harrison v. Pavers*, 76 Ga. 218.

See also as to the *Georgia* law of Sunday contracts, *Hill v. Wilker*, 41 Ga. 449; 5 Am. Rep. 540, where a contract made in *Kansas* was held void.

Rhode Island.—The statute prohibits "labor, business or work within the ordinary calling of the parties." It has been held that the execution by delivery on Sunday, of a release by a creditor to an assignee under a voluntary assignment is not void, since it is not labor, business, or work within the ordinary calling of the parties. *Allen v. Gardiner*, 7 R. I. 22. See also *Sayles v. Wellman*, 10 R. I. 465; *Hazard v. Day*, 14 Allen (Mass.) 487; 92 Am. Dec. 790, contract made in *Rhode Island*. This case holds that it is not within one's ordinary calling to purchase a dwelling house for the personal occupation of himself and family, signing a contract therefor and making and delivering a check for part payment.

Where horses are hired of a liveryman on Sunday, the contract of hiring is void. *Smith v. Rollins*, 11 R. I. 464; 23 Am. Rep. 509; *Whelden v. Chappel*, 8 R. I. 230. See also *Brown v. Browning*, 15 R. I. 422, a case of a *Connecticut* contract.

South Carolina.—The statute forbids tradesmen, workmen, laborers, etc., from exercising any worldly labor, business or work in their ordinary calling. In *Hellams v. Abercrombie*, 15 S. Car. 110; 40 Am. Rep. 684, it is held that the execution of a mortgage on Sunday is not in violation of the statute.

Tennessee.—Here it is held that where a contract is entered into on Sunday, being the exercise of his "common avocation," by either of the parties, both parties are *in pari delicto*, and neither can assert any rights under such contract. *Berry v. Planters' Bank*, 3 Tenn. Ch. 69; *Tennessee Code*, § 1723.

But an isolated private contract out-

A note signed on Sunday but delivered on a secular day is valid, as it is the delivery, not the signing, which constitutes the consummation of the contract.¹ And so of other contracts.² A note actually executed and delivered on Sunday but dated as of

side the ordinary calling or "common avocation" of the parties may be valid, although entered into on Sunday. *Swann v. Swann*, 21 Fed. Rep. 299; 24 Am. L. Reg. (N. S.) 378; *Arms v. Kyle*, 2 Yerg. (Tenn.) 31; 24 Am. Dec. 463.

1. **Note Signed on Sunday but Delivered on a Secular Day.**—*Gibbs, etc., Mfg. Co. v. Brucker*, 111 U. S. 597; *Fritch v. Heilsen*, 40 Mo. 555; *Flanagan v. Myer*, 41 Ala. 132; *Burns v. Moore*, 76 Ala. 342; 52 Am. Rep. 335; *Butler v. Lee*, 11 Ala. 885; 46 Am. Dec. 231; *State v. Young*, 23 Minn. 551; *Harris v. Morse*, 49 Me. 432; 77 Am. Dec. 269; *Hilton v. Houghton*, 35 Me. 143; *Stacy v. Kemp*, 97 Mass. 166; *Lovejoy v. Whipple*, 18 Vt. 379; 46 Am. Dec. 157; *Goss v. Whitney*, 24 Vt. 187; *McCalop v. Hereford*, 4 La. Ann. 185; *Dehoney v. Dehoney*, 7 Bush (Ky.) 221; *Prather v. Harlan*, 6 Bush (Ky.) 185; *King v. Fleming*, 72 Ill. 21; 22 Am. Rep. 131; *Love v. Wells*, 25 Ind. 503; 87 Am. Dec. 375; *Cameron v. Peck*, 37 Conn. 556; *Greathead v. Walton*, 40 Conn. 235; *Com. v. Kendrick*, 2 Pa. St. 449; *Miley v. Weldermuth*, 4 W. N. C. (Pa.) 462; *Bell v. Mahin*, 69 Iowa 408. *Compare* *Kountz v. Price*, 40 Miss. 341; *Marshall v. Russell*, 44 N. H. 509.

So of a note dated on Sunday but signed and delivered on a previous day. *Stacy v. Kemp*, 97 Mass. 166. See also *Prescott Nat. Bank v. Butler*, 157 Mass. 548.

The presumption is that a note was delivered on the day of its date. *Harris v. Norton*, 16 Barb. (N. Y.) 264; *LEASE*, vol. 12, p. 974, and cases there cited.

Note Signed by Two and Delivered by One.—But a note signed by two makers on Sunday and delivered by one only, on a secular day, will not bind the other; the authorization to deliver given on Sunday was invalid. *Bishop on Contracts* (Enlarged ed.), § 544; *Davis v. Barger*, 57 Ind. 54. *Compare* *King v. Fleming*, 72 Ill. 21; 22 Am. Rep. 131. And in *Beman v. Wessels*, 53 Mich. 549 it is said that it is conclusively presumed that one of two joint makers of a note has authority from the other to deliver it, if he does so.

Where, however, one of two partners

executed an assignment on Sunday and the other partner executed and delivered it on a secular day, the instrument was considered to be valid. *Farwell v. Webster*, 71 Wis. 485.

2. In *Taylor v. Young*, 61 Wis. 314, it is said that an agreement entered into on Sunday is not void if carried into effect on a secular day.

In *Tuckerman v. Hinkley*, 9 Allen (Mass.) 452, a party was allowed to recover for services performed on a week day in pursuance of an agreement made by letter on Sunday. *Stackpole v. Symonds*, 23 N. H. 229.

A contract consummated on a secular day is not invalidated by the fact that the negotiations leading to it took place on Sunday. *McKinnis v. Estes*, 81 Iowa 749; *Tyler v. Waddingham* (Conn. 1890), 20 Atl. Rep. 335; *Ray v. Catlett*, 12 B. Mon. (Ky.) 537; *Merrill v. Downs*, 41 N. H. 72, "to render a contract void because made on Sunday, it must have been closed or perfected on that day"; *Moseley v. Vanhoser*, 6 Lea (Tenn.) 286; 40 Am. Rep. 37; *Foster v. Worten*, 67 Miss. 540, bill of sale made on Sunday in pursuance of the terms of a sale made on Friday previous, does not invalidate the sale; *Butler v. Lee*, 11 Ala. 885; 46 Am. Dec. 231, terms agreed upon on Sunday—contract made on subsequent day—held valid.

The fact that a contract to finish a courthouse for a county on the happening of a certain condition was signed by one of the parties on Sunday does not make such contract void as to him. *Beham v. Ghio*, 75 Tex. 87.

In *Allen v. Deming*, 14 N. H. 133; 40 Am. Dec. 179, defendant bought shingles on Sunday and gave his note for the price. He permitted the shingles to remain where they were for a month, then took them away on a secular day. The sale was held to have been completed on Sunday, and therefore void.

In *Smith v. Foster*, 41 N. H. 220, a proposition of purchase and sale was made on Saturday, but the contract was completed by delivery on Sunday. It was held that the contract was made on Sunday.

Where policies of insurance are made out and delivered upon a secular day,

a secular day is void between the parties thereto, but valid in the hands of an innocent holder for value without notice.¹

Payment made on Sunday in discharge of a debt and retained by the payee discharges the debt.² But it is generally held that since all promises made on Sunday are void, a promise or part payment on Sunday has no effect to bar the Statute of Limitations.³ A loan of money on Sunday is void as a contract; but, if money be placed in the hands of a party, as a deposit and

the mere fact that they bear the date of Sunday, that being the date upon which the old policies expire, will not invalidate them. *Boulden v. Phoenix Ins. Co.* (Ala. 1892), 11 So. Rep. 774.

In *Heller v. Crawford*, 37 Ind. 279, parties to an application for insurance, knowing that it was Sunday and wishing to avoid the illegality attaching to Sunday contracts, post-dated the application and premium notes several days. There being no evidence of subsequent ratification on a secular day, the contract was held void as having been made on Sunday.

1. *Note Executed on Sunday but Bearing a Different Date.*—*Harrison v. Powers*, 76 Ga. 218, draft accepted and delivered on Sunday, but dated as of day before; *Cameron v. Peck*, 37 Conn. 556; *Greathead v. Walton*, 40 Conn. 235; *Vinton v. Peck*, 14 Mich. 287; *Arbuckle v. Reaum*, 96 Mich. 243; *Clinton Nat. Bank v. Graves*, 48 Iowa 228; *Leightman v. Kadetska*, 58 Iowa 676; *Heise v. Bumpass*, 40 Ark. 545; *Gilman v. Berry*, 59 N. H. 62; *Allen v. Deming*, 14 N. H. 133; 40 Am. Dec. 179, point here left *quære*; *Beman v. Wessels*, 53 Mich. 549; *Cranston v. Goss*, 107 Mass. 439; 9 Am. Rep. 45; *Hilton v. Houghton*, 35 Me. 143.

As against a *bona fide* indorsee the maker cannot set up the defense that the note was made on Sunday. He cannot excuse himself by alleging his own wrong doing. *State Capital Bank v. Thompson*, 42 N. H. 369; *Bank of Cumberland v. Mayberry*, 48 Me. 198; *Johns v. Bailey*, 45 Iowa 241; *Wharton on Contracts*, § 386. If the note bears date on Sunday and was executed on that day it is void absolutely, no matter in whose hands. *Sayre v. Wheeler*, 31 Iowa 112; 32 Iowa 559.

Evidence is always admissible to show when a note was actually delivered, whatever may be its apparent date. *Bank of Cumberland v. Mayberry*, 48 Me. 198.

2. *Payment on Sunday.*—*Johnson v.*

Willis, 7 Gray (Mass.) 164; *Lamore v. Frisbie*, 42 Mich. 186; *Berry v. Planter's Bank*, 3 Tenn. Ch. 69. See also *Peake v. Conlan*, 43 Iowa 297. Compare *Perkins v. Jones*, 26 Ind. 499.

In *Kaufman v. Hamm*, 30 Mo. 387, a note given on Sunday for the payment of an antecedent debt was held valid. The contrary is the rule in *Mississippi*. *Miller v. Lynch*, 38 Miss. 344.

3. Does Not Bar Statute of Limitations.

—*Clapp v. Hale*, 112 Mass. 368; 17 Am. Rep. 111; *Dennis v. Sharman*, 31 Ga. 607; *Bumgardner v. Taylor*, 28 Ala. 687; *Hussey v. Roquemore*, 27 Ala. 281; *Linn's Estate*, 2 Pears. (Pa.) 487; *Haydock v. Tracy*, 3 W. & S. (Pa.) 507; *Whitcher v. McConnell*, 59 N. H. 470; *Wharton on Contracts*, § 382; *Tiedeman on Sales*, § 153.

The correctness of the doctrine of these cases, it seems, may well be questioned. If the Statute of Limitations is to be regarded as based upon a presumption of payment, then the suit is always on the original promise, the only effect of a promise or part payment being to rebut the presumption of payment created by the statute. And as admissions or acknowledgments are not considered to be of no effect merely because made on Sunday (*Beardsley v. Hall*, 36 Conn. 275; 4 Am. Rep. 74), it would seem that they would serve to rebut the statutory presumption, even when made on the first day of the week. This would seem more consonant, too, with the principle just announced that payment of a debt is valid though made on Sunday even where the statute is regarded as purely one of repose. And there are some authorities which so hold. *Thomas v. Hunter*, 29 Md. 406; *Ayres v. Bam*, 39 Iowa 518. See also *Bayliss v. Street*, 51 Iowa 627, cause of action remains in the original promise; *Penley v. Waterhouse*, 3 Iowa 438; *Patton v. Hassinger*, 69 Pa. St. 311; *Beardsley v. Hall*, 36 Conn. 278; 4 Am. Rep. 74.

merely for purposes of safety, and such party afterwards appropriates it, the owner may recover it.¹

A valid contract cannot be affected by a rescission made on Sunday; such rescission is of no effect.² An agreement on Sunday to form a partnership is void.³ The general rules as to the effect of contracts made in foreign jurisdictions apply in this connection as well as elsewhere.⁴ The burden of proof to show

where the point was left undecided; *Quantock v. England*, 5 Burr. 2630; 4 Minor's Insts. (2d ed.) [503] 541; *LIMITATION OF ACTIONS*, vol. 13, p. 749 *et seq.*

And where it is provided by statute that the action may be either on the new promise or the old, it seems that an acknowledgment on Sunday will operate as a bar of the statute. See 4 Minor's Insts. (2d ed.), p. [506] 545 *et seq.*

The *Pennsylvania* court, in *Lea v. Hopkins*, 7 Pa. St. 499, held that a bond, void because executed on Sunday, might be used as an admission of liability. The court, by Coulter, J., said: "It was void as a contract. . . . But a man may acknowledge the truth on Sunday; and if he does I do not know any rule that would prevent its being given in evidence against him. . . . The suit is founded on the previous liability, the admission is only evidence of the fact that defendant acknowledged that liability. . . . We cannot carry the law so far as to say that the admission of a previously existing debt, made on the Sabbath, is not good."

1. Loans Made on Sunday.—*Tamplin v. Still*, 77 Ala. 374. It was there held that when the money was deposited on Sunday, not for use but only for safe keeping, the liability of the person keeping it dates only from his subsequent conversion. And that the depositor might waive the tort and maintain an action for money had and received. *Flanagin v. Meyer*, 41 Ala. 132. A loan of money was held to be "business" and therefore illegal if done on Sunday, in *Troewert v. Decker*, 51 Wis. 46; 37 Am. Rep. 808; and the same case also held that the fact that a person borrowing money on Sunday retains it and converts it to his own use does not raise an implied promise on his part upon which an action may be maintained. The same idea is advanced in *Meador v. White*, 66 Me. 90; 22 Am. Rep. 501; the doctrine of this latter case however is questioned by Mr. Bishop.

Bishop on Contracts (Enlarged ed.), § 542. In *Beman v. Wessels*, 53 Mich. 549, it was held that one who on a week day lends money on a note which he does not know was made on Sunday, may recover the amount loaned upon the implied promise.

2. Rescission on Sunday.—*Benedict v. Bachelder*, 24 Mich. 425; 9 Am. Rep. 130; *Merritt v. Robinson*, 35 Ark. 483; *Myers v. Meinwrath*, 101 Mass. 366; 3 Am. Rep. 368n. *Compare Pence v. Langdon*, 99 U. S. 578, holding that a notice of the rescission of a contract is not void because made on Sunday.

3. Partnership.—*Durant v. Rhener*, 26 Minn. 362.

Relief in Equity.—*Blakesley v. Johnson*, 13 Wis. 530. In this case the parties to a suit pending before a justice made, on Sunday, an agreement for a settlement, by which the plaintiff received a certain amount in full and agreed to discontinue the suit. The defendant, relying on the agreement, failed to appear further, and the plaintiff prosecuted the suit and obtained unjust judgment against defendant, of which he (defendant) had no knowledge until after time for appeal had expired. *Held*, that equity would perpetually restrain the collection of such judgment notwithstanding that the agreement was void in law. See also *Merritt v. Baldwin*, 6 Wis. 439.

4. Conflict of Laws.—A contract entered into upon Sunday is held to be in no way in contravention of the laws of a particular state, if properly entered into in another state. *Adams v. Gay*, 19 Vt. 358.

A *Connecticut* statute prohibited the pursuit of one's secular calling on Sunday between sunrise and sunset; a *Rhode Island* statute prohibited such pursuit during the entire day. It was held that a contract made in *Connecticut* after sunset, in pursuit of plaintiff's ordinary calling, could be recovered on in a suit in *Rhode Island*, it not being against good morals or invalid where made. *Brown v. Browning*, 15 R. I.

that a contract was made on Sunday rests upon the party assailing the contract.¹ Various other cases which have arisen in connection with Sunday contracts are set forth in the note.²

422. *Compare* Hayden v. Stone, 13 R. I. 106.

A contract made on the Lord's Day and valid by the law of the state where it was made, will be enforced by the courts of another state even though such contract would be void under the laws of the latter state. Swann v. Swann, 21 Fed. Rep. 299; Brown v. Browning, 15 R. I. 422. This rests of course upon the settled principle that a contract valid by the law of the place where it is made is valid everywhere; except that contracts violative of good morals and tending to promote vice and crime will not be enforced, no matter where made. Swann v. Swann, 21 Fed. Rep. 299; Story on Conflict of Laws, § 244; Wharton on Conflict of Laws, § 490; CONFLICT OF LAWS, vol. 3, p. 542, *et seq.*

Where a contract is void by the *lex fori*, but is made in another jurisdiction, and there is no proof of any statutes affecting it in the *locus contractus*, it would seem that the contract should be held valid on the ground that the common law must be presumed to exist in the *locus contractus*, and as has been seen, contracts made on Sunday are not invalid at common law. See CONFLICT OF LAWS, vol. 3, pp. 539-40; Robards v. Marley, 80 Ind. 185; Eichelburger v. Pittsburgh, etc., R. Co. (Ohio, 1882), 9 Am. & Eng. R. Cas. 158. But in Hill v. Wilker, 41 Ga. 449; 5 Am. Rep. 540, it is held that in such a case the *lex loci contractus* is presumed to be the same as the *lex fori*. See also, as sustaining the same view, Sayre v. Wheeler, 31 Iowa 112; Cutter v. Wright, 22 N. Y. 472; Greenhood on Pub. Policy, p. 121.

A vendor of personal property, when sued in *Mississippi* upon his warranty, cannot defend upon the ground that the sale made on Sunday was void, the sale having been made in *Louisiana*, since there is no law in the latter state making such sales void or prohibiting their enforcement. McKee v. Jones, 67 Miss. 405.

1. **Burden of Proof.**—Because the presumption is always in favor of the validity of instruments, the burden of proof that a certain contract was made on Sunday is upon the party assailing the contract. Mason v. Dinsmore, 34

Me. 391; O'Shea v. Kohn, 33 Hun (N. Y.) 114. See also Troewert v. Decker, 51 Wis. 46; 37 Am. Rep. 898. *Compare* Hill v. Wilker, 41 Ga. 449; 5 Am. Rep. 540.

And when only contracts within the ordinary calling of the parties are void because made on Sunday, the party alleging the invalidity of the contract must show it to be within their ordinary calling. The presumption is that it was not so. Sanders v. Johnson, 29 Ga. 526; Mills v. Williams, 16 S. Car. 593; Bethune v. Hamilton, 6 U. C., Q. B. 105.

2. **Miscellaneous Cases Relating to Sunday Contracts.**—A creditor agreed with his debtor on Sunday, that if he would pay a portion of his note a day before it fell due, he should have further time. It was held that this agreement was not void for want of a consideration; that though void as an executory contract, because it was made on Sunday, yet payment and receipt on a secular day formed a new and binding contract. Uhler v. Applegate, 26 Pa. St. 140.

Forgery of an Instrument Dated on Sunday.—Upon a charge of making and uttering a forged mortgage and certificate of acknowledgment on the 13th, the fact that the certificate, when produced, is dated on the 14th, which is Sunday, will not preclude its reception as evidence, upon the objection that by purporting to have been made on Sunday it was on its face invalid for that reason, and hence incapable of being made the basis of prosecution for forgery. Van Sickle v. People, 29 Mich. 61.

Defense of Sunday Contract Must Be Specially Pleaded.—In Chlein v. Kabat, 72 Iowa 291, it is said that the defense that a contract was made on Sunday is a purely technical one provided by statute, in the interest of what is deemed public policy, and is barren of justice as between the parties; that such defense must therefore be specially pleaded, and set up at the outset of the case, and not by amendment at the trial. Riech v. Bolch, 68 Iowa 526.

Action of Tort Founded on Sunday Contract.—In the case of Costello v. Ten Eyck, 86 Mich. 348, it appeared that the plaintiff left a horse with

b. RATIFICATION.—By the weight of authority it seems that a contract entered into upon Sunday is incapable of ratification, in the strict sense of the term; the authorities supporting this view maintaining that the contract is absolutely void, being declared illegal by statute, and that the parties, by a mere subsequent agreement, cannot legalize what the law has declared illegal.¹ Authorities are not wanting, however, to the effect that, as the contract is only illegal because entered into on Sunday, a ratification upon a secular day purges it of this illegality, and that it then becomes as binding and valid as though entered into, in the

defendant to be pastured, under a contract to pay a certain sum each month. Defendant knew that other horses in the pasture were diseased, but he concealed this from plaintiff, and in consequence thereof plaintiff's horse contracted the disease. Plaintiff having sued in a plea of trespass on the case, claiming damages, it was held that the action was in tort, and that the fact that the contract of pasturage was made on Sunday was no defense.

Recovery Upon the Original Consideration.—In *Daniel on Neg. Instr.* 66, it is said: "Though the note made and delivered on Sunday is void, the payee may still recover upon the original consideration." Citing *Finney v. Callendar*, 8 Minn. 41.

Statute of Frauds.—In *Beaumont v. Brengerl*, 5 C. B. 301; 57 E. C. L. 299, the point was left *quære* as to whether the Statute of Frauds invalidates a previous parol contract for the sale of goods where delivery and acceptance take place on Sunday. See also on this point, *FRAUDS, STATUTE OF*, vol. 8, p. 735; 9 Am. L. Rev. 436-8. And see *Hazard v. Day*, 14 Allen (Mass.) 487; 92 Am. Dec. 790.

1. In *Day v. McAllister*, 15 Gray (Mass.) 434, the court, by Hoar, J., said: "The statute which prohibited it was not designed merely for the protection of the defendant, giving him a personal privilege which he might waive, but rested upon grounds of broad public policy. The defendant could not ratify the illegal contract, because its want of validity did not depend in any degree upon his choice. The law annulled it, and there was no subject of ratification.

... It is not quite accurate to speak of the 'ratification' by a party of something which the law forbids, and which is made void, not from any want of his full consent, but in spite of it. 20 Am. Jurist 255." Citing *Williams v. Paul*, 6 Bing. 653; 19 E. C. L. 192; and *ex-*

plaining Stebbins v. Peck, 8 Gray (Mass.) 553. See also *Cranston v. Goss*, 107 Mass. 440; 9 Am. Rep. 45. This language was quoted and approved in *Vinz v. Beatty*, 61 Wis. 648, where it was held that a lease made on Sunday was void and was not validated by mere subsequent occupation of the premises and payment of the rent.

In *Reeves v. Butcher*, 31 N. J. L. 224, the court, by Beasley, C. J., said: "It is to be remembered that the effect of a ratification is to impart validity to the original agreement. Such act creates no new obligation; it merely continues the existence of, or legalizes, one already in existence. The maxim of the law is '*Omnis ratihabitio retro trahitur, et mandato priori equiparatur*.' [Brown's Leg. Maxims (8th ed.), p. 867; *Fleckner v. Bank of U. S.*, 8 Wheat. (U. S.) 363.] It follows, therefore, as a consequence which is entirely unavoidable, that there can be no such thing in law, strictly speaking, as a ratification of a transaction, which, at the time of its performance, was prohibited by statute. The parties cannot legalize that which the law has declared to be illegal." Quoted, and declared to be a "logical and perspicuous presentation of the true rule on the subject," in *Gwinn v. Simes*, 61 Mo. 338.

Other cases opposing the doctrine of ratification are: *Shippey v. Eastwood*, 9 Ala. 198; *Butler v. Lee*, 11 Ala. 885; 46 Am. Dec. 231; *Ramey v. Catts*, 22 Ala. 288; *Meriweather v. Smith*, 44 Ga. 541; *Calhoun v. Phillips* (Ga. 1891), 13 S. E. Rep. 593, no ratification by allowing credit on vendor's account for the amount of the price; *Pope v. Linn*, 50 Me. 85; *Plaisted v. Palmer*, 63 Me. 576; *Ladd v. Rogers*, 11 Allen (Mass.) 211; *Tucker v. Mowrey*, 12 Mich. 379; *Winfield v. Dodge*, 44 Mich. 355; 40 Am. Rep. 476; *Kountz v. Price*, 40 Miss.

first instance, upon a day other than Sunday.¹ There are other cases cited in support of this latter doctrine, *i. e.*, that a Sunday contract is capable of ratification, which upon examination will be found not to support it, the contracts in question being in fact new contracts with regard to the same subject-matter entered into upon a secular day; the same consideration being available.²

341; *Steffens v. Earl*, 40 N. J. L. 137; 29 Am. Rep. 214; *Nubert v. Baghurst* (N. J. Eq.), 25 Atl. Rep. 474. *Bishop on Contracts* (Enlarged ed.), § 542; *Hare on Contracts*, pp. 296-7.

1. The leading case in support of this doctrine is that of *Adams v. Gay*, 19 Vt. 358. There the court, by Redfield, J., said: "We think contracts made on Sunday should be held an exception, in some sense, from the general class of contracts which are void from illegality; they are illegal only as to the time in which they are entered into; when purged of this ingredient they are like other contracts. Contracts of this kind are not void because they grow out of a transaction on Sunday. . . . They must be finally closed upon that day; and although closed upon that day, yet if affirmed upon a secular day, they become valid." *Sargeant v. Butts*, 21 Vt. 102; *Summer v. Jones*, 24 Vt. 323.

In *Harrison v. Colton*, 31 Iowa 16, it is said that to state the doctrine that a Sunday contract cannot be ratified, "is to refute it." In *Story on Contracts* (5th ed.), § 619, it is said that any ratification of a contract on a week day, such as a new promise to pay, a refusal to rescind on demand made, a partial payment and the like, would render the contract binding, though originally made on Sunday. *Russell v. Murdock*, 79 Iowa 101.

Other cases sustaining the doctrine of ratification are: *Van Hoven v. Irish*, 3 McCrary (U. S.) 444; *McKinney v. Demby*, 44 Ark. 78, receipt of purchase money on week day is ratification of contract of sale made on Sunday; *Evansville v. Morris*, 87 Ind. 269; 44 Am. Rep. 763; *Kuhns v. Gates*, 92 Ind. 68; *Smith v. Case*, 2 Oregon 192; *Williams v. Paul*, 6 Bing. 653; 19 E. C. L. 192; *Holman v. Johnson*, Cowp. 343 (opinion of Lord Mansfield).

In *Perkins v. Jones*, 26 Ind. 501, it is said that contracts of this kind "are not, however, rendered void as being illegal at common law, but their illegality consists merely in being *mala prohibita*, not *mala in se*, and they may

be made obligatory by the subsequent acts of the parties."

2. There is no question but that the parties to a Sunday contract may make an entirely new and valid contract on the same subject on a secular day, the original consideration being still available (*Daniel on Neg. Instr.* 69); and many cases which assert this principle are often cited as holding that a Sunday contract may be ratified, when their holding by no means sustains such a view. Thus it is held in *Tucker v. West*, 29 Ark. 386, that a note void because made on Sunday may be ratified "by an express promise made on a week day to pay it." See also *Clough v. Davis*, 9 N. H. 500; *Bradley v. Rea*, 103 Mass. 188; *Reeves v. Butcher*, 31 N. J. L. 224; *Gwinn v. Simes*, 61 Mo. 335.

Where a contract is made on Sunday but is renewed and performed upon a secular day, the consideration therefor may be recovered. *Hopkins v. Stefan* (Wis. 1890), 45 N. W. Rep. 676.

Other cases are often wrongly cited. Thus, *King v. Fleming*, 72 Ill. 21; 22 Am. Rep. 131, is claimed to assert the doctrine of ratification; but it has been seen that contracts made on Sunday are not invalid in *Illinois*. *Richmond v. Moore*, 107 Ill. 429; 47 Am. Rep. 445. So in *Saginaw, etc., R. Co. v. Chappell*, 56 Mich. 190, the holding is that the contract is void unless it be delivered on a secular day. *Wilson v. Milligan*, 75 Mo. 41, simply held that the instructions of the presiding judge as to ratification did not affect the point on which the case turned.

And in *Sayles v. Wellman*, 10 R. I. 465, where a party sold and delivered horses on Sunday, the vendor was allowed to recover; but it was because the vendor on the Tuesday following the day of sale, paid two hundred dollars and gave his note for one hundred and fifty dollars. The delivery of the horses, though made on Sunday, was a sufficient consideration, and the note having been executed on a secular day was valid and binding.

Indiana.—Although in *Banks v. Worts*, 13 Ind. 203, it was held that

What will constitute a ratification in those jurisdictions permitting Sunday contracts to be ratified upon a secular day, depends largely upon the circumstances in each case.¹

c. EXCEPTIONS—CONTRACTS OF NECESSITY OR CHARITY.—The exception in favor of works of necessity or charity prevails in this connection as well as elsewhere, and contracts, though entered into or to be performed on Sunday, are held valid when made to carry out works of necessity or charity.² Under this exception are embraced subscriptions for church purposes, since they are regarded as contracts in aid of a work of charity.³ Here also are included contracts for the relief of the sick and suffering,

contracts entered into on Sunday might be ratified on a secular day, it would seem from the later cases in that state that the doctrine there is in conformity with that set out in the text as being supported by the weight of authority. In *Catlett v. M. E. Church*, 62 Ind. 366, it is said, "As a general rule, void contracts cannot be ratified, but there seems to be an exception in favor of contracts void for having been made on Sunday, which may be ratified upon a consideration that essentially makes a new contract; as when property, or something of value, has been obtained through the means of a contract made on Sunday, and a promise afterwards made to pay for it. In such case keeping the property and making the promise constitute the new contract or ratification. But, while the contract remains unexecuted, when nothing has passed between the parties, and they remain as they were at the time the contract was made, a mere promise to execute it will have no validity." See also *Perkins v. Jones*, 26 Ind. 499; *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; *Parker v. Fitts*, 73 Ind. 597. It thus appears from these cases that what the court means by "ratification" "is essentially a new contract" entered into upon a secular day in regard to the same subject-matter.

1. What Constitutes a Ratification.—To amount to a ratification of a lease made on Sunday something more than a mere occupation of the premises must be shown. Such occupancy might render the tenant liable upon an implied promise for a *quantum meruit*, but not for the rent stipulated. To constitute a ratification there must be some new promise to perform the terms of the lease, or something equivalent thereto. *McIntosh v. Lee*, 57 Iowa 356.

A contract made on Sunday for the sale of land will bind the vendor if he

demands the purchase money on a week day. *McKinney v. Demby*, 44 Ark. 74.

2. Contracts of Necessity or Charity.

—See the rule of the text applied in *Western Union Tel. Co. v. Yopst* (Ind. 1887), 11 N. E. Rep. 16, telegram on Sunday; *Davis v. Somerville*, 128 Mass. 594; 35 Am. Rep. 399; *Doyle v. Lynn, etc., R. Co.*, 118 Mass. 197; 19 Am. Rep. 431; *Allen v. Duffie*, 43 Mich. 1; 38 Am. Rep. 159, church subscription; *Fisher v. Kyle*, 27 Mich. 454; *Parmalee v. Wilkes*, 22 Barb. (N. Y.) 539, saving logs scattered by storm; *Logan v. Matthews*, 6 Pa. St. 417; *Gulf, etc., R. Co. v. Levy*, 59 Tex. 542; 12 Am. & Eng. R. Cas. 96; 46 Am. Rep. 278, Sunday telegram; *Adams v. Gay*, 19 Vt. 358, where *Redfield, C. J.*, reviews the whole doctrine of Sunday contracts; *Bishop on Contracts* (Enlarged ed.), § 541.

If the exigency of the case is such as to render it necessary that a creditor in order to save his debt, or procure indemnity against liability, should contract with the debtor on Sunday, such a contract will not necessarily be void or invalid. *Hooper v. Edwards*, 18 Ala. 280; 25 Ala. 528.

Contracts, *e. g.*, with a common carrier, made in order to enable one to attend divine services on Sunday, are also held valid on the ground of necessity or charity. *Feital v. Middlesex R. Co.*, 109 Mass. 398; 12 Am. Rep. 720, attendance at a spiritualist camp-meeting, *Com. v. Nesbit*, 34 Pa. St. 398. Compare *Tillock v. Webb*, 56 Me. 100.

But merely to prevent an inconvenient delay in traveling does not make the execution of a note a matter of necessity so as to validate the note. *Burns v. Moore*, 76 Ala. 339; 52 Am. Rep. 332.

3. Church Subscriptions.—*Allen v. Duffie*, 43 Mich. 1; 38 Am. Rep. 159; *Dale v. Knepp*, 98 Pa. St. 389; 42 Am.

for the services of a physician or nurse, and for medicine, etc.¹ An exception is also made in favor of marriages, so that, although a marriage is regarded in law as purely a civil contract, it is valid when entered into on Sunday.² The question has frequently arisen as to whether a contract by a telegraph company to transmit a message on Sunday falls within the exception of this section. This seems to depend largely upon the character of the message. Usually a message sent to inform one of the death of a near relative, and asking his immediate presence, is considered one of necessity, which the company is bound to send immediately; so of a message requesting the immediate attendance of a physician.³ If the message is not one of

Rep. 624; 24 Alb. L. J. 432. *Compare* Catlett v. M. E. Church, 62 Ind. 365; 30 Am. Rep. 197, holding that such a subscription was void, and that a mere subsequent acknowledgment of the making of it, accompanied by a declaration of an intention to pay the same, but supported by no consideration, was not a ratification which would make it binding on the subscriber. But in *Bryan v. Watson*, 127 Ind. 42, it was held that a subscription to liquidate an indebtedness upon a church is not void because made on Sunday, under a statute making "common labor" on that day illegal, but excepting works of charity; that such a subscription is not "common labor," although ordinary contracts would be, and that it is more-over a work of charity. The case of *Catlett v. M. E. Church*, 62 Ind. 365; 30 Am. Rep. 197, was overruled.

1. *Contracts for Relief of Sick.*—*Com. v. Sampson*, 97 Mass. 407; *Doyle v. Lynn, etc.*, R. Co., 118 Mass. 195; 19 Am. Rep. 431.

The employment of a physician on Sunday, and a promise on that day to pay him for his services, is therefore binding. *Smith v. Watson*, 14 Vt. 332. A contract made on Sunday by an overseer of the poor for the relief of a sick pauper, is to be classed as one of necessity or charity. *Aldrich v. Blackstone*, 128 Mass. 148.

2. *Marriage.*—In *Bennett v. Brooks*, 9 Allen (Mass.) 122, the court, by Bigelow, J., said: "A contract of marriage is purely a civil contract. . . . Yet no one would contend that it would be unlawful for a civil magistrate to complete the execution of such a contract by joining parties in matrimony on the Sabbath, or that a contract of marriage entered into before and solemnized by a magistrate would be invalid

because the act was done on the Lord's Day."

And in *Boon v. Richards*, 2 Ohio St. 387, the court, by Norman, J., said: "There are few contracts of more frequent occurrence than marriage. In a legal point of view it is a civil contract and nothing more. But will any one say that a marriage solemnized on Sunday is void? Are the thousands of Sunday marriages that have taken place in *Ohio* nullities, the union of the parties meretricious, and their issue illegitimate? No one will pretend it."

3. *Telegrams on Sunday.*—If the sending of a telegram is a matter of necessity, then the contract with the telegraph company is valid and binding and a recovery may be had for a failure to transmit the message. The existence of the necessity depends upon circumstances, and must be shown by the party alleging it. It is not necessary however that the telegram should show on its face the necessity of its being transmitted immediately, or that the company should have notice of such necessity. But if the company retains the message received on Sunday without notice to the sender until a secular day, and then wholly fails to transmit it, it is liable to the sender, whether the message was one of necessity or not. *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; 25 Am. & Eng. Corp. Cas. 519.

A telegram sent by a party on Sunday announcing to his father the death of his (*i. e.* the sender's) wife and child, and requesting him to come at once, is one of necessity, and damages may be recovered for a failure to transmit it. *Gulf, etc. R. Co. v. Levy*, 59 Tex. 542; 12 Am. & Eng. R. Cas. 96; 46 Am. Rep. 269.

In *Bassett v. Western Union Tel. Co.*

necessity there can be no recovery against the telegraph company for a failure to send it on Sunday.¹

VIII. SUNDAY AS DIES NON JURIDICUS—(See also DAY, vol. 5, p.85).—At common law, and since the earliest times, Sunday, it seems, has been considered *dies non juridicus*, and all judicial proceedings on that day have, therefore, been held to be void. And this common-law recognition of Sunday has been extended and strengthened by statute.² The term "all judicial proceedings" embraces in this connection all proceedings in the administration of justice,³

(an unreported case of the St. Louis Ct. of appeals), 25 Am. L. Rev. 434, it was held that a telegram explaining a delay which prevented the sendee arriving when expected was a work of necessity.

In *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599, this telegram was sent by the plaintiff to his wife explaining his absence: "I will be home to-night." The company failed to send it and the sender brought an action to recover the statutory penalty. In view of the circumstances of the case the court held that the sending of the telegram was such a necessity that the company could not defend on the ground that it was offered for transmission on Sunday, and that it was immaterial that the necessity for sending on Sunday instead of a previous day arose out of the negligence or inadvertence of the plaintiff. See the opinion by Thompson, J., for a discussion of definitions of necessity and charity in this connection.

In *Brown v. Western Union Tel. Co.* (Utah 1889), 21 Pac. Rep. 988, a telegram was sent: "Send doctor on first train. Katy has broken her finger." It was not delivered until twelve hours later than if it had been sent immediately. As a consequence of the late delivery the doctor arrived late, and amputation of the girl's finger was necessary. The jury having found that the company had been negligent and were therefore liable in damages, the court refused to set aside the verdict merely because the message was offered for transmission on Sunday. But a dispatch on ordinary business matters is not of necessity and the company is not bound to send it on Sunday, nor will a contract to send it be enforced. *Thompson v. Western Union Tel. Co.*, 32 Mo. App. 191.

In the case of *Western Union Tel. Co. v. Wilson* (Ala. 1891), 9 So. Rep. 414, a party sent to his brother on Sun-

day this telegram: "Father died this p. m. Come at once." The company having negligently failed to deliver the telegram in time, the plaintiff was allowed to recover damages. The court held the contract to be valid though entered into on Sunday, *McClelland, J.*, saying: "We cannot doubt but that the emergency of the death and burial of one's father involves such moral necessity for his presence before and at the funeral, as brings any contract, made to that end on Sunday, within the exception of cases of necessity made by our statute, if, indeed, such contracts would not also be within the exception in favor of works of charity, in a liberal sense of that term. Code of Alabama, § 1749; *Burns v. Moore*, 76 Ala. 239; 52 Am. Rep. 335." See also *Western Union Tel. Co. v. Way*, 83 Ala. 562; *Carnahan v. Union Tel. Co.*, 89 Ind. 526; TELEGRAPHS AND TELEPHONES.

1. *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; 25 Am. & Eng. Corp. Cas. 519; *Rogers v. Western Union Tel. Co.*, 78 Ind. 162; 41 Am. Rep. 558; *Thompson v. Western Union Tel. Co.*, 32 Mo. App. 191.

2. 2 Coke's Insts. 264-5; 4 Bl. Com. (Chitty's ed.) 64; *Brown's Leg. Maxims* (8th ed.), 21 *et seq.*; *Morris v. Shew*, 29 Kan. 661; *Parsons v. Lindsay*, 41 Kan. 336; *Coleman v. Henderson*, Litt. Sel. Cas. (Ky.) 171; 12 Am. Dec. 290; *Johnson v. Day*, 17 Pick. (Mass.) 106; DAY, vol. 5, p. 85. See also 1 Bishop on Crim. Proc., § 207. That Sunday was *dies non* at common law has been questioned in *Ringold* on Sunday Law, p. 151.

3. **Award**.—The distinction between a judicial and a ministerial act is not always clear. Rendering an award is held to be a judicial act, and hence void if done on Sunday. *Story v. Elliott*, 8 Cow. (N. Y.) 27; 18 Am. Dec. 483; *Hobdell v. Miller*, 6 Bing. N. Cas. 292;

comprehending all issuing or service of civil processes,¹ the

37 E. C. L. 387; *Crosby v. Blanchard*, 50 Vt. 696. Compare *Sargeant v. Butts*, 21 Vt. 99.

Notice of an award previously made is, however, a ministerial act, such as is valid if done on Sunday. *Kiger v. Coats*, 18 Ind. 153; 81 Am. Dec. 351. See also *Crosby v. Blanchard*, 50 Vt. 696.

But where parties, witnesses, and arbitrators are Jews, or people who observe another day, an award made on Sunday, in pursuance of a trial held on that day, but dated and delivered on the following day, is valid. *Isaacs v. Beth Hamedash Soc.*, 1 Hilt. (N. Y.) 469.

An inquest held by a coroner, and his commitment to jail of a person accused of murder, are not void because done on Sunday. *Blaney v. State* (Md. 1891), 21 Atl. Rep. 547. The court in this case based its decision upon the ground that such proceedings were ministerial rather than judicial, citing the case of *State v. Sneed*, 84 N. Car. 824, in support of the idea that the duties of a conservator of the peace were so far ministerial as to be not void because done on Sunday. But notwithstanding these two cases, it must be stated that the duties of a conservator of the peace, and particularly duties involving the exercise of judicial discretion, are judicial and not ministerial. 1 Minor's Insts. (3d ed.) 100-10; 1 Bl. Com. 343; Bac. Abr. tit. *Sheriffs*, L.; *People v. Devine*, 44 Cal. 452; *CORONER*, vol. 4, p. 174.

The true reason for the decision in the case of *Blaney v. State* (Md. 1891), 21 Atl. Rep. 547, was that the proceedings were a necessity and to be justified on that ground alone. The court strikes the true ground for its decision where it observes that, "Society would be absolutely at the mercy of desperadoes and criminals if the officers charged with the duty of enforcing the law and bringing the guilty to justice, were powerless to act on Sunday."

1. *Morris v. Shew*, 29 Kan. 661; *Field v. Park*, 20 Johns. (N. Y.) 140; *Matthews v. Ansley*, 31 Ala. 20; *Van Vechten v. Paddock*, 12 Johns. (N. Y.) 178; 7 Am. Dec. 303; *Johnston v. People*, 31 Ill. 469; *Shaw v. Dodge*, 5 N. H. 462; *Devries v. Summit*, 86 N. Car. 131; *Wood v. Brooklyn*, 14 Barb. (N. Y.) 425; *New York Pen. Code*, § 268; *DAY*, vol. 5, p. 85; *SERVICE OF PROCESS*, vol. 22, p. 107.

Delivery of process by post on Sun-

day is not service of process within the prohibition. *Reg. v. Leominster*, 2 B. & S. 391; 110 E. C. L. 391; 8 Jur., N. S. 793; 31 L. J., M. C. 95; 6 L. T., N. S. 216.

Service of process on a Sunday is absolutely void, and cannot be made good by any subsequent waiver of the defendant by his not objecting till after a rule to plead given. *Taylor v. Phillips*, 3 East 155; 8 T. R. 86.

A subpoena is included under the term "civil process," such as is forbidden to be issued or served on Sunday. *McRath v. Nicholson*, 19 Ves. 367.

So a writ of replevin conveys no authority to an officer to seize property under it on Sunday; and the owner may lawfully resist such seizure. *Bryant v. State*, 16 Neb. 651.

In *Hauswirth v. Sullivan*, 6 Mont. 203, a summons was served on Sunday, but the sheriff's return stated service to have been made on Saturday. It was held that the service was void; that the court acquired no jurisdiction under it over the person served, and that the want of such jurisdiction might be shown in a proceeding to set aside the judgment notwithstanding the fact that the record showed a perfect service.

A summons is to be considered "civil process" within the meaning of the Sunday law. *McLaughlin v. Wheeler* (S. Dak. 1891), 50 N. W. Rep. 834; *PROCESS*, vol. 19, p. 222.

An order or other process returnable on Sunday is void. *Arctic F. Ins. Co. v. Hicks*, 7 Abb. Pr. (N. Y.) 204; *SERVICE OF PROCESS*, vol. 22, p. 107.

Notice of Escheat.—In *South Carolina* it is held that a notice of escheat is not a "process," such as is meant in connection with Sunday as *dies non*; nor, when published in a newspaper on Sunday, is it served on that day. "The statute forbidding the service of civil process on Sunday does not make such notice void." *Eason v. Witcofskey*, 29 S. Car. 239.

Other Notices.—Notice from a surety to a payee given on Sunday is said to be void. And the court will take judicial notice as to whether a certain day on which notice was given was Sunday. *Chrisman v. Tuttle*, 59 Ind. 155.

Notice of non-payment cannot be served on Sunday so as to charge an indorser. *Rheem v. Carlisle Deposit Bank*, 76 Pa. St. 132.

hearing or trial of causes, civil or criminal,¹ the publication of

In *Cadwell v. First Nat. Bank* (Wash. 1891), 28 Pac. Rep. 365, the appellants gave the appellee notice fixing Sunday as the day for settling a statement of facts on appeal. Such notice was void and subsequent orders of the judge extending the time for settling the case, based on it (the notice) were without authority.

Demand.—Demand made on Sunday is void and may be disregarded; the illegality of such a demand cannot be waived. *Brackett v. Edgerton*, 14 Minn. 174; 100 Am. Dec. 211; *Delamater v. Miller*, 1 Cow. (N. Y.) 75; 13 Am. Rep. 512.

Execution.—Executions come within the term "civil process," so that they may neither be issued or served on Sunday. *Bland v. Whitfield*, 1 Jones (N. Car.) 122; *Peirce v. Hill*, 9 Port. (Ala.) 151; 33 Am. Dec. 306; *Stern's Appeal*, 64 Pa. St. 447; 4 *Miner's Insts.* (2d ed.) 825-6. In *Crabtree v. Whiteselle*, 65 Tex. 111, the statute on the subject was said to be merely declaratory of the common law. So also the return of an execution being practically a part of the "service" is void if made on Sunday, and this, even though Sunday be the return day. It should in such case be returned the day following. *Peck v. Cavell*, 16 Mich. 9; *Arctic F. Ins. Co. v. Hicks*, 7 Abb. Pr. (N. Y.) 204; *Chitty's Arch. Pr.* (11th ed.) 157, 187. An order given to a sheriff on Sunday to proceed on an execution is a nullity; he is not bound to receive such an order on that day. *Stern's Appeal*, 64 Pa. St. 447.

In Civil Cases.—A warrant of arrest in a civil case is civil process such as may not be issued or served on Sunday, and if an arrest be made on any day, secular or otherwise, under a warrant so issued, it is without authority, and the officer arresting is liable to an action. The same is true where the arrest is made on Sunday under a valid warrant. 4 *Min. Insts.* (2d ed.) 402; *DAY*, vol. 5, p. 86; *FALSE IMPRISONMENT*, vol. 7, p. 671 and cases cited; *Clayton v. Scott*, 45 Vt. 386; *Pearce v. Atwood*, 13 Mass. 324; *King v. Strain*, 6 Blackf. (Ind.) 446; *Rob v. Moffat*, 3 Johns. (N. Y.) 257; *Stern's Appeal*, 64 Pa. St. 447; *Hooper v. Lane*, 6 H. L. Cas. 443; *Rex v. Myers*, 1 T. R. 265; *Rawlins v. Ellis*, 16 M. & W. 172; *Ex p. Eggington*, 2 E. & B. 717; 75 E. C. L. 717; 18 Jur. 224; 23 L. J. M. C. 41 (a leading case).

An arrest under a chancellor's warrant, for contempt of court, is in the nature of criminal process and may be made on Sunday. *Ex p. Whitcomb*, 1 Atk. 55.

Where a prisoner had been arrested on a Sunday, a subsequent detainer by another party without collusion is not vitiated by the illegality of the original arrest. In *Re Ramsden*, 15 L. J. M. C. 113; *Hooper v. Lane*, 6 H. L. Cas. 443.

In some instances an arrest is equivalent to an attachment, and exceptions are made in extreme cases. For such an instance, see *Pearson v. The Alsalfa*, 44 Fed. Rep. 358; *Watts v. Com.*, 5 Bush (Ky.) 309.

Other Cases.—Whether an affidavit, which appears by its *jurat* to have been sworn in court on Sunday is void—*quare*. *Doe v. Roe*, 3 D. & L. 328; 15 L. J. Q. B. 39.

A judgment entered upon a confession contained in a note made on Sunday has been allowed to stand. *Lee v. Drake*, 10 Pa. Co. Ct. Rep. 276.

A writ of summons tested on a Sunday is a nullity; but a copy tested on a Sunday, and service thereof (the writ being correctly tested), are merely irregular, and the irregularity will be waived by laches. *Corrall v. Foulkes*, 2 B. C. Rep. 262; 5 D. & L. 590.

Service of a notice of appeal on Sunday would be void. *Reg. v. Middlesex*, 3 New. Sess. Cas. 152; 2 B. C. Rep. 271; 11 Jur. 434; 17 L. J., M. C. 111.

Where a declaration in ejectment was left at the house of the tenant on Saturday, and received by him on Sunday, it was held that this was service of process on Sunday, and void. *Doe v. Roe*, 8 D. & R. 342; 16 E. C. L. 344; *Goodtitle v. Nottle*, 2 D. & R. 232; 16 E. C. L. 82; *Doe v. Roe*, 5 B. & C. 764; 12 E. C. L. 373.

Service of notice of plea filed on a Sunday is void. *Roberts v. Monkhouse*, 8 East 547.

So service of a notice to produce on a Sunday is bad. *Hughes v. Budd*, 8 Dowl. Pr. Cas. 315; 4 Jur. 150. For a collection of many other cases, see *DAY*, vol. 5, pp. 85-7.

1. *Broom's Leg. Maxims* (8th ed.) 21 *et seq.*

Continuing a cause over from Saturday to Sunday is not keeping a court open on the Sabbath. *Vanderwerker v. People*, 5 Wend. (N. Y.) 530.

notice in the nature of legal process, etc.¹ So also a judgment rendered or sentence pronounced on Sunday is void,² as are other proceedings of the court on that day.³ Nor can a civil officer exercise the duties of his office on Sunday.⁴

To these rules, however, there are a few well-defined exceptions on the ground of expediency and public policy; for example, a verdict may be received and entered on record on Sunday,⁵ or

If a cause is continued to a certain day, which happens to be Sunday, the justice loses jurisdiction over the person of the defendant obtained by the original service of process, and the cause cannot proceed without new notice to the defendant, or his waiver by appearance. *Taylor v. Ringer*, 3 Wash. Ter. 539.

1. Publication of Notices in Sunday Newspapers.—In *Hastings v. Columbus*, 42 Ohio St. 585, it is held that the publication of preliminary and other ordinances of street improvement which is required to be made in a paper of general circulation may be made in a paper published only on Sunday.

Where there is a stipulation between private parties that notice shall be given by publication for ten days, the publication on Sunday may be counted. *Kingsbury v. Buckner*, 70 Ill. 514.

But where it is required by law that notice, being in the nature of process, shall be published for six days, a publication which occurs on Sunday cannot be counted. Two reasons are assigned: 1st. The publication is service of process and cannot be made on Sunday; 2d. The Sunday issue of newspapers is regarded as a different paper from the daily of the same name though published by the same firm. *Scammon v. Chicago*, 40 Ill. 146. In the absence of proof, however, it will be presumed that publication was not made on Sunday but on secular days. *Jenks v. Chicago*, 48 Ill. 296. See also *McLaughlin v. Wheeler* (S. Dak. 1891), 50 N. W. Rep. 834.

2. Brown's Leg. Maxims (8th ed.) 21-2; *Swann v. Browne*, 3 Burr. 1595; *Baxter v. People*, 8 Ill. 368, judgment rendered on Sunday; *Ex p. White*, 15 Nev. 146; 37 Am. Rep. 466; *Parsons v. Lindsay*, 41 Kan. 336; *Davis v. Fish*, 1 Greene (Iowa) 406; 48 Am. Dec. 391; *Arthur v. Mosby*, 2 Bibb (Ky.) 589; *DAY*, vol. 5, p. 87.

Advertisement of Tax Sale.—The advertisement of a tax sale in a Sunday newspaper has been held invalid. *Sawyer v. Cargile*, 72 Ga. 290. So also a

sheriff's sale made under an execution, is void if made on Sunday. See *SHERIFF'S SALES*, vol. 22, p. 570.

3. *Chapman v. State*, 5 Blackf. (Ind.) 111; *National Bank v. Williams*, 46 Mo. 17; *McKalley's Case*, 9 Co. Rep. 66; *Cro. Jac.* 280.

4. *Frost v. Hull*, 4 N. H. 153; *Shaw v. Dodge*, 5 N. H. 462.

5. Verdict May be Received on Sunday.—For authorities sustaining the rule of the text, see numerous cases cited in *DAY*, vol. 5, p. 86. For others, see *Reid v. State*, 53 Ala. 402; 25 Am. Rep. 627; *Hodge v. State* (Fla. 1892), 10 So. Rep. 556; *Henderson v. Reynolds*, 84 Ga. 159; *Baxter v. People*, 8 Ill. 368; *Jones v. Johnson*, 61 Ind. 257; *Stone v. Bird*, 16 Kan. 488; *Arthur v. Mosby*, 2 Bibb (Ky.) 589; *State v. Penley*, 107 N. Car. 808; *Webber v. Merrill*, 34 N. H. 202; *Huffman v. State*, 28 Tex. App. 174.

In *McGimsey v. State*, 80 N. Car. 377; 30 Am. Rep. 90, a jury in a capital case retired on Saturday at midnight and were discharged at 6 o'clock on Sunday evening before verdict, because it appeared that they could not agree. It was held that the prisoner was entitled to be discharged although the term expired on Saturday. But compare *Pulling v. People*, 8 Barb. (N. Y.) 384, where a conviction was held erroneous because the jury were instructed at two o'clock Sunday morning and rendered their verdict at three. In *Bass v. Irvin*, 49 Ga. 436, a verdict received on Sunday was considered a nullity. So also in *Shaw v. M'Combs*, 2 Bay (S. Car.) 232. This latter case, however, is expressly overruled in *Hiller v. English*, 4 Strobb. (S. Car.) 486. The court may also receive any motion on Sunday touching the verdict received on that day, and may discharge the jury. *McCorkle v. State*, 14 Ind. 39; *Jones v. Johnson*, 61 Ind. 257.

In *State v. Muir*, 32 Kan. 481, it was held error to receive a verdict on Sunday in the absence of the accused and his counsel, and to discharge the jury,

the jury having retired on Saturday the court may give them additional instructions on Sunday.¹ Likewise, a recognizance or bail bond entered into on that day is not necessarily invalid.² There is also an exception in favor of criminal process, since in frequent cases a delay of one day might allow the guilty to escape entirely;³ and, similarly, an exception is often made in favor of attachments in civil cases in order to prevent a failure of justice, as in cases where a debtor is about to abscond or about to send his property out of the state.⁴ There are other exceptional cases in which equity will grant relief on Sunday agreeably to the

and refuse on the next day to recall the jury and allow them to be polled.

1. Jury May be Instructed.—*People v. Odell*, 1 Dakota 197; *Jones v. Johnson*, 61 Ind. 257.

The authority to receive a verdict and to discharge the jury on Sunday imports the power to make orders incidental thereto, as, *e. g.*, to have the verdict recorded and to designate the day when verdict thereon will be rendered. *State v. Rover*, 13 Nev. 17.

2. Recognizance Entered Into on Sunday—Valid.—*State v. Douglass*, 69 Ind. 544; *Watts v. Com.*, 5 Bush (Ky.) 309; *Hammons v. State*, 59 Ala. 164; 31 Am. Rep. 13; *Johnston v. People*, 31 Ill. 469; *Rice v. Com.*, 3 Bush (Ky.) 14.

The same is true of bail. See *BAIL*, vol. 2, p. 19, n.; *Salter v. Smith*, 55 Ga. 245; *Day*, vol. 5, p. 87; *Weldon v. Colquitt*, 62 Ga. 449; 35 Am. Rep. 128. *Compare State v. Suhur*, 33 Me. 539; *Link v. Clemmens*, 7 Blackf. (Ind.) 479, *replevin* bond executed on Sunday void.

An appeal bond executed on Sunday has been held valid. *State v. California Min. Co.*, 13 Nev. 203.

3. Criminal Process—Issued or Executed on Sunday.—That the exception exists is beyond doubt and has never been denied. See *Day*, vol. 5, p. 87; *Keith v. Tuttle*, 28 Me. 326; *Bac. Abr.*, tit. *Trespass* (D) 3.

The exception by statute in *England* is held to extend to all indictable offenses and is not restricted to treason and felony, and such misdemeanors as involve an actual breach of the peace. *Rawlins v. Ellis*, 16 M. & W. 172; 10 Jur. 1039; 16 L. J. Exch. 5.

In *Wood v. Brooklyn*, 14 Barb. (N. Y.) 425, it was held that an arrest could not be made on Sunday for the violation of a corporate ordinance. But this view may well be questioned. See *Davis v. American Society, etc.*, 75 N. Y. 362. An ordinance which it is within the power of a municipal cor-

poration to pass has all the force and effect of a state statute. See *ORDINANCES*, vol. 17, p. 236; *POLICE POWER*, vol. 19, p. 747.

4. Attachment on Sunday.—An attachment is a civil process purely, and therefore comes usually within the rule that no civil process may be issued or executed on Sunday. *Waples on Attachment* 138-9; *Butler v. Kelsey*, 15 Johns. (N. Y.) 177; *Thomas v. Hinsdale*, 78 Ill. 259; *Morris v. Shew*, 29 Kan. 661. *Compare Johnson v. Day*, 17 Pick. (Mass.) 106; *Tracy v. Jenks*, 15 Pick. (Mass.) 465, attachment after sunset on Sunday, valid. But for the reason stated in the text, and plain to all, an exception is made so that in proper cases an attachment may be issued and served on Sunday. *Drake on Attachment*, §§ 187, 417; 4 *Minor's Insts.* (2d ed.) 479; *Updyke v. Wheeler*, 37 Mo. App. 680, necessary contents of affidavit in such cases stated. Thus a warrant of arrest against a vessel may issue in admiralty on Sunday where she has changed her date for sailing and proposes to sail on Sunday, and the libellant for wages did not learn that his wages would not be paid in time to begin the suit earlier. *Pearson v. The Alsalfa*, 44 Fed. Rep. 358. *Compare* here the case of *Fifield v. Wooster*, 21 Vt. 215, where there was a statute forbidding service of process between sunset on Saturday and midnight of Sunday. It was held that this statute had reference to the beginning of a service of attachment, and that if service was begun before sunset of Saturday it might be completed after that time.

Where a marshal takes possession of goods on Sunday under color of process issued on the same day, and illegal, therefore, under the laws of the state, it is his duty to surrender possession to a sheriff having a lawful writ of attachment from the state court; and if he refuses to do so, an action may be

maxim that "courts of chancery are always open." Thus, where an injunction is necessary to prevent an irreparable injury to property it may be issued and served on Sunday.¹

IX. SUNDAY IN COMPUTATIONS OF TIME.—See TIME.

X. WILLS; BOARD MEETINGS; NOTICE, ETC.—A will made on Sunday is not for that reason invalid.² Notice on Sunday to a consignee of the arrival of a cargo is valid.³ Admissions may be proved though made on Sunday, and are admissible as evidence.⁴ Sunday statutes do not apply to business meetings of benevolent societies,⁵ but they do apply to other societies; therefore a resolution passed by a non-religious corporation on Sunday has been held void.⁶ Courts will take judicial notice

sustained against him for damages. *Gumbel v. Pitkin*, 124 U. S. 131.

1. Comyn's Dig., tit. Temps, ch. 5.

Injunction Issued on Sunday.—In general, whenever judicial action is necessary to prevent irreparable injury to person or property—*e. g.*, to prevent the destruction of valuable trees, etc.—it may be issued and served on Sunday. *Langahier v. Fairbury, etc.*, R. Co., 64 Ill. 243; 16 Am. Rep. 550, injunction on Sunday; *Parmalee v. Wilks*, 22 Barb. (N. Y.) 539; *Morris v. State*, 31 Ind. 189; *Hooper v. Edwards*, 18 Ala. 281; *McGatrick v. Wason*, 4 Ohio St. 566.

In *Langalier v. Fairbury, etc.*, R. Co., 64 Ill. 247; 16 Am. Rep. 553, the court, through Breese, J., said: "Here, this *dies non juridicus* was selected by the railway company as the proper day to commit a great outrage upon public and private rights, believing the arm of the law could not be extended on that day to arrest them in their high-handed and unlawful design. To the complainant, the acts they were organized to perpetrate on that day were fraught with irreparable injury. Feeble, indeed, would be the judicial arm if it could not reach such miscreants. To save a debt of twenty dollars judicial acts (attachment, etc.) can be performed on Sunday, and maintained as well. To prevent the ruin of an individual, such an act must not be done. Lame and impotent conclusion." *Richmond v. Moore*, 107 Ill. 439.

2. Wills Made on Sunday.—*Bennett v. Brooks*, 9 Allen (Mass.) 118; *Weidan v. Marsh*, 4 Clark (Pa.) 401; *Beitenman's Appeal*, 55 Pa. St. 183; *Banks v. Werts*, 13 Ind. 203; *George v. George*, 47 N. H. 27; *Perkins v. George*, 1 Am. Law Rev. 755; 2 *Parsons on Contracts* (7th ed.) 761; 3 *Washburn on Real*

Prop. (4th ed.) 504; 7 *Am. Law Rev.* 319; 15 *Centr. Law Jour.* 377.

In the case of *Rapp v. Ruhling*, 122 Ind. 255, it is held that a will made on Sunday is valid, though the testator was in good health; since the drafting of such an instrument does not come within section 2,000 of *Indiana Rev. Stat.* (1881) making it a penal offense to be found engaged in "common labor" or in one's usual avocation on that day.

3. Notice on Sunday to Consignee.—*Lake v. Hurd*, 38 Conn. 540. Nor is a notice to quit invalid because given on Sunday. *Sangster v. Noy*, 16 L. T., N. S. 157.

But a notice to a tenant given on Sunday, that after the expiration of his existing term he would be charged an increased rent, does not raise an implied contract to pay such increased rent where the tenant simply remains in possession. *State v. Ryan* (N. J. 1887), 8 *Atl. Rep.* 293.

4. Admissions or Memoranda on Sunday.—See, as supporting the statement of the text, *Riley v. Butler*, 36 Ind. 51.

So a memorandum in writing, though signed on Sunday, is admissible as evidence to prove a contract made on another day. *McCalop v. Hereford*, 4 La. Ann. 185.

5. Corrigan v. Young Men's, etc., Soc., 65 Barb. (N. Y.) 357.

6. Resolutions and Petitions.—*Lansing Turnverein Soc. v. Carter*, 71 Mich. 608.

And a petition by taxpayers signed on Sunday is invalid. *De Forth v. Wisconsin, etc.*, R. Co., 52 Wis. 320; 5 *Am. & Eng. R. Cas.* 28; 38 *Am. Rep.* 737.

Likewise a railroad aid subscription signed on Sunday is *prima facie* void.

that a certain day was Sunday.¹ Other miscellaneous cases are set forth below.²

SUPERINTEND.—To oversee.³

SUPERIOR.—Superior means higher in dignity, quality, or excellence.⁴

SUPERNUMERARY.—In military law, an officer whose battalion or corps has been reduced or disbanded, or so arranged as to leave him for the present no command.⁵

SUPERSEDE.—To supersede, when used of a military officer,

Saginaw, etc., *R. Co. v. Chappell*, 56 Mich. 190.

1. **Judicial Notice of Sunday.**—Wharton on Ev., § 335; Wharton on Contracts, § 390; Tutton *v. Darke*, 5 H. & N. 645; Sasscer *v. Farmers' Bank*, 4 Md. 410; Clough *v. Goggins*, 40 Iowa 325; Rodgers *v. State*, 50 Ala. 102; Chrisman *v. Tuttle*, 59 Ind. 155; First Nat. Bank *v. Kingsley* (Me. 1891), 24 Atl. Rep. 794.

But when a statute prescribes that Sunday ends at sunset, and a contract is alleged to be void for having been made on Sunday, it must be shown that the contract was made before sunset. Wharton on Contracts, § 390; *Nason v. Dinsmore*, 34 Me. 391.

2. **An enlistment** may be made on Sunday. *Wolton v. Gavin*, 16 Q. B. 48; 71 E. C. L. 48.

Acknowledgment of a deed may be valid though made on Sunday. *Lucas v. Larkin*, 85 Tenn. 355.

Statute 6 & 7 Vict., ch. 18, § 4, enacts that persons desirous of being put on the registry of voters shall give or send to the overseers, on or before the 20th of July, a notice in writing. When the 20th of July happened to be on Sunday, it was held that the notice might be properly given on that day. *Rawlins v. West Derby*, 2 C. B. 72; 15 L. J. C. P. 70; 52 E. C. L. 71; *Colville v. Lewis*, 2 C. B. 60; 52 E. C. L. 60. In this latter case the notice was posted, and, in the due course of the mail, was delivered on Sunday, and it was held to be a valid notice.

In *Roberts v. Monkhouse*, 8 East 547, service of notice of a plea was held invalid; and in *Hughes v. Budd*, 8 Dowl. Pr. Cas. 315, service of a notice to produce was held void. But in these two last cases the notice was in the nature of process.

Closing Canal on Sunday.—A power was given to a canal company to make

by-laws for the government of the company, for the good and orderly using of the navigation, and of warehouses, wharves, etc., and for the well-governing of the bargemen. It was held that this did not authorize them to close the canal on Sunday by a chain suspended across it; and that a by-law for so closing the canal on Sundays was illegal and void. *Calder, etc., Nav. Co. v. Pilling*, 14 M. & W. 76; 3 R. Cas. 735; 9 Jur. 377; 14 L. J. Exch. 223.

Compelling Apprentice to Work on Sunday.—To compel an apprentice to work on Sunday, in violation of the statute, is ground for repudiating the articles of apprenticeship. *Warner v. Smith*, 8 Conn. 14; *Phillips v. Immes*, 4 C. & F. 234.

3. *People v. Steele*, 2 Barb. (N. Y.) 397.

Superintendent.—A superintendent is one who superintends; a director; an overseer. *Worcester's Dict.*, followed in *St. Louis, etc., R. Co. v. De Ford*, 38 Kan. 299.

The *Nevada* sole traders act prohibits a married woman from carrying on any business in her own name "when the same is managed or superintended by her husband." The words manage and superintend as used in the statute are synonymous. *Youngworth v. Jewell*, 15 Nev. 48.

The word "superintendence" means oversight or inspection. *Moffit v. Asheville*, 103 N. Car. 237.

4. *Worcester's Dict. quoted in Gilman v. Jones*, 87 Ala. 691; and in that case, where a certain sum was payable, by the terms of a contract, contingently, "whenever it is finally decided in said suit, or otherwise, that said bonds are a superior lien to the other bonds of the said railroad," etc., it was held that "superior" manifestly meant "prior," "superior lien," meaning "prior lien."

5. *Lilly's Case*, 1 Leigh (Va.) 529.

means to put one in a place which, by the ordinary course of military promotion, belongs to another.¹

SUPERSEDEAS.—(See also STAY OF PROCEEDINGS, vol. 23, p. 520; UNDERTAKINGS ON APPEAL.)

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| <ul style="list-style-type: none"> I. Definition, 581. II. Express Supersedeas, 581. III. Implied Supersedeas, 584. <ul style="list-style-type: none"> 1. Definition, 584. 2. Habeas Corpus, 584. 3. Certiorari, 584. 4. Writ of Error, 585. 5. Appeal, 586. | <ul style="list-style-type: none"> IV. Statutory Stays on Appeal and Error, 587. V. What Court May Award Supersedeas, 595. VI. Effect of Supersedeas, 596. <ul style="list-style-type: none"> 1. Upon Jurisdiction Below, 596. 2. Upon Execution Begun, 597. VII. Remedy for Violation of Supersedeas, 597. |
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I. DEFINITION.—A supersedeas, in the strict sense of the word, means the setting aside or annulling of an act. But the word in its legal acceptation means the preventing as well as the setting aside or annulling of an act.² It has been judicially defined as a writ that lies in a great many cases, and signifies in general a command to stay some ordinary proceeding at law on good cause shown, which ought otherwise to proceed;³ and again, as merely an auxiliary process designed to supersede the enforcement of the judgment of the court below brought up by writ of error for review.⁴ A supersedeas may be express, or it may result by implication from the issuance of some other writ or the execution of an undertaking from which it follows as a matter of right.⁵

II. EXPRESS SUPERSEDEAS.—Express supersedeas is usually by writ commanding the officer to whom it is directed to forbear from doing the thing mentioned, or to annul it as far as possible,

1. *Ex parte* Hall, 1 Pick. (Mass.) 262.

2. Bacon's Abr., tit. *Supersedeas*.

3. *Perteet v. People*, 70 Ill. 171.

4. *Williams v. Bruffy*, 102 U. S. 249.

In practice, a writ issued for the purpose of relieving a party from the operation of another writ which has been or may be issued against him. A writ issued to a ministerial officer commanding him to desist from executing or acting under another writ which has been or may be delivered to him. Thus, the defendant may in certain cases procure his discharge from custody under a *capias* by obtaining a writ of supersedeas to be directed to the sheriff for that purpose. 1 Tidd's Pr. 279; 1 Burr. Pr. 399.

The name of this writ is derived from its emphatic word in Latin forms, a great variety of which are to be found in the Register. *Tibi præcipimus quod captioni corporis prædicti Roberti occasione præmissa supersedeas usque*

ad, etc. We command you that you supersede the taking of the body of the aforesaid Robert on the occasion aforesaid until, etc. Reg. Orig. 70 b, 71 a. Burr. L. Dict.

That you supersede, that you set aside. The name of a writ issued to a ministerial officer commanding him to supersede or desist from proceeding under another writ previously or subsequently delivered to him. But it is very common in American books to see the expression used that something is a supersedeas, when the meaning is only that it operates as a stay of proceedings; it has a legal effect like a supersedeas. Thus in speaking of a writ of error granted by the Supreme Court of the *United States*, it is common to say that if the security required is given, the writ is a supersedeas. Abb. Law Dict.

5. Every writ is a supersedeas by implication, by which, although no writ of supersedeas have issued thereupon,

if it has already been done. But it may be without writ, as where a judicial officer has made an order, and subsequently countermands it by a second order.¹ It is quite common in modern practice for courts to interfere thus by order, on motion of the aggrieved party, without the formality of a writ, in a great variety of circumstances where it is made to appear that justice requires it.² An express supersedeas without writ can only be granted by the judge or tribunal making the order intended to be superseded.³

The writ of supersedeas was formerly awarded in a great variety of cases; as where a *capias* or an exigent had been awarded, the person against whom it was awarded might have a writ of supersedeas.⁴ A supersedeas lay also to a process of outlawry.⁵ So also, if a justice of the peace had granted a warrant to compel one to find surety of the peace, he might, upon entering into a recognizance before another justice, have a supersedeas to the warrant.⁶ In such case, the court of chancery or King's Bench might award a writ of supersedeas upon the person's finding surety.⁷ The commission of a justice of the peace might be suspended by a writ of supersedeas.⁸ If a court Christian were proceeding to excommunication after a writ of prohibition had been awarded, the court of King's Bench might award a writ of supersedeas.⁹ Also if an inferior court were proceeding with a cause of which it had no jurisdiction, a supersedeas might be awarded.¹⁰

A supersedeas lay where a process or writ had improperly or erroneously issued.¹¹ If an *audita querela*, founded on matter of record, were brought, the plaintiff might have a supersedeas to stay execution.¹² Under the old English bankruptcy law, a

the doing of an act is prevented. Bac. Abr., tit. *Supersedeas* (A).

1. Bac. Abr., tit. *Supersedeas* (A), citing *Pancras v. Rumbald*, Stra. 6. "But," says the commentator, "if the act directed by the former order to be done were done before the delivery of the second order, it is doubtful whether this shall annul the act. It may, perhaps, be proper that only a writ of supersedeas should have a retrospective power."

2. See STAY OF PROCEEDINGS, vol. 23, p. 520.

3. Bac. Abr., tit. *Supersedeas* (B).

4. Fitzh. N. B. 236.

5. Bac. Abr., tit. *Supersedeas* (C), citing Fitzh. N. B. 237.

6. 1 Hawk. P. C., ch. 66, § 14; Lamb. 95, 96, 99.

7. Fitzh. N. B. 238; Lamb. 96.

8. As the office of these justices is conferred by the king, so it subsists only during his pleasure; and is determined. . . . by superseding the com-

mission by writ of supersedeas, which suspends the power of all the justices, but does not totally destroy it; seeing it may be revived again by another writ called a *procedendo*. 1 Black. Com. 353.

9. Fitzh. N. B. 239; Anonymous, 1 Sid. 181; Rex v. Theed, Stra. 43.

10. Bac. Abr., tit. *Supersedeas* (C), citing Fitzh. N. B. 239, 240.

11. Harvey's Case, Lit. Rep. 314; Cro. Jac. 43.

If a writ of *habere facias possessionem* have issued erroneously and been executed, a supersedeas will lie to restore possession. Jenk. Cent. 58.

To justify the circuit court in superseding a levy and sale under execution, on the ground of the levy being excessive, the excess must be so glaring as to indicate a disposition to abuse the process of the court. Walker v. Gilbert, 15 Smed. & M. (Miss.) 693.

12. Bac. Abr., tit. *Supersedeas* (C), citing Morston v. Parrie, 2 Roll. Abr. 493; Fitzh. N. B. 104; Cro. Eliz. 364;

commission in bankruptcy might be suspended by writ of supersedeas.¹

The Lord Chancellor might supersede a commission in lunacy where the lunatic had recovered or where one had been irregularly found a lunatic.²

In one jurisdiction in the *United States*, a petition for the supersedeas of an execution is a substitute for the common-law writ of *audita querela*;³ and in another it is a substitute for the writ of error in all civil cases in which it is designed that the judgment of the court below shall be superseded.⁴

In jurisdictions where execution may be issued against the person of the defendant, the writ of supersedeas may issue to relieve him from imprisonment when the plaintiff enforces his remedy in an oppressive manner.⁵

Salk. 92; Whidner v. Conyers, 2 Roll. Abr. 493.

1. Smallcombe v. Oliver, 2 D. & L. 217; 13 M. & W. 77; 8 Ves. 533.

2. *In re Gordon*, 2 Ph. 242; Pope's Lunacy, 190.

3. Under the *Alabama* practice a petition for the supersedeas of an execution is a substitute for the common-law writ of *audita querela* and any proceedings under it. While matters which go behind the judgment cannot be inquired into, the execution will be superseded and quashed on account of matter which operates an equitable satisfaction of the judgment. A proceeding by a supersedeas is regarded in the nature of a bill of equity, but the same strictness in pleading is not required. Thompson v. Lassiter, 86 Ala. 536; Branch Bank of Mobile v. Coleman, 20 Ala. 140; Mervine v. Parker, 18 Ala. 241.

4. "In the courts of other states, a supersedeas is merely an auxiliary process designed to supersede the enforcement of the judgment of the court below brought up by writ of error for review. But in *Virginia*, it serves a different purpose. 'There,' says Robinson in his treatise on the practice of the courts in that state, 'the writ of error is never used as a means of removing the judgment of an inferior court before a superior tribunal, except in those cases in which security is dispensed with. In practice, the supersedeas is a substitute for the writ of error in all cases in which it is designed that the judgment of the court below shall be superseded.' Vol. 1, p. 660; White v. Jones, 1 Wash. (Va.) 118; Burnell v. Anderson, 2 Wash. (Va.) 194; Wingfield v. Crenshaw, 3 Hen. &

M. (Va.) 245. By the law of that state where an application is made to the supreme court of appeals for a writ of supersedeas, the court looks into the record of the case, and only allows the writ when of opinion that the decision complained of ought to be reviewed." Field, J., in Williams v. Bruffy, 102 U. S. 248.

"The writ of supersedeas, like the writ of error, generally is awardable only for error in law apparent on the face of the record; the errors being identical with those which warrant the latter writ, of which many instances have already been stated. It is awarded, also, on like terms, and indeed, differs from a writ of error generally in nothing but the formal tenor of it, and in the fact that in practice in *Virginia* it is preferred in civil cases to the writ of error and cannot be used in criminal cases at all. The difference in its tenor from a writ of error is that it is addressed to the sheriff, instead of to the judge, and commands him to forbear further proceedings on the judgment; informs him that the record thereof has been removed into the appellate court for the correction of errors therein, and enjoins upon him to give notice to the other party to appear in the appellate court and answer the complaint in error. The precept to the sheriff in this writ is direct and express to supersede from further proceedings, and not implied only, as at common law it is in the writ of error." 4 Minor's Inst. 952. See also Laidley v. Bright, 17 W. Va. 779.

5. Lippman v. Petersburg, 9 Abb. Pr. (N. Y.) 209; 18 How. Pr. (N. Y.) 270; Hills v. Lewis, 13 Abb. Pr. (N. Y.) 101, note; Wells v. Jones, 2 Abb. Pr. (N. Y.) 20; Desisles v. Cline, 4

III. IMPLIED SUPERSEDEAS—1. Definition.—A supersedeas results by implication where the issuance of some writ, or the compliance with the statutory provisions in that regard provided, either permanently or temporarily, prevents the taking of another step in a cause.¹

2. Habeas Corpus.—At common law the writ of *habeas corpus* supersedes the authority of an original commitment, and so completely takes away the power of the court to which it is directed that every proceeding after it is served and before a *procedendo* is awarded, is void.²

3. Certiorari.—At common law it is well settled that a writ of certiorari is a supersedeas to all proceedings subsequent to the delivery of the writ to the court or person to whom it is directed, and any further proceeding had thereafter is *coram non judice* and is void.³ But if the levy be made before the writ of certiorari is

Robt. (N. Y.) 645; *Masters v. Edwards*, 1 Cai. (N. Y.) 516; *Reynolds v. Corp.*, 3 Cai. (N. Y.) 267; *Reynolds v. Church*, 3 Cai. (N. Y.) 274; *People v. Westchester County*, 57 Barb. (N. Y.) 377; 8 Abb. Pr. N. S. (N. Y.) 277; *New York Cent., etc., R. Co. v. Shepherd*, 10 Civ. Pro. Rep. (N. Y.) 153; *In re Shepard*, 43 Hun. (N. Y.) 287; *overruling People v. Grant*, 10 Civ. Pro. Rep. (N. Y.) 158; *Watt v. Healy*, 22 Hun. (N. Y.) 491.

1. See Abb. L. Dict.; Bac. Abr., tit. *Supersedeas* (A).

2. Bac. Abr., tit. *Supersedeas* (D); 2 Roll. Abr. 493; *Johnson v. Ellis*, Cro. Eliz. 916; *Dorrington v. Edwin*, Skin. 244; *Ellis v. Johnson*, 2 Jones, 209.

In *Barth v. Clise*, 12 Wall. (U. S.) 401, the court said: "By the common law, upon the return of a writ of *habeas corpus* and the production of the body of the party suing it out, the authority under which the original commitment took place is superseded. After that time and until the case is finally disposed of, the safe keeping of the prisoner is entirely under the control and direction of the court to which the return is made. The prisoner is detained, not under the original commitment, but under the authority of the writ of *habeas corpus*. Pending the hearing he may be bailed *de die in diem*, or be remanded to the jail whence he came, or be committed to any other suitable place of confinement under the control of the court; he may be brought before the court from time to time by its order until it is determined whether he shall be discharged or remanded. *King v. Bethel*, 5 Mod. 19; Bac. Abr., tit. *Hab-*

as Corpus (B) 13; Anonymous, 1 Vent. 330; Sir Robert Peyton's Case, 1 Vent. 346; *Hurd's Habeas Corpus* 324. We have not overlooked the statute of 31 Car. II. This doctrine has been recognized by this court. *In re Kaine*, 14 How. (U. S.) 134."

3. Bac. Abr., tit. *Supersedeas* (D) 4; tit. *Certiorari* (G); Com. Dig. *Certiorari* (E); *Cross v. Smith*, Cro. Eliz. 915; *Rex v. Spelman*, Moor 73; *Reg. v. Nash*, 1 Salk. 147; 2 Ld. Raym. 989; *Fitzwilliam's Case*, Cro. Jac. 282; 6 Mod. 61. See Cro. Car. 261; 7 Mod. 138; 12 Mod. 643; 3 Salk. 79, pl. 4; *Chantflower v. Priestly*, Cro. Eliz. 913; *Gardiner v. Murray*, 4 Yeates (Pa.) 560; *Kingsland v. Gould*, 6 N. J. L. 161; *Mairs v. Sparks*, 5 N. J. L. 592; *Allen v. Hopper*, 24 N. J. L. 514; *McWilliams v. King*, 32 N. J. L. 21; *Ludlow v. Ludlow*, 4 N. J. L. 444; *Conover v. Devlin*, 24 Barb. (N. Y.) 636; 14 How. Pr. (N. Y.) 348; *Launtz v. Dixon*, 5 Sandf. (N. Y.) 249.

In *Kingsland v. Gould*, 6 N. J. L. 161, the court said: "The certiorari is itself a supersedeas. The court cannot proceed after a certiorari is granted. It would defeat the whole object of the measure."

In *Mairs v. Sparks*, 5 N. J. L. 592, the court said: "The writ of certiorari issuing out of this court and directed to the court for the trial of small causes, is, in its nature and effect, a supersedeas, and ought to stay all further proceedings in the cause. After it is received the justice has no right to take any proceeding or to issue any writ; if he does, he subjects himself to an attachment for contempt, and the records of this

issued, the writ does not operate to stay proceedings under the execution without the allowance of a writ of supersedeas, and the officer may proceed to sale by virtue of a writ of *venditioni exponas*.¹

4. **Writ of Error.**—At common law a writ of error was a supersedeas by implication and operated to stay proceedings from the time of its allowance, without an undertaking or other security;² but it would not so operate upon any proceeding which was not founded on the same original upon which the judgment was founded. Upon this distinction it was formerly held that although

court show at least one instance in which the attachment has been granted and a justice punished for issuing an execution upon a judgment which had been removed hither by that writ."

In *McWilliams v. King*, 32 N. J. L. 21, Beasley, C. J., said: "But it is to be remembered that the writ of certiorari is of itself and *proprio vigore* a supersedeas. Neither the inferior court nor the officer holding the process of such inferior court can rightfully proceed after formal notice of its having issued. Every act done after such notice, is not only irregular, but is absolutely void, and the parties doing such an act are trespassers. Com. Dig., tit. *Certiorari* (G); *Chantflower v. Priestly*, Cro. Eliz. 914; Cro. Jac. 379."

1. Reg. v. Nash, 1 Salk. 147; 2 Ld. Raym. 989; Cro. Eliz. 597, 598; 1 Tidd's Pr. 337; *Meriton v. Stevens*, Willes 271; 2 Hawk. Pl. Cr. ch. 27, § 63; *Patchin v. Brooklyn*, 13 Wend. (N. Y.) 664; *Blanchard v. Myers*, 9 Johns. (N. Y.) 66; *Launtz v. Dixon*, 5 Sandf. (N. Y.) 249. In *Blanchard v. Myers*, 9 Johns. (N. Y.) 66, the court said: "A certiorari allowed after execution begun to be executed by the constable is no supersedeas to the execution. The same rule applies to cases arising under justices' judgments and executions, which exists as to other courts when a regular writ of error is allowed; and it is well settled that the allowance of a writ of error, after the sheriff has levied under a *fi. fa.*, is no supersedeas to it. (*Meriton v. Stevens*, Willes 271.) Here the levy was made before the allowance of the certiorari, and the issuing of the execution within the thirty days, and the constable taking security that the goods levied on should be forthcoming at a certain day, did not affect the application of the rule."

In *Patchin v. Brooklyn*, 13 Wend. (N. Y.) 664, *Savage, C. J.*, said: "But

where an execution is begun to be executed before the service of the writ, the sheriff shall finish it and the court below may award a *venditioni exponas* for that purpose. Cro. Eliz. 597, 598. See 1 Tidd's Pr. 137. This point was so decided by this court in *Blanchard v. Myers*, 9 Johns. (N. Y.) 66, the court saying that a certiorari allowed after execution begun to be executed by the constable is no supersedeas to it; citing *Meriton v. Stevens*, Willes 271. And the same doctrine has been held recently in 1 Cow. (N. Y.) 21."

But the modern tendency of courts is to break away from the doctrine that an execution is an entire thing and cannot be divided. "A party may sue out execution within four days, but it is at the peril of a supersedeas of execution and restitution of the property, if error is brought and bail perfected within that time. There may have been some doubt heretofore as to the practice in a case like this, growing out of a notion which has long prevailed in England that an execution being an entire thing cannot be divided, and that when a levy is made under a *fi. fa.*, the sheriff shall not be stayed but shall proceed and sell the goods. But since the decision of this court in *Jackson v. Schaubert*, 7 Cow. (N. Y.) 417, 490, it is supposed that the practice of this court would be considered as settled." *People v. Judges*, 1 Wend. (N. Y.) 81.

2. Bac. Abr., tit. *Supersedeas* (D) 5; Bro. Exec. pl. 68; Bro. *Supersedeas*, pl. 16, 17; Skin. 452; Bishop of Ossory's Case, Goldb. 439; *Hughes v. Underwood*, 1 Mod. 28; *Meagher v. Vandyck*, 2 Bos. & P. 370; *Braithwaite v. Brown*, 1 Chitt. 238; *Perkins v. Woolaston*, Salk. 321; 1 Vent. 255; 6 Mod. 130; 8 Mod. 147; *Lampiere v. Mereday*, 1 Mod. 112; *Jaques v. Nixon*, 1 T. R. 272; *Doe v. Bracebridge*, 1 T. R. 272; *Hawkins v. Jones*, 5 Taunt. 204; Cleg-

no execution could issue upon a judgment while a writ of error was pending, still an action of debt might be brought on a judgment, and execution might issue on the new judgment secured thereon;¹ and to such new action of debt the pendency of the writ of error was held not sufficient when pleaded in bar.² Neither was it sufficient as a plea in abatement of such action.³ But it was finally settled that execution on a judgment in the second action would be stayed by rule of court until the writ of error was determined.⁴

5. **Appeal.**—As a writ of error operates as a supersedeas at common law, so an appeal is a supersedeas to a decree or order appealed from in a suit in equity. After a struggle between the House of Lords and the judges, it became the law of the appellate court that the mere presenting of an appeal to the House of Lords suspended all proceedings whatever in the court below. But this doctrine was subsequently so modified that the appeal operated to stay proceedings only on the matter appealed from, and did not take away the jurisdiction of the chancellor so as to prevent a proceeding in any other matter in the cause. This latter is the general rule in the *United States* except in so far as it has been modified by statute.⁵

horn *v.* Desanges, Gow. 66; Moorfoot *v.* Chiver, 8 Mod. 273; Capron *v.* Archer, 1 Burr. 340; Thorpe *v.* Beer, 2 B. & Ald. 373; Tyler *v.* Hamersley, 44 Conn. 414; 26 Am. Rep. 479; Arnold *v.* Fuller, 1 Ohio 458; Kitchen *v.* Randolph, 93 U. S. 86.

1. Bac. Abr., tit. *Supersedeas* (D) 5; 2 Roll. Abr. 490; (B) pl. 4; Bro. Err. pl. 170; Anon. Dyer, 32; Grandvill *v.* Dighton, Skin. 388; Adams *v.* Tomlinson, Sid. 236 (Hill. 16 Car. 11); Gale *v.* Hill, 3 Lev. 397.

2. Rogers *v.* Mayhoe, Carth. 1.

3. Rottenhoffer *v.* Lenthall, Show. 146; *overruling* Aby *v.* Buxton, Carth. 191.

4. Bac. Abr., tit. *Supersedeas* (D) 5; Clarkson *v.* Physic, Mich. T. 13 Geo. II; Taswell *v.* Stone, 4 Burr. 2454; Benwell *v.* Black, 3 T. R. 643. See also Humphries *v.* Daniel, 1 Barn. 202.

5. In Hart *v.* Albany, 3 Paige (N. Y.) 383, the court, by Walworth, Ch., said: "To understand the meaning of the several provisions of the Revised Statutes relative to the stay of proceedings pending an appeal, it may be necessary to inquire what was the former law and practice of the courts on this subject, and what were the evils intended to be remedied by these legislative provisions. It will be recollected by those who have had occasion to look into the history of the jurisdiction of

the House of Lords in *England*, relative to appeals from the court of chancery, that their jurisdiction was for a long time contested, not only by the House of Commons, but by several distinguished English judges; and the learned Chief Justice Hale wrote a very elaborate treatise for the purpose of showing that the Lords could not rightfully exercise such a jurisdiction. In this struggle to obtain or preserve jurisdiction in case of appeals, it will be found, on examination, that very little regard was paid to the rights of suitors or of their counsel; some of whom were heavily amerced, and even imprisoned, for questioning the jurisdiction of the Lords, or for refusing to appear as counsel in that court. During this contest it was a matter of course that the Lords, for the purpose of sustaining the jurisdiction which they claimed, should prohibit the respondent from taking any steps in the cause in the court of chancery pending the appeal, whatever injury he might sustain by the delay. Hence, it became the law of the appellate court that the mere presenting of an appeal to the House of Lords suspended all proceedings whatever in the court below. And so far was the principle carried, that, as late as 1772, it was supposed that an appeal had this effect of totally suspending the jurisdiction of the Lord Chancellor as

IV. STATUTORY STAYS ON APPEAL AND ERROR¹—(See UNDERTAKINGS ON APPEAL).—The doctrine that a writ of error without an undertaking or other security operated as a supersedeas was long

to the whole suit until the decision of the Lords on the appeal. But in the case of *Pomfret v. Smith*, which came before Lord Apsley at that time, he decided that his jurisdiction was suspended only as to the matter appealed from; but that it was not totally suspended, so as to prevent, a proceeding as to any other matter in the cause. Palmer, Pr. H. L. 9. The jurisdiction of the Lords being finally established, and having remained for a long time undisputed, they saw the necessity of permitting the court of chancery, during the recess of Parliament, to take such proceedings in the cause, pending the appeal, as the Lord Chancellor might deem requisite for the preservation of the rights of the parties. At length this practice became so fully established that in the case of *Burke v. Brown*, in 1807 (Palmer, Pr. 10; 15 Ves. 184), the Lords decided that an appeal did not stay any of the proceedings, even upon the point appealed from, without an express order of the appellate court, unless the Lord Chancellor, in the exercise of a judicial discretion, thought proper to suspend the proceedings wholly or in part pending the appeal. This country having separated from *England* before this change in the practice had been established, the courts of this state followed the practice, as settled by Lord Apsley in 1772, of considering the appeal as a stay of the proceedings upon the point of the appeal."

In *Hudson v. Smith*, 9 Wis. 126, Paine, J., said: "In *Massachusetts*, under a statute providing that on an appeal from a decree of the probate court all proceedings should cease in the court below, it was held that the decree was vacated by the appeal, and could not be held in force, even though the appeal was never entered or prosecuted. Paine v. Cowdin, 17 Pick. (Mass.) 142; Davis v. Cowdin, 20 Pick. (Mass.) 510. So an appeal has the same effect in admiralty. In *Yeaton v. U. S.*, 5 Cranch (U. S.) 281, Chief Justice Marshall says: 'The majority of the court is clearly of opinion that in admiralty cases, an appeal suspends the sentence altogether; and that it is not *res adjudicata* until the final sentence of the appellate court is pro-

nounced.' In *Wade v. Colonization Soc.*, 4 Smed. & M. (Miss.) 671, under a statute providing that before granting an appeal the chancellor should require a bond with security to pay or perform the decree or order, etc., the court held that where the statute was complied with, the appeal would by its own force suspend the decree, though there was nothing in the act saying it should have that effect. In *Helm v. Boone*, 6 J. J. Marsh. (Ky.) 351, speaking of the effect of an appeal, the court says: 'And from necessity the action of the circuit court would be suspended by the appeal, until the appellate court had disposed of it. There could not be a greater absurdity in judicial proceedings than to have a cause progressing at the same time in the inferior and appellate tribunals of the country.' In *Yocum v. Moore*, 4 Bibb (Ky.) 221, the court held that an appeal from a decree dismissing a bill would even have the effect of suspending a previous order dissolving an injunction, so as to leave the injunction in force. There are many authorities which hold a different doctrine, some of which were cited on the argument. But if in this conflict we look at the nature and object of an appeal, it seems to us that these support the rule that it works a stay of proceedings."

In *Hovey v. McDonald*, 109 U. S. 150, Bradley, J., said: "In *England*, until the year 1772, an appeal from a decree or order in chancery suspended all proceedings, but since that time a contrary rule has prevailed there. The subject was reviewed by the House of Lords in 1807 and an order was made establishing the right of the chancellor to determine whether and how far an appeal should be suspensive of proceedings, subject to the order of the House, on the same subject. See Palmer's H. L. 9, 10 (*Huguenin v. Baseley*, 15 Ves. 184; *Hart v. Albany*, 3 Paige (N. Y.) 383, 385)." See also *Barnum v. Barnum*, 42 Md. 251; *Rice v. West*, 42 Md. 614; *State v. Jacksonville*, etc., R. Co., 15 Fla. 201; *Ratzer v. Ratzer*, 29 N. J. Eq. 162; *Espy v. Balkum*, 45 Ala. 256.

1. The distinction that a writ of error lies to review proceedings at law only, and that appeal may be taken

since changed by statute in *England*,¹ and the rule has been wholly abrogated by acts of Congress and of the legislatures of the various states. It is believed that no stay of proceedings may now be had as a matter of right in the *United States*, pending an appeal or writ of error, unless an undertaking be filed under the terms prescribed by the statute.²

But persons who act in a representative capacity, such as executors, administrators, trustees, and guardians, are generally not required to file such undertakings, as they are usually liable on their official bonds for any personal liability they may incur.³ The statutes in general provide that in order to have proceedings stayed in case of appeal or writ of error, the appellant or plaintiff in error must file a bond or undertaking with sufficient surety, conditioned to prosecute his appeal or writ of error with effect, and to pay the amount of the decree or judgment in case of dismissal or affirmance, or such part thereof as may be affirmed, together with all costs and damages; but the statutory provisions vary greatly in this regard, and as the supersedeas is a statutory remedy, the statute under which it is sought must be strictly

only in cases in equity or such as proceed by the civil-law method, is not now generally observed; and while the distinction is still maintained in the *United States* Supreme Court, the law of supersedeas is practically the same in both modes of procedure.

1. Statutes of 3 Jac. I., ch. 8; 3 Car. I., ch. 4, § 4; 13 Car. II., St. 2, ch. 2, § 9; Bac. Abr., tit. *Supersedeas* (C), tit. *Bail in Civil Causes* (B) 7.

2. "When an appellant will rely alone upon his appeal for a stay of the proceedings on the judgment appealed from, he must give the undertaking that the code requires. The code, however, does not abridge the power that the Supreme Court has always had over its own judgments, to correct mistakes in them, to vacate them for irregularity, to stay proceedings on them for such time and on such terms as to the court seem proper. It is a discretion still resting in that court, and not to be reviewed in this court, unless capriciously exercised or abused." *Granger v. Craig*, 85 N. Y. 620. And see generally the statutes of the *United States* and of the various states.

3. *Williams v. Stewart*, 12 Smed. & M. (Miss.) 533; *Fishback v. Weaver*, 34 Ark. 569; *Wilson v. Yonge*, 54 Ark. 353; *State v. Judge*, 21 La. Ann. 43. In *Wilson v. Wilson*, 1 Hen. & M. (Va.) 15, the court of appeals of *Virginia*, without the aid of a statute, said: "If an executor or an administrator ob-

tains an appeal, he is not ruled to give security except in cases where a judgment for a *devastavit* has been obtained against him, because he represents the estate of a deceased person, for the faithful administration of which he has already given security, and if in prosecuting or defending any suit for or against his testator or intestate, as the case may be, he does that which in law is injurious to a creditor, the securities for his administration are liable; and because, too, if you compel him to give security in those cases in order that he may be enabled to do justice to his testator's or intestate's estate, you compel him to make the debt his own, although he should be guilty of no improper act. It is the usual course of the country—it is every day's practice in all our courts of law and equity—to allow an executor or administrator who stands in right of another to prosecute or defend himself without security."

The plaintiff having obtained judgment against five defendants, with award of execution against four, the fifth being an administrator, all the defendants appealed without giving a supersedeas bond. The plaintiff then issued an execution against all the defendants except the administrator. They moved to quash the execution on the ground that there was an appeal and a supersedeas as to all, because one of the defendants was an administrator, and, by the *Missouri* statute, his appeal without bond works a

complied with.¹ As a rule, neither a decree, nor an order granting or dissolving an injunction, will be suspended by an appeal, notwithstanding a compliance with all the statutory requirements

supersedeas of the judgment. But the court held that the administrator alone was entitled to a stay, in the absence of bond, and that the judgment was not so entire as to render a stay of execution against one, especially within the statute, operative as to the others not embraced by the statute. *State v. Finn*, 19 Mo. App. 557.

1. *United States Supreme Court Doctrine.*—In *Kitchen v. Randolph*, 93 U. S. 86, the court, by Waite, C. J., in an elaborate review of the Federal legislation upon the subject, said: "At common law, a writ of error was a supersedeas by implication. *Bac. Abr.*, tit. *Supersedeas* (D) 4. To avoid the effect of this rule, the Act of 1789, 1 Stat. at L. 85, § 23, provided that a writ of error 'shall be a supersedeas, and stay execution in cases only where the writ of error is served, by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of;' and in cases where a writ of error might be a supersedeas no execution could issue for ten days.

"Under this section it was held, in *Hogan v. Ross*, 11 How. (U. S.) 297, that there was no authority 'to award a supersedeas to stay proceedings on the judgment of an inferior court upon the ground that a writ of error is pending, unless the writ was sued out within ten days after judgment and in conformity with the provisions of the act;' and in *Baltimore, etc., R. Co. v. Harris*, 7 Wall. (U. S.) 575, that the effect of the writ as a supersedeas 'depends upon compliance with the conditions imposed by the act,' and that 'we cannot dispense with that compliance in respect to lodging a copy for the adverse party.'

"The stay of proceedings followed as a matter of right from the issue and service of the writ of error, in the manner and within the time prescribed by the act. No special directions as to the security were necessary, because, under the law as it originally stood, security must be given in all cases when the writ was issued, that the plaintiff in error would prosecute his writ to effect, and answer all damages and costs if he failed to make his plea good. It soon

became manifest, however, that in cases where there was to be no supersedeas, security to this extent was unnecessary; and, consequently, in 1794, it was enacted, 1 Stat. at L. 404, 'That the security to be required and taken on the signing of a citation on any writ of error, which shall not be a supersedeas and stay execution, shall be only to such an amount as, in the opinion of the justice or judge taking the same, shall be sufficient to answer all such costs as upon an affirmance of the judgment or decree, may be adjudged or decreed to the respondent in error.' After this the form of the security became material, and the supersedeas was made to depend upon the condition of the bond executed at the time of the signing of the citation, as well as upon the prompt issue and service of the writ. *Rubber Co. v. Goodyear*, 6 Wall. (U. S.) 156; *Slaughter House Cases*, 10 Wall. (U. S.) 289, 291.

"In 1803, appeals were granted in cases of equity and of admiralty and maritime jurisdiction, and made 'subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error.' 2 Stat. at L. 244, § 2. It has accordingly been held that an appeal to operate as a supersedeas must be perfected and the security given within ten days after the rendition of the decree. *Adams v. Law*, 16 How. (U. S.) 148; *Hudgins v. Kemp*, 18 How. (U. S.) 535; *French v. Shoemaker*, 12 Wall. (U. S.) 100; *Bigler v. Waller*, 12 Wall. (U. S.) 149. The allowance of the appeal is the equivalent of the writ of error.

"It thus appears that, under the statutes which regulated the early practice, a supersedeas could not be obtained except by prompt action and strict compliance with all the requirements of the law. Parties were, however, not unfrequently put to serious inconvenience by so stringent a rule; and, to avoid this, it was enacted in 1872, 17 Stat. at L. 198, § 11, 'that any party or person desiring to have any judgment, decree or order of any district or circuit court reviewed on writ of error or appeal, and to stay proceedings thereon during the pendency of such writ of error or appeal, may give the security required by law therefor with-

in sixty days after the rendition of such judgment, decree or order, or afterward, with the permission of a justice or judge of the appellate court.' In *Telegraph Co. v. Eyser*, 19 Wall. (U. S.) 419, we held, in reference to this statute, that where an appeal was taken and the requisite security given after the expiration of ten days, but within sixty, a supersedeas followed as a matter of right. In the course of the opinion in that case it was said: 'It is expressly declared that the supersedeas bond may be executed within sixty days after the rendition of the judgment, and later, with the permission of the designated judge. It is not said when the writ of error shall be served. Its issuance must, of course, precede the execution of the bond, and, as the judge who signs the citation is still required to take the bond, we think it is sufficiently implied that it may be served at any time before, or simultaneously with, the filing of the bond. Indeed, the giving of the bond alone is made the condition of the stay. The section is silent as to the writ. . . . The execution, approval and filing of the bond are substantial. The filing of the writ is matter of form.' In *Board of Com'rs v. Gorman*, 19 Wall. (U. S.) 661, decided at the same term, we further held, that execution might issue after the expiration of ten days, if a supersedeas had not been obtained; but, if one should issue, and a supersedeas be thereafter perfected, that would only operate to stay further proceedings under the execution and could not interfere with what had already been done.

"In this condition of the law the Revised Statutes were adopted and section 1007 is as follows: 'In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward, with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas, execution shall not issue until

the expiration of the said term of sixty days.'

"At the next session of Congress, an amendment to this section was passed, limiting the time for withholding execution to ten days, 18 Stat. at L. 318. By section 1012 Revised Statutes, that part of the Act of 1803, 2 Stat. at L. 244, which placed appeals on the same footing as writs of error, was re-enacted, and, by section 1000, provision was made for security for costs only in cases where no supersedeas was desired, thus reproducing the old law on that subject. It is evident that Congress intended in this revision to change to some extent the Law of 1872, 17 Stat. at L. 196. The fair inference from the opinion in *Telegraph Co. v. Eyser*, is that as that law 'was silent as to the writ,' and 'it was not said when it must be served,' a supersedeas could be obtained by the execution, approval and filing of the necessary security, even though the writ of error should not be served or the appeal taken until after the expiration of sixty days. In this way the old rule requiring promptness of action to obtain a stay of proceedings was substantially abandoned. A justice or judge could, in his discretion, grant the stay at any time, if the writ should be issued and served within the two years allowed for that purpose. The revised section is not 'silent as to the writ,' and it is 'said when it must be served.' If a supersedeas is asked for when the writ is obtained, the writ must be sued out and served within sixty days, and the requisite bond executed when the citation is signed. The policy of the old law is thus restored, the only modification being in the extension of time allowed for action. Sixty days are given instead of ten."

In *Sage v. Central R. Co.*, 93 U. S. 420, Waite, C. J., said: "In *Kitchen v. Randolph*, decided at the present term, 93 U. S. 86, we held that it was not within the power of a justice of this court to grant a supersedeas on a writ of error or upon an appeal, unless the writ of error was sued out and served or the appeal taken within sixty days. Sundays exclusive, after the rendition of the judgment or decree complained of. The decree in this case was rendered Oct. 22, 1875. At that time, the present appellants were not parties to the suit, and consequently could not appeal. The application of Dec. 16, though made in their interest, was in form by

the Farmers' Loan and Trust Company. This application was denied; and properly so, because an appeal was only asked so far as it affected the interests of these appellants. The trustee represents all the bond holders; and as the decree is indivisible, it must appeal for the whole or none. No application was then made by the appellants for leave to intervene and become parties, and consequently the court could not then have been asked to allow them an appeal as parties. Such an application was, however, made Jan. 11; and Jan. 14 they were admitted as parties for the purpose of appealing. An appeal was then allowed to them; but they did not avail themselves of it, either by giving a supersedeas bond or a bond for costs. And if they had done so, it could not have had the effect of a supersedeas, because it was not allowed until after the expiration of the sixty days. The order of the court, to the effect that if the bond should be given the appeal might be regarded as taken and perfected Dec. 16, was of no effect for the purposes of a supersedeas. While it is true that the court may enter an order in a cause *nunc pro tunc*, where the action asked for has been delayed by or for the convenience of the court, *Perry v. Wilson*, 7 Mass. 394, it is never done where the parties themselves have been at fault, *Fishmongers' Co. v. Robertson*, 3 Man. G. & S. 974, or where it will work injustice. A supersedeas, is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with. *Hogan v. Ross*, 11 How. (U. S.) 297; *Baltimore, etc., R. Co. v. Harris*, 7 Wall. (U. S.) 575. Time is an essential element in the proceeding, and one which neither the court nor the judges can disregard. If a delay beyond the limited time occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired, and of which he cannot be deprived without due process of law. The court can no more give effect to a supersedeas by ordering that the appeal shall relate back to a time within the sixty days, than it can to an appeal taken after the expiration of two years, by dating it back to a time within the limitation. To make a *nunc pro tunc* order effectual for such purposes, it must appear that the delay was the act of the

court and not of the parties, and that injustice will not be done."

An appeal will operate as a supersedeas if taken within the time prescribed by statute, either from the announcement of the decree in open court or from the settling and filing thereof. *Silby v. Foote*, 20 How. (U. S.) 290.

An appeal will not operate as a supersedeas if no bond be given within the time prescribed by statute. *Adams v. Law*, 16 How. (U. S.) 144.

An appeal taken and perfected by bond within the time prescribed by statute of a hearing and denial of a motion to rescind the decree, will be seasonable to operate as supersedeas where the motion is made and heard during the term at which the decree was rendered. *Washington, etc., R. Co. v. Washington*, 7 Wall. (U. S.) 575.

A bond approved and filed after the time provided by statute within which it must be filed, although it may not operate to supersede the execution, will suffice to sustain the appeal. *Hudgins v. Kemp*, 18 How. (U. S.) 530.

An appeal does not supersede the execution of a decree of foreclosure by sale of mortgaged chattels, unless a bond to secure the whole amount of the debt is given within the time prescribed by statute, although the property is in the hands of a receiver. *Stafford v. Union Bank*, 16 How. (U. S.) 135; 17 How. (U. S.) 275; *Stafford v. New Orleans, etc., Banking Co.*, 17 How. (U. S.) 283.

An appeal taken instead of a writ of error in an action at law, cannot operate as a supersedeas. *Saltmarsh v. Tuthill*, 12 How. (U. S.) 387.

Where an appeal to the supreme court has been duly taken in an equity suit, the supersedeas follows not by virtue of any process issued, but from the compliance with the provisions of the act of Congress in that behalf. *Godard v. Ordway*, 94 U. S. 672.

Where the appeal is taken by the party for whom the decree is rendered, it operates as a supersedeas without the filing of a bond; and it makes no difference that the adverse party enters a cross-appeal. *Bronson v. La Crosse, etc., R. Co.*, 1 Wall. (U. S.) 405.

An appeal from a decree of foreclosure does not operate to stay a sale of mortgaged premises under the decree, where the appeal bond is conditioned only that the appellant shall pay costs and damages. *Orchard v. Hughes*, 1 Wall. (U. S.) 73.

Where an appeal by defendant in equity is dismissed for want of prosecution, and the court on petition allows another, and the same term passes a decree to execute the original decree, from which the defendant also appeals, the second appeal from the original decree does not operate as a supersedeas. *Carr v. Hoxie*, 13 Pet. (U. S.) 460.

The circuit court may quash a supersedeas granted on an appeal, if satisfied that sufficient security has not been taken, and the supreme court cannot review such proceeding or issue a new supersedeas upon inquiring and finding out that the security was sufficient. *Black v. Zacharie*, 3 How. (U. S.) 482.

If a petition to open a final decree be filed and considered during the term in which the decree was made, the time within which the appeal must be taken to operate as a supersedeas will not begin to run until the petition is disposed of. *Brockett v. Brockett*, 2 How. (U. S.) 238.

Doctrine of Various State Courts.—

If the condition of a bond for a writ of error substantially conforms to the requisites of the statute, it is sufficient, though the language be different. *Sanders v. Rives*, 3 Stew. (Ala.) 109; *Gardner v. Woodyear*, 1 Ohio 170.

The appeal bond on appeal from an order refusing to grant a new trial, does not supersede the original judgment, but only the order appealed from. *Epsy v. Balkum*, 45 Ala. 256.

A writ of error bond without security does not operate as a supersedeas of the judgment. *Williams v. Hart*, 17 Ala. 102.

An appeal to the supreme court is not perfected and does not operate as a supersedeas, unless the affidavit required by statute is duly filed or duly waived. *Hanna v. Pitman*, 25 Ark. 275.

A three-hundred-dollar undertaking on appeal *ipso facto* operates as a supersedeas and stay of proceedings in any case where the appellants are not required by the judgment to perform any conditions; and an order of this court staying proceedings is not essential to preserve the rights of appellants upon an appeal from an interlocutory decree in partition settling rights of property. *Born v. Horstmann*, 80 Cal. 452. See *Neale v. San Diego County*, 77 Cal. 28; *Dennery v. Sacramento County*, 84 Cal. 7.

An appeal from an order refusing, except upon terms, to open a default and allow an answer to be made, is not

effectual to stay the entry of judgment upon the default. *Exley v. Berryhill*, 37 Minn. 182.

Where a writ of error was allowed and signed before judgment entered, and was legally served and brought before a court having jurisdiction of the cause, and was eventually abated on motion of the defendants in error, it was held to be a supersedeas of an execution issued on such judgment between the allowance and the service of it. *Dutton v. Tracy*, 4 Conn. 365.

A writ of error from the state court to the Supreme Court of the *United States*, if sued out within the time and with the formalities required in cases of writs of error to the circuit courts of the *United States*, operates in like manner as a supersedeas and stay of execution. *Carter v. Bennett*, 5 Fla. 92.

An appeal to the supreme court cannot *ipso facto* operate as a supersedeas except when the decree was for the payment of money. In other cases the supersedeas must be a subject of special order. *McGill v. McGill*, 19 Fla. 341.

On application for a supersedeas in appeal on an interlocutory order or decree, the judge or justice is not required to satisfy himself on litigated questions, but to see from an inspection of the record that there is an appeal; that it is not frivolous, and that the state of the case as to its future course is such as to render a stay of proceedings proper. *Williams v. Hilton*, 25 Fla. 608.

A party to a decree has no right to a supersedeas on any feature of it that does not affect his interest. And where such a supersedeas has been granted, it will be vacated. *Warner v. Watson*, 27 Fla. 518.

A writ of error is no supersedeas of an execution unless bond and security are given. *Allen v. Savannah*, 9 Ga. 286; *Jones v. Dougherty*, 11 Ga. 305; and the same is true of an appeal. *Branigan v. Rose*, 8 Ill. 123.

Upon the completion of a bill of exceptions in a criminal case for an offense punishable by death, the supersedeas is a matter of right and may be enforced by mandamus. *Spann v. Clark*, 47 Ga. 369.

The supersedeas will not be granted to a plaintiff in error who chooses to set aside a judgment in his own favor. *Carr v. Miner*, 40 Ill. 33.

The supersedeas is allowed only where upon inspection of the record

probable grounds appear for suspending the enforcement of the execution. *Lowry v. Bryant*, 3 Ill. 2.

It is the duty of officers taking appeal bonds to pursue the directions of the statute. The obligation should be broad enough to comprise every case of liability contemplated by the statute. *Stephens v. People*, 13 Ill. 132; *Hoare v. Harris*, 14 Ill. 35; *Wood v. Tucker*, 66 Ill. 276.

Where a bond is filed with the writ of error, it operates as a supersedeas. *Burge v. Burns*, 1 Morris (Iowa) 287.

A statute requiring a bond to be filed with a writ of error does not operate upon cases already in court. *Battelle v. Bridgeman*, 1 Morris (Iowa) 363. See *Pratt v. Western Stage Co.*, 26 Iowa 241.

An appeal from a judgment of conviction in a criminal cause suspends the effect of the judgment until judgment is pronounced in the appellate court. *State v. Volmer*, 6 Kan. 379.

The supersedeas bond only stays the execution of a judgment or final order sought to be reversed. *Central Branch Union Pac. R. Co. v. Andrews*, 34 Kan. 563; *Heizer v. Pawsey*, 47 Kan. 33.

A supersedeas suspends the effect of a judgment, but does not annul it as a reversal does. It takes effect, not when issued, but when the certificate is filed in the office of the court below, or when due notice of it is given to the officers or party to be restrained by it. *Runyon v. Bennett*, 4 Dana (Ky.) 599.

The clerk of the court of appeals cannot issue a supersedeas until a copy of the record has been filed in the office. *Hunt v. Berryman*, 2 Metc. (Ky.) 240.

A judgment is not suspended until the order of supersedeas from the proper court is issued. *Reed v. Lander*, 5 Bush (Ky.) 599.

The judgment is not suspended by the execution of the bond; an order of supersedeas must be issued by the clerk. *Whitehead v. Boorum*, 7 Bush (Ky.) 401.

The mere execution of the supersedeas bond does not, like the execution of the appeal bond, suspend the judgment or decree; the record must be filed here, and the writ of error with supersedeas as sued out. *Saddler v. Glover*, 1 B. Mon. (Ky.) 51.

If the judge of the district court find the security insufficient, he may order execution to issue notwithstanding the appeal. *State v. Judge*, 21 La. Ann. 178; *State v. Judge*, 22 La. Ann. 35. But in the cases described by the code,

if the appellant tenders the requisite security, he has a legal right to a suspensive appeal; and if the district court errs in denying it, the decision may be revised in the supreme court. *State v. Judge*, 21 La. Ann. 64; *State v. Judge*, 21 La. Ann. 113; *State v. Judge*, 21 La. Ann. 735.

The stay begins upon the execution of a sufficient appeal bond and issuance of a citation. *State v. Judge*, 21 La. Ann. 43; *State v. Judge*, 21 La. Ann. 152.

The writ of error in a criminal case will not operate as a supersedeas unless a recognizance for the appearance of the accused in that court be taken. *State v. Craft, Walk.* (Miss.) 409.

When a writ of error *coram nobis* is issued, a supersedeas cannot issue in favor of all the defendants when they sue out this writ, unless they all join in the bond. *Jones v. Mississippi, etc.*, R. Co., 5 How. (Miss.) 407. See *Tucker v. Zollicoffer*, 12 Smed. & M. (Miss.) 591; *Bosley v. Bruner*, 24 Miss. 457; *Wharton v. Porter*, 10 Smed. & M. (Miss.) 305.

An appeal from a judgment overruling a motion to quash an execution operates as a supersedeas of the judgment upon which the execution issued. *Parker v. Hannibal, etc.*, R. Co., 44 Mo. 415; *Ruby v. Hannibal, etc.*, R. Co., 44 Mo. 443.

Where a proper supersedeas bond is filed and approved, no execution can issue on the judgment until the bond is set aside, modified, or the appellant fails to perfect his appeal. *State Bank v. Green*, 8 Neb. 297.

The stay by appeal and bond is a stay of such proceedings as may be instituted to enforce the judgment. *Ireland v. Nichols*, 9 Abb. Pr. N. S. (N. Y.) 71; 46 How. Pr. N. S. (N. Y.) 85.

A stay of proceedings will not be granted on an appeal from an order refusing a stay. *People v. Manhattan R. Co.*, 9 Abb. N. Cas. (N. Y.) 448.

On appeal to the court of appeals, from a judgment of affirmance, an undertaking to stay execution must be in such form as to secure payment of the judgment. *Morss v. Hasbrouck*, 10 Abb. N. Cas. (N. Y.) 407.

An appeal by the defendant in a criminal case vacates the judgment below. Hence, although the judgment above be that there is no error, the accused is entitled to be discharged without costs on producing an unconditional pardon. *State v. Underwood*, 64 N. Car. 599.

An appeal carries the whole case to

for obtaining a supersedeas;¹ but in some jurisdictions the contrary doctrine prevails.² It has also been held that an appeal does not operate as a supersedeas and stay execution of a *mandamus*.³

the supreme court, whether security is given to stay proceedings or not. And a motion for a new trial cannot be entertained below pending appeal. *Gledsoe v. Nixon*, 69 N. Car. 81.

On appeal taken and undertaking entered into for a stay of proceedings, the circuit court may on motion recall and set aside the execution. *Bentley v. Jones*, 8 Oregon 47.

An appeal from a decree of the orphans' court ordering a sale of real estate for the payment of debts, operates as a supersedeas. *Hess's Appeal*, 1 Watts. (Pa.) 255.

A perfected appeal in equity is a supersedeas. *Chillas v. Brett*, 5 Clark (Pa.) 325; *Brooke v. Underkoffer*, 1 W. N. C. (Pa.) 480.

An appeal from an interlocutory decree with security, though irregular, is a supersedeas. *In re Branch Tp. Road*, 4 Leg. Gaz. (Pa.) 413; 1 Leg. Chron. 29.

An appeal in the nature of a writ of error does not vacate but suspends the judgment appealed from. *Galena v. Sudheimer*, 9 Heisk. (Tenn.) 189.

But a simple appeal vacates the decree below and releases the lien upon land. *Smith v. Holmes*, 12 Heisk. (Tenn.) 466.

An appeal vacates a judgment. *Allen v. Chadburn*, 59 Tenn. 225.

The statute allowing persons unable to give a supersedeas bond to give bond for costs and damages only, does not make such an appeal operate as a supersedeas. *Ledbetter v. Burns*, 42 Tex. 508.

A judgment awarding a peremptory *mandamus* is superseded by an appeal to the supreme court. *Griffin v. Wakelee*, 42 Tex. 513.

An appeal bond given to remove a cause to the supreme court, suspends the right to sell under a decree of the district court pending appeal. *Burns v. Ledbetter*, 54 Tex. 374.

1. A decree dismissing a suit brought to obtain an injunction and dissolving an injunction, is not governed by the ordinary rules that relate to a supersedeas of execution, but by those principles and rules which relate to chancery proceedings exclusively. Neither a decree for an injunction nor a decree dissolving an injunction is suspended in

its effect by a writ of error, although all the requisites for a supersedeas are complied with. *Hovey v. McDonald*, 109 (U. S.) 150; *Leonard v. Ozark Land Co.*, 115 U. S. 465; *Green v. Griffin*, 95 N. Car. 50.

An appeal from an order dissolving an injunction does not of itself reinstate the injunction. But an appeal and an order by the circuit judge, or a justice of the supreme court under the statute that the appeal shall operate as a supersedeas to the order appealed from, and a compliance with the terms of the supersedeas order as to giving bond, do restore the injunction. *McMichael v. Eckman*, 26 Fla. 43; *Chegary v. Scofield*, 5 N. J. Eq. 525; *Central Union Tel. Co. v. State*, 110 Ind. 253.

Pending an appeal, the operation of a judgment which grants a perpetual injunction will not be stayed. *Swift v. Shepard*, 64 Cal. 423. See *Sullivan v. Weibeler*, 37 Minn. 10.

2. An appeal duly taken from a judgment dissolving an injunction suspends the judgment as a dissolution, and retains the injunction pending appeal. *Williams v. Pouns*, 48 Tex. 141.

A restraining order is preserved in force by an appeal from an order of dismissal where proper steps are taken to obtain supersedeas. *Lewis v. Leahey*, 14 Mo. App. 564.

3. In *Pinckney v. Henegan*, 2 Stobh. (S. Car.) 250; 49 Am. Dec. 594, O'Neill, J., said: "In this case, I have no doubt the appellants could appeal both from my decision awarding the *mandamus*, and that of Judge Frost, giving the party leave to sue out a peremptory *mandamus*, or an attachment, as he might be advised. But notwithstanding the appeal, I have also no doubt that the orders must be executed, and that the appeal was in neither case a supersedeas. And such is clearly the authorities. In *The Dean and Chapter of Dublin v. Dowgatt*, 1 P. Wms. 351, it was said that error lay upon an application for a *mandamus*, yet that it was no supersedeas to the peremptory *mandamus*, for that such a construction would quite defeat the end of the statute, and prevent the officer who was chosen annually from having any fruit of the *mandamus*. In *The Dean and*

V. WHAT COURT MAY AWARD SUPERSEDEAS.—At common law any court of record at Westminster might in term time award a writ of supersedeas to any writ or process which had issued from the same court, or to proceedings in any other court, if the proceedings superseded were such as might be had in the court from which the writ of supersedeas issued. A writ of supersedeas did not lie from any other court to the court of chancery, but the court of chancery might, at any time, award such writ to any other court.¹ If a cause were transferred to a higher court for purposes of review, it was the custom for the trial court to award a writ of supersedeas to process in the hands of its ministerial officers.² But in the *United States*, as a rule, the appellate court may also award a supersedeas in cases where it may properly be awarded.³

Chapter of *Dublin v. Rex*, 1 Bro. P. C. 76, it is said that all the judges held that 'no writ of error will lie upon a peremptory *mandamus*.' This ruling would even exclude the appeal; but here that, I think, cannot be done, for the reasons already stated. Still we are at liberty to adopt the result of the English adjudications, by holding that, notwithstanding the appeal, the *mandamus* must be executed."

But in *Texas* it is otherwise; a judgment of the district court awarding a peremptory *mandamus* for the restitution of the plaintiff to an office is superseded by an appeal to the supreme court. *Griffin v. Wakelee*, 42 Tex. 513.

1. Bac. Abr., tit. *Supersedeas* (B).

2. In *McWilliams v. King*, 32 N. J. L. 23, the court, by Beasley, C. J., said: "In strictness, according to the common law, this precept appears to have always been awarded in such cases by the court from which the process to be arrested had issued. The order of proceeding was this, viz., when the writ of certiorari came to be served on the court below, it became the duty of such court to see that the execution of the judgment to be reviewed was suspended, and the means by which this end was effected was the writ of supersedeas. It was the process by which the execution in the hands of the ministerial officer was controlled, but it was the process of the inferior and not of the superior court. Chancery, indeed, would, in some cases, on the ground of necessity, award this writ, Fitz. Herb. N. B. 539; but I have not found any instance in which the court of king's bench, by this precept, ever attempted to regulate the final process of other courts. On the contrary, the precedents seem to be clear that the power to exercise such

control was not claimed. Thus in *Prince v. Allington*, Moore 677, it is said that if justices of the peace receive a certiorari, all that they do after is erroneous; but what the sheriff does after, on a warrant received before, is not erroneous, and yet their negligence (that is, the negligence of the justices) is punishable by attachment as contempt. And in *Rex v. Spelman*, 1 Keb. 93, pl. 79, the court, sustaining the same doctrine, remark that the hands of the justices are closed by the issuing of the certiorari, though they be not in contempt for what they have done before the delivery of it; but they ought to have awarded a supersedeas immediately upon the receipt of the certiorari. And the same principle was still more distinctly presented in *Reg. v. Nash*, 1 Salk. 147, the second resolution of the court being embodied in these words: 'That this court had no power over the warrant, being granted before the certiorari issued, and therefore they refused to make a rule upon the constable to return it.' To the same effect are the following authorities: 2 Hawk. P. C. 293; Bac. Abr., tit. *Certiorari* (G); F. N. B. 237."

3. In *McWilliams v. King*, 32 N. J. L. 24, the court, after stating the early English practice in such case, said: "Such appears to have been the procedure at common law; but in this state a different practice has prevailed. From the earlier times a supersedeas has issued not from the inferior but from the superior court. In cases of certiorari to justices, those magistrates have not used the writ."

Where a decree appealed from finds as a fact that land conveyed to another was for the joint benefit of himself and the appellant, a writ of supersedeas

VI. EFFECT OF SUPERSEDEAS—1. Upon Jurisdiction Below.—The general rule is that when a cause is transferred to the appellate court by writ of error or appeal, the jurisdiction of the court below is suspended whenever the last step requisite to give the appellate court jurisdiction is taken, and does not again attach until the cause is remitted for further proceedings.¹ But in some jurisdictions it is held that the lower court is not ousted of its jurisdiction, and that proceedings had pending such stay are merely voidable and not void.²

may issue to stay a writ of assistance issued by the court below to put the appellee into possession, although the holder of the legal title has not appealed. *Hunt v. Oliver*, 109 U. S. 177. See also *Covington Stock Yards Co. v. Keith*, 121 U. S. 148.

Where the district judge refuses for an insufficient reason to approve an appeal bond, the supreme court may issue a supersedeas on the filing of the bond. *Ex p. Milwaukee, etc., R. Co.*, 5 Wall. (U. S.) 188.

But the supreme court has no power by virtue of its appellate jurisdiction to award a supersedeas where the writ of error was not sued out seasonably to have that operation. *Hogan v. Ross*, 11 How. (U. S.) 294; *Kitchen v. Randolph*, 93 U. S. 86; *Sage v. Central R. Co.*, 93 U. S. 412.

The supreme court may issue a supersedeas by virtue of its appellate power. *Hill v. Finnigan*, 54 Cal. 493. See *Granger v. Craig*, 85 N. Y. 619.

The supersedeas should be granted by the court having at the time the custody of the record. *Payne v. Thompson*, 48 Ala. 535.

1. In *Keyser v. Farr*, 105 U. S. 265, Waite, C. J., said: "After the acceptance of the bonds for the appeal and the docketing of the cause in this court, the jurisdiction of the court below is gone; from that time the suit is cognizable only in this court. In *Goddard v. Ordway*, 101 U. S. 745, there was nothing more than the formal order of allowance entered, as in this case, with the final decree. Such an order while in that condition was held subject to the control which every court retains over its ordinary judgments during the term. In *Draper v. Davis*, 102 U. S. 370, however, it was decided that after a bond had been accepted by one of the justices of the court in accordance with such an order of allowance, the jurisdiction was transferred to this court." See also *Goddard v. Ordway*, 94 U. S.

672; *Thomas v. Sullivan*, 11 Nev. 280; *Spears v. Mathews*, 66 N. Y. 127; *Whaley v. Charleston*, 8 S. Car. 344; *State v. Clark*, 33 La. Ann. 422; *State v. Judge*, 36 La. Ann. 192; *State v. Duffel*, 41 La. Ann. 958; *Skinner v. Bland*, 87 N. Car. 168; *Pasour v. Lineberger*, 90 N. Car. 159; *Western, etc., R. Co. v. State*, 69 Ga. 524; *Cralle v. Cralle*, 81 Va. 773; *Burgess v. O'Donoghue*, 90 Mo. 299; *Stewart v. Taylor*, 68 Cal. 5; *Lee Chuck v. Quan Wo Chong Co.*, 81 Cal. 222.

After an appeal in a prize court, the district court can make no order concerning the property and no sale of it can take place. *The Peterhoof*, Blatchf. P. C. (U. S.) 620; *The Sunbeam*, Blatchf. P. C. (U. S.) 638.

Notwithstanding an appeal which operates as a supersedeas, the court below may so control the actions of the parties as to preserve the *status in quo*. *New Brighton, etc., R. Co. v. Pittsburgh, etc., R. Co.*, 105 Pa. St. 13.

An appeal does not destroy the power of the court below to correct a mistake in the wording of the order appealed from. *State v. Delafield*, 69 Wis. 264; *Kelly v. Chicago, etc., R. Co.*, 70 Wis. 335.

The fact that the appeal is perfected does not deprive the lower court of jurisdiction to settle the bill of exceptions. *Colbert v. Rankin*, 72 Cal. 197. See *Dunbar v. Dunbar*, 5 W. Va. 567; *Harrison v. Trader*, 29 Ark. 85; *Moore v. Randolph*, 52 Ala. 530; *Holland v. State*, 15 Fla. 549.

2. Where an execution was improperly sued out on the judgment of the circuit court and levy upon the defendant's land and sale thereof made pending an appeal from the judgment, it was held that the proceedings were irregular and might have been quashed on motion by the defendant in the circuit court, but that not having been done, the sale was valid and passed the defendant's title to the land to the grantees in the sheriff's

2. Upon Execution Begun.—At common law, a stay of execution did not operate to stay proceedings, where the levy had been made before the stay was granted; so, if an officer had levied on property before a writ of error or an appeal was perfected so as to operate as a supersedeas, he might be compelled to proceed to sale by a writ of *venditioni exponas*.¹ This rule has been changed by statute in many of the states so as to leave the levy in force, under such circumstances, but to stay proceedings under it until the determination of the appeal or writ of error.²

VII. REMEDY FOR VIOLATION OF SUPERSEDEAS.—If a ministerial officer proceeds by virtue of process in his hands, after he has notice of supersedeas, he is a trespasser and is liable in damages to the party aggrieved.³ And if a judicial or a ministerial officer

deed; and that the sale could not be questioned by a third party claiming under the defendant in the execution. *Oakes v. Williams*, 107 Ill. 154. To the same effect is *Shirk v. Metropolitan*, etc., Gravel Road Co., 110 Ill. 661.

When an order is made in a cause or proceeding of which the court has jurisdiction, an appeal from the order with a stay of proceedings on it does not go to the jurisdiction of the court to enforce the order by proceedings against the parties disobeying for contempt. The parties' remedy to try the rightfulness of the court so proceeding is not by prohibition, but by appeal if convicted. *State v. Young*, 44 Minn. 76.

In *Briggs v. Shea*, 48 Minn. 218, Gillfillan, C. J., said: "What, then, was the effect of that appeal and the stay on the jurisdiction of the district court? An appeal without a stay does not affect it, for in such case the court below may proceed as though there had been no appeal. There might be a case where it would be proper for the court to decline to go on pending the appeal, *McArdle v. McArdle*, 12 Minn. 122, but that would not affect its power to do so—its jurisdiction. Nor does the stay, or failure to stay, affect the jurisdiction of this court, so that this court may have jurisdiction of the matter involved in the appeal while the jurisdiction of the court below in the cause is unimpaired. A distinction exists between jurisdiction and the propriety or rightfulness of exercising it in the particular instances. Proceedings without jurisdiction, are void. Those within the jurisdiction, but wrongful, are voidable only; are errors or irregularities, and stand unless set aside or reversed, and the party may waive or by laches lose his remedy. Acts done in disregard of the stay of

proceedings come within the latter class. The district court may in a proper case stay temporarily all proceedings in a cause before it. The stay would not affect its jurisdiction, though proceedings in disregard of it while in force might be error or irregularity. The stay provided on an appeal and stay bond, is similar in effect, except that the court below cannot remove it. The question whether an appeal with the stay operates as a supersedeas has several times been suggested. Laws of 1861, ch. 22, provided expressly that it should so operate, and *Starbuck v. Dunklee*, 12 Minn. 161, gave it that effect. In *Robertson v. Davidson*, 14 Minn. 554, where the appeal was under the law as it now is, it was held not to so operate. The question has seldom been raised in *New York*, from whose statute ours is taken. But in *Bowman v. Tallman*, 28 How. Pr. (N. Y.) 482, an appeal with a stay had been taken from a judgment, and pending the appeal an execution was issued. The court held the execution irregular, but not void."

1. *Boyle v. Zacharie*, 6 Pet. (U. S.) 648; *Meriton v. Stevens*, Willes 271; *Charter v. Peter*, Cro. Eliz. 597; *Blanchard v. Myers*, 9 Johns. (N. Y.) 65; *Kinnie v. Whitford*, 17 Johns. (N. Y.) 34; *Patchin v. Brooklyn*, 13 Wend. (N. Y.) 664; *Payfer v. Bissell*, 3 Hill (N. Y.) 239; *Macon v. Shaw*, 14 Ga. 162. See *supra*, this title, *Certiorari*.

2. *Freeman on Executions*, vol. 1, § 32; *Delafield v. Sandford*, 3 Hill (N. Y.) 473; *Northwestern Express Co. v. Landes*, 6 Minn. 564; *First Nat. Bank v. Rogers*, 13 Minn. 407; 97 Am. Dec. 239. See *Robertson v. Davidson*, 14 Minn. 554.

3. *Wythers v. Henley*, 1 Roll. 241; *Belshaw v. Marshall*, 4 B. & Ad. 336;

SUPERSTITIOUS USE—SUPPLEMENTAL BILL.

proceeds in violation of a supersedeas, after due notice of the same, he is liable to be punished for contempt.¹ If the court below is proceeding to execute its judgment, notwithstanding a supersedeas, the appellate court may restrain such action by appropriate writ.²

SUPERSTITIOUS USE.—See CHARITIES, vol. 3, p. 130.

SUPERSTRUCTURE.—Webster defines the word "superstructure," referring to railroad engineering, as "the sleepers, rails, and fastenings, in distinction from the road-bed; called also 'permanent way.'"³

SUPERVISOR OF ELECTIONS.—(See also ELECTIONS, vol. 6, p. 255; UNITED STATES OFFICERS).—A person commissioned under the Federal Election law by a judge of the *United States* circuit court, to attend at the registration of voters for congressmen, and so supervise the registry as to insure the detection of improper removals or additions of names.⁴ The statute has been repealed by the LIII. Congress.

SUPERVISORS.—See COUNTY COMMISSIONERS, vol. 4, p. 373; TOWNS.

SUPPLEMENTAL BILL.—See EQUITY PLEADINGS, vol. 6, p. 776; BILL OF REVIEW, vol. 2, p. 263; BILL OF REVIVOR, vol. 2, p. 269; BILL TO PERPETUATE TESTIMONY, vol. 2, p. 281.

Bleasdale v. Darby, 9 Price 606; *O'Donnell v. Mullin*, 27 Pa. St. 199; 67 Am. Dec. 458.

1. Bac. Abr., tit. *Supersedeas* (H); 2 Hawk., ch. 22, § 28; *Fitzwilliam's Case*, Moore 677; *Cotton v. Daintry*, 1 Vent. 330; *Hannott v. Farrettes*, Barnes 376; *Prince v. Allington*, Moore 677; *McWilliams v. King*, 32 N. J. L. 24. See *Foster v. Kansas*, 112 U. S. 201.

2. "A supersedeas upon the appeal of a suit in equity operates to stay the execution of the decree appealed from. When this appeal was taken, the only execution there could be, of the decree below, was the collection of the cost and the delivery of the fund in court, which is the subject-matter of the litigation, to the defendant. To that end, a further order of the court was asked; but such an order would be in aid of the execution of the decree which has been stayed, and, consequently, beyond the power of the court to make until the appeal is disposed of. While the court below may make the necessary orders to preserve the fund, and direct its receiver to that extent, it cannot place the money beyond the control of any decree that may be

made here, for that would be to defeat our jurisdiction. A supersedeas is not obtained by virtue of any process issued by this court, but it follows as a matter of right from a compliance by the appellants with the provisions of the act of Congress in that behalf. We are not required, therefore, to issue any writ to perfect the right of a party to that which the law has given him. But if the court below is proceeding, through mistake or otherwise, to execute its judgment or decree, notwithstanding the supersedeas, we may, under section 706 R. S., issue an appropriate writ to restrain that action, for it would be 'a writ necessary for the exercise of our jurisdiction.' The precise form of the writ to be issued, or relief to be granted, must necessarily depend upon the particular circumstances of any case that may arise." *Goddard v. Ordway*, 94 U. S. 672.

3. *Cass Co. v. Chicago*, etc., R. Co., 25 Neb. 348. And in that case it was held that a bridge across the Missouri river was not within the definition of "road-bed, right of way, and superstructure" of a railroad.

4. *And. Law Dict.*; *Rev. Stat. U. S.*, §§ 2011-31.

SUPPLEMENTARY PROCEEDINGS.—(See also CREDITOR'S BILL, vol. 4, p. 573; EXECUTION, vol. 7, p. 117; POOR DEBTORS, vol. 18, p. 823.)

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I. DEFINITION.¹—Supplementary proceedings are proceedings supplemental to execution, provided by statute for the summary discovery and sequestration of the debtor's property for the purpose of satisfying and discharging a judgment.²

II. CHARACTER OF PROCEEDINGS; NATURE OF REMEDY.—The purpose of these proceedings is to furnish a simple and inexpensive substitute for the old equity proceedings in discovering and applying the property of a debtor, which cannot otherwise be reached, to the payment of his debts.³ The proceedings are strictly stat-

1. This article is based, for the most part, on the procedure in *New York*, because supplementary proceedings in their present form were first instituted in that state and have been most utilized and developed there. The decisions in other states are cited, with incidental references to the statutes on which they rest.

2. *Becker v. Torrance*, 31 N. Y. 634. In this case it was said: "The proceedings supplementary to the execution may be considered as the commencement of a process in equity, in the nature of the former suit by creditor's bill." See *infra*, this title, *Character of Proceedings; Nature of Remedy*.

3. *Joyce v. Spafard*, 9 Civ. Pro. Rep. (N. Y.) 342.

Where, in *Iowa*, a judgment creditor, having recovered judgment against a corporation, filed with a judge of the superior court an affidavit conforming to the requirements of the code providing for proceedings auxiliary to execution, on which affidavit an order was made requiring two third persons, alleged to have in their possession property belonging to the corporation, to appear and be examined, and both of said third persons appeared in the proceedings and filed answers not provided for or authorized by the said code, although the clerk treated the proceeding as an equitable action against the two third persons, it was held on appeal that the proceeding was for the discovery of property in aid of execution, and not an equitable action. *Estey v. Fuller Implement Co.*, 82 Iowa 678.

In *North Carolina*, it has been held that where one creditor has begun supplementary proceedings against the debtor subsequent to the bringing, by another creditor, of a judgment creditor's action, it is error to dismiss supplementary proceedings, as both remedies may be pursued at the same time. *Monroe v. Lewald*, 107 N. Car. 655.

In *California*, it has been held that in these proceedings the court had no jurisdiction to try a contested title to real estate, though it was probable that a conveyance had been made in fraud of the judgment debtor's creditors. *McDowell v. Bell*, 86 Cal. 615.

In *Colorado*, it has been held that a contested title to property cannot be tried in supplementary proceedings. *Allen v. Tritch*, 5 Colo. 222.

In *North Carolina*, supplementary proceedings are permitted as a means of getting possession of a distributive share of an estate in the hands of an administrator, which estate is due the judgment debtor. *Rand v. Rand*, 78 N. Car. 12. But an equitable estate in lands not subject to execution was held not properly within the scope of these proceedings; another remedy being provided to get possession of the same property. *McCaskill v. Lancashire*, 83 N. Car. 393.

Substitute for Creditor's Bill.—In *California*, *South Carolina*, *Wisconsin*, *Colorado*, *North Carolina*, *Indiana*, and *Minnesota*, these proceedings are considered to be a substitute for and in the nature of the creditor's bill. *Pacific Bank v. Robinson*, 57 Cal. 520; 40 Am. Rep. 120; *McCullough v. Clark*, 41 Cal. 298; *Kennesaw Mills*

utory and not a branch of the equitable jurisdiction of the former court of chancery.¹ They are, however, in the nature of a creditor's bill in equity; and the practice established by the former court of chancery, in respect to the course of procedure upon creditors' bills, applies to the new proceeding, unless it is inconsistent with, or obviously superseded by, the change which the legislature has made.² Each of the remedies provided for by the

Co. v. Walker, 19 S. Car. 104; Smith v. Weeks, 60 Wis. 94; Graham v. La Crosse, etc., R. Co., 10 Wis. 459; *In re* Remington, 7 Wis. 643; Seymour v. Briggs, 11 Wis. 196; Allen v. Tritch, 5 Colo. 226; Frazer v. Colorado Dressing, etc., Co., 5 Fed. Rep. 163; 2 McCrary (U. S.) 11; Rand v. Rand, 78 N. Car. 12; Mason v. Weston, 29 Ind. 561; Tomlinson, etc., Mfg. Co. v. Shatto, 34 Fed. Rep. 380; State v. Dunning, 9 Ind. 20; Butler v. Jaffray, 12 Ind. 504. And see in *California* the early cases of Swift v. Arents, 4 Cal. 390; Adams v. Hackett, 7 Cal. 201.

In *Kansas* and *Oregon*, the proceedings are held not to be a complete substitute for the creditor's bill. Ludes v. Hood, 29 Kan. 49; Williams v. Gallick, 11 Oregon 337. But in the proceedings the chancery rules are generally followed. See Kellogg v. Collier, 47 Wis. 649; Clark v. Bergenthal, 52 Wis. 103.

1. Hayner v. James, 17 N. Y. 316; Estey v. Fuller Implement Co., 82 Iowa 678.

2. Smith v. Mahoney, 3 Daly (N. Y.) 285; Pope v. Cole, 64 Barb. (N. Y.) 406; Becker v. Torrance, 31 N. Y. 631; Board of Education v. Scoville, 13 Kan. 17; Owen v. Dupignac, 9 Abb. Pr. (N. Y.) 180; Sale v. Lawson, 4 Sandf. (N. Y.) 718; Orr's Case, 2 Abb. Pr. (N. Y.) 457.

It has been held that these proceedings, when brought against the third party, are similar to what was formerly known as a bill in aid of execution, rather than to a creditor's bill. Lowber v. New York, 5 Abb. Pr. (N. Y.) 268.

In *New Jersey*, the proceedings seem to be rather in the nature of an executionary process. Gibson v. Gorman, 44 N. J. L. 325.

Indiana.—In *Indiana*, these proceedings are of an anomalous character. The provisions of the statute authorizing them are similar to those of *New York*, and, by the terms of the statute, the proceedings are stated to be summary without pleadings further than the affidavits on which the orders for

examination are based. *Indiana* Rev. Stat., 1881, § 822. Furthermore, the early cases decided under the statute held that the proceedings were in the nature of a creditor's bill; that formal pleadings were not contemplated, and that the proceedings were merely to ascertain and discover what property belonged to the judgment debtor and to apply to the judgment only that to which the judgment debtor's title was practically undisputed. Mason v. Weston, 29 Ind. 561; State v. Dunning, 9 Ind. 20; Butler v. Jaffray, 12 Ind. 504; Coffin v. McClure, 23 Ind. 356; Carpenter v. Vanscoten, 20 Ind. 50.

It has been distinctly stated and decided, following the rule in *New York*, that in this form of proceeding the court or judge had no power to adjudicate and settle controverted questions of right between the judgment debtor and third parties, in order to set aside a sale or conveyance of property by the debtor on the alleged ground of fraud. Burt v. Hoettinger, 28 Ind. 214; Witherow v. Higgins, 13 Ind. 440. Though, where the interest of the judgment debtor in property possessed by a third party was admitted, this interest could be reached in supplementary proceedings. Figg v. Snook, 9 Ind. 202. But in spite of the wording of the statute, the decisions just cited, and the trend of opinion in other states, the supreme court of *Indiana* squarely reversed itself and decided in Toledo, etc., R. Co. v. Howes, 68 Ind. 458, that "in proceedings supplementary to execution instituted against the execution defendant and either his debtor or the custodian of his property, the answers of the defendants under oath in denial either of the possession of such property or of the existence of the alleged indebtedness, are not final and conclusive upon any question of fact involved therein; but as to any such question, pleadings may be filed, and issues, either of law or of fact, may be joined by and between the plaintiff and the defendants or either of them, or by and between the defendants, and

New York code is a special proceeding.¹ They are not unconnected with and independent of the action in which the judgment was obtained, but are taken in that action to enforce the said judgment.² They are, therefore, entitled to all the presumptions of regularity belonging to proceedings in courts of general jurisdiction, and when they are used in collateral proceedings, proof of jurisdictional facts is not required.³

such issues so joined may be heard, tried, and determined in the same manner as other issues of law or fact in other civil actions or proceedings." And the court said: "In such proceedings, with all interested parties before the court and with issues properly joined by and between them, we do not know of any good or sufficient reason why any and all controverted questions between all or any of the parties may not and should not be heard, tried, and determined." This precedent was followed in *Kissell v. Anderson*, 73 Ind. 485; *Eden v. Everson*, 65 Ind. 113; *McMahan v. Works*, 72 Ind. 19; *Burkett v. Holman*, 104 Ind. 6. And see to the same effect *American White Bronze Co. v. Clark*, 123 Ind. 230; *First Nat. Bank v. Stanley*, 4 Ind. App. 213.

As to the final judgment in supplementary proceedings being a bar to further action, see *Baker v. State*, 109 Ind. 47.

1. *New York Code Civ. Proc.*, § 2433.

While as a matter of fact the papers in these proceedings are usually filed in the office of the clerk of the court where the proceedings are instituted, still it has been held that as the remedies are considered to be special proceedings, the records therein should be filed in the county clerk's office. *Fiske v. Twigg*, 50 N. Y. Super. Ct. 69.

Under the old code, these proceedings were sometimes regarded as a continuation of the original action operating as a sort of supplementary execution. *Dresser v. Van Pelt*, 15 How. Pr. (N. Y.) 19; *Bank of Genesee v. Spencer*, 15 How. Pr. (N. Y.) 412; *Gould v. Torrance*, 19 How. Pr. (N. Y.) 560; *Holstein v. Rice*, 24 How. Pr. (N. Y.) 135; *Seeley v. Black*, 35 How. Pr. (N. Y.) 369; *Ross v. Clussman*, 3 Sandf. (N. Y.) 676.

At other times, however, the proceedings were considered to be in the nature of a new action, separate and distinct from the original one. *Driggs v. Williams*, 15 Abb. Pr. (N. Y.) 477; *Allen v. Starring*, 26 How. Pr. (N. Y.)

57; *Davis v. Turner*, 4 How. Pr. (N. Y.) 190; *Griffin v. Dominquez*, 2 Duer (N. Y.) 656; *Campbell v. Foster*, 16 How. Pr. (N. Y.) 275.

In *Wisconsin*, *North Carolina*, *South Carolina*, and *Colorado*, the proceedings are regarded as part of the original action. *Barker v. Dayton*, 28 Wis. 367; *McCaskill v. Lancashire*, 83 N. Car. 393; *Coates v. Wilkes*, 92 N. Car. 376; *Kennesaw Mills Co. v. Walker*, 19 S. Car. 104; *Henlien v. Graham*, 32 S. Car. 303; *Frazer v. Colorado Dressing, etc., Co.*, 5 Fed. Rep. 163; 2 *McCrary* (U. S.) 11; *Allen v. Tritsch*, 5 Colo. 226.

In *Indiana* and *Minnesota*, the proceedings seem to be independent of the preceding action. *Pounds v. Chatham*, 96 Ind. 342; *Flint v. Webb*, 25 Minn. 263.

2. *Smith v. Tozer*, 42 Hun (N. Y.) 22; 11 Civ. Pro. Rep. (N. Y.) 343; *Graves v. Scoville*, 12 Civ. Pro. Rep. (N. Y.) 165.

3. *Wright v. Nostrand*, 94 N. Y. 31; *Hyatt v. Dusenbury*, 5 N. Y. St. Rep. 846; 12 Civ. Pro. Rep. (N. Y.) 152; *Arthur v. Hale*, 6 Kan. 161.

New York Code Civ. Proc., § 2432, provides for three distinct remedies, *first*, an order made or a warrant issued against a judgment debtor after the return of an execution; *second*, an order made or a warrant issued against a judgment debtor after the issuing and before the return of an execution; *third*, an order made after the issuing and either before or after the return of an execution, against a person who has property of the judgment debtor, or is indebted to him. The proceedings under the third division may be pursued, either alone or simultaneously with the proceedings under subdivision first or subdivision second.

Under the old code, it was held that the remedy provided for in the third subdivision could not be invoked independently of a proceeding against the judgment debtor himself. *Sherwood v. Buffalo, etc., R. Co.*, 12 How. Pr. (N. Y.) 136. And see *Kemp v. Hard-*

III. JURISDICTION — COURTS AND JUDGES. — As the jurisdiction is statutory, no general rule can be formulated, but the statutes of the various states, recognizing the proceeding, must be looked to. In *Kentucky*, the proceeding must be instituted in the court wherein the judgment was rendered.¹ In *North Carolina*, not only the resident judge may entertain the proceeding, but it may be entertained by the judge assigned to the district, or the judge who is holding court there by exchange;² in *Kansas*, the probate judge has jurisdiction;³ in *Wisconsin*, the justice of a county court having civil jurisdiction may entertain the proceeding.⁴

In *New York*, questions of jurisdiction are somewhat complicated, owing to the number of tribunals in that state, and the extent of litigation upon this branch of the law. The provision of the code lies at the foundation of these questions, and for convenience of discussion is stated below.⁵

ing, 4 How. Pr. (N. Y.) 178; *Barker v. Johnson*, 4 Abb. Pr. (N. Y.) 435. But section 2432 aforesaid definitely settled the question whether or not the remedies therein contained were independent of each other; and, as a result of it, the rule has been established that they may be instituted before different judges. *First Nat. Bank v. Dering*, 8 N. Y. Wkly. Dig. 261.

In *Colorado*, the proceedings are independent. *Hexter v. Clifford*, 5 Colo. 168.

A judgment creditor may institute the above proceedings and at the same time pursue other remedies; as, for instance, a suit to make a judgment a lien on real property. *Gates v. Young*, 17 N. Y. Wkly. Dig. 551.

Though supplementary proceedings are pending, and the issuing of a body execution against the person of the debtor will *ipso facto* discontinue them, still the judgment creditor is not relieved from the duty of issuing a body execution. *Newgas v. Solomon*, 20 Abb. N. Cas. (N. Y.) 175.

In *Kentucky*, it was held in *Smith v. Gower*, 3 Metc. (Ky.) 171, that where one having an execution returned *nulla bona*, seeks to subject to his execution, a debt due to the defendant, he may proceed against the debtor either as an ordinary defendant or as a garnishee; but having chosen one or the other of these courses, he must pursue it consistently, and strictly comply with all the regulations laid down in the statutes relating to such process; and any variance, whether material or not, from the prescribed course will be fatal.

1. *Burnes v. Cade*, 10 Bush (Ky.) 251.

2. *Corbin v. Berry*, 83 N. Car. 27.

3. *Young v. Ledrick*, 14 Kan. 92; and when the proceeding has been instituted properly before the probate judge, his jurisdiction continues until all orders made in the course of the proceeding have been enforced. *In re Morris*, 39 Kan. 28.

4. *Second Ward Bank v. Upmann*, 12 Wis. 499.

The proceeding in this state may be entertained by the court as well as by the judge. *Gould v. Dodge*, 30 Wis. 621.

A court commissioner, who, in *Wisconsin*, possesses the ordinary powers of a judge at chambers, may issue an order requiring the debtor to appear for examination before a justice of the court, but with the issuance of such order the functions of the commissioner cease. *In re Remington*, 7 Wis. 643.

In *Indiana*, where the process is issued in vacation, the summons issued by the clerk is sufficient as an order. *Carpenter v. Vanscoten*, 20 Ind. 50.

5. *New York*.—"Either special proceeding may be instituted before a judge of the court out of which, or the county judge, or the special county judge, or the special surrogate of the county to which the execution was issued; or where it was issued to the city and county of New York, from a court other than the city court of that city, before a judge of the court of common pleas for that city and county. Where the execution was issued out of a court other than the supreme court, and it is shown by affidavit that each of the judges before whom the special proceeding might be instituted, as pre-

scribed by this section, is absent from the county, or, for any reason, unable or disqualified to act, the special proceedings may be instituted before a justice of the supreme court. In that case, if he does not reside within the judicial district embracing the county to which the execution was issued, the order made or warrant issued by him must be returnable to a justice of the supreme court residing in that district, or the county judge, or the special county judge, or special surrogate of that or an adjoining county, as directed in the order or warrant." *New York Code Civ. Proc.*, § 2434. See *Strybing v. Hicks*, 2 N. Y. Month. Law Bull. 6.

"The system of section 2434 seems to be very plain. It is to confer power to institute proceedings: first, before any judge of the court out of which the execution was issued; second, before any county judge, or special county judge, of any county to which the execution was issued; third, before any judge of the court of common pleas in and for the city and county of New York where the execution was issued to the city and county of New York out of any court other than the marine court of that city; fourth, to provide for cases where the execution is issued out of a court other than the supreme court, and each of the judges before whom the special proceedings might be instituted, as previously prescribed in the section, is absent from the county, or, for any reason, unable or disqualified to act by authorizing the proceedings in such cases to be instituted before a justice of the supreme court, and directing where the subsequent steps in the proceeding shall be taken in cases in which the party proceeded against does not reside within the judicial district embracing the county to which the execution was issued." *Davis, P. J.*, in *Baldwin v. Perry*, 25 Hun (N. Y.) 72.

A county judge may make the order when the execution has been issued to his county. *Miller v. Adams*, 52 N. Y. 409; but has no such power on a judgment of the supreme court, unless the execution has been so issued to his county. *Terry v. Hultz*, 8 Abb. Pr. N. S. (N. Y.) 109.

The judge of any court out of which the execution was issued, even though the judgment was not obtained in that court, has jurisdiction to institute the proceedings. *Terry v. Hultz*, 8 Abb. Pr. N. S. (N. Y.) 109; *Miller v. Adams*,

7 Lans. (N. Y.) 131; *Gould v. Moore*, 51 How. Pr. (N. Y.) 188.

The words "in that case," in the third subdivision of *New York Code Civ. Proc.*, § 2434, refer to both the preceding subdivisions; that is to say: "Whether the judge making the order be a supreme court judge or an inferior judge, if he does not reside within the judicial district embracing the county to which the execution was issued, the order made by him must be returnable to a justice of the supreme court residing in that district, or the county judge or the special county judge or special surrogate of that or an adjoining county as directed in the order." *Peck v. Baldwin*, 58 Hun (N. Y.) 308; *affirmed*, 131 N. Y. 567; *Browning v. Hayes*, 41 Hun (N. Y.) 382; *Merrill v. Allin*, 46 Hun (N. Y.) 626; *overruling Blanchard v. Reilly*, 11 Civ. Pro. Rep. (N. Y.) 279.

Various Judges in New York.—It has been held at different times that the following judges have power to entertain these proceedings under general or particular statutes: The recorder of Troy, *Hayner v. James*, 17 N. Y. 317; the justice of the marine court of *New York*, *Holbrook v. Orgler*, 40 N. Y. Super. Ct. 33; the recorder of Oswego, *Ross v. Wigg*, 36 Hun (N. Y.) 107; the surrogate of Steuben County (on a judgment of the district court); *McIntyre v. Allen*, 43 Hun (N. Y.) 124; a judge of a *United States* court, *Ex p. Boyd*, 105 U. S. 647. See *Wilson v. Andrews*, 9 How. Pr. (N. Y.) 39. But in *Cashman v. Johnson*, 4 Abb. Pr. (N. Y.) 256; 13 How. Pr. (N. Y.) 495, it was held that a judge of the city court of Brooklyn had not the powers exercised by a justice of the supreme court in regard to these proceedings. And in *Carroll v. Langan*, 44 N. Y. St. Rep. 224, it was held that the power conferred upon the recorder of the city of Albany to act in proceedings supplementary was to be confined to that city.

A justice of the supreme court has power to institute proceedings in any part of the state, and all proceedings thereon, except the attendance and examination of the judgment debtor or third persons, may be had before the justice. *Bingham v. Disbrow*, 37 Barb. (N. Y.) 24; 14 Abb. Pr. (N. Y.) 251; *affirmed* 5 Trans. App. (N. Y.) 198; *Crouse v. Wheeler*, 33 How. Pr. (N. Y.) 337; *Jacobson v. Doty Plaster Mfg. Co.*, 32 Hun (N. Y.) 436.

Previous to the amendment of 1859 of section 292, of the old code, a justice

Under the *New York* procedure, the judge before whom, out of court, the proceeding is instituted and carried on may be said to constitute a tribunal separate from that of the court of which he is a part. No other judge can interfere unless he acts as a substitute;¹ and the court exercises no jurisdiction further than to vacate or modify an order made by the judge.²

IV. PARTIES—1. In General.—Creditors who are not parties to the supplementary proceedings are not entitled to share in the benefits arising therefrom.³ Nor are those who are not parties to the proceedings affected by them, nor are their rights determined thereby, in the absence of laches on their part.⁴

of the supreme court could not entertain the proceedings but on a judgment of his own court. *Hersenheim v. Hooper*, 1 Duer (N. Y.) 594; *Stright v. Vose*, 1 Code Rep. N. S. (N. Y.) 79, note; *Blake v. Locy*, 6 How. Pr. (N. Y.) 108.

A justice of the supreme court cannot entertain proceedings in the city and county of New York in cases not coming within the *New York* Code of Civil Procedure, section 2434; as, for instance, upon a judgment recovered in a district court. *Haurie v. Veigtlin*, 5 N. Y. Month. Law Bull. 38.

The issuing of an execution, within the meaning of section 2434 aforesaid, has been construed to mean the issuing of an execution in accordance with section 2458, of the *New York* Code of Civil Procedure; that is to say, "Where a judgment debtor resides in the state or has a place of business in the state for the regular transaction of business in person, then the execution must be issued to the sheriff of the county where he resides, or, if his place of business is not in the county of his residence, then to the sheriff of either county." *Merrill v. Allin*, 46 Hun (N. Y.) 623; *Schenck v. Erwin*, 63 Hun (N. Y.) 104. The debtor cannot be required to attend in any other county for the purpose of being examined concerning his property. *Anway v. David*, 9 Hun (N. Y.) 296; *Browning v. Hayes*, 41 Hun (N. Y.) 382; *Merrill v. Allen*, 13 N. Y. St. Rep. 20.

Where a judgment of a district court was entered and transcript filed, but the execution issued outside the county, supplementary proceedings based thereon were held void, on the ground that only the county clerk where the transcript was filed could issue the execution. *Merritt v. Judd*, 18 Civ. Pro. Rep. (N. Y.) 159.

1. *Bank of Genesee v. Spenser*, 15 How. Pr. (N. Y.) 14; *Hulsaver v. Wiles*, 11 How. Pr. (N. Y.) 446; *Webber v. Hobbie*, 13 How. Pr. (N. Y.) 382; *Allen v. Starring*, 26 How. Pr. (N. Y.) 57.

2. *New York* Code Civ. Proc., § 2433; *Miller v. Rossmann*, 15 How. Pr. (N. Y.) 10; *Douglass v. Mainzer*, 40 Hun (N. Y.) 75.

The extent of the judge's power under the statute seems somewhat in doubt. It has been held that he has the same power that the court would have, had the jurisdiction been conferred on it, giving him absolute power over the proceedings only subject to review on appeal. *Cowdrey v. Carpenter*, 17 Abb. Pr. (N. Y.) 107.

It has been insisted that, while judges are bound by the code provisions as to jurisdiction, such provisions may be construed liberally in furtherance of their spirit. *Webber v. Hobbie*, 13 How. Pr. (N. Y.) 382; *Squire v. Young*, 1 Bosw. (N. Y.) 690; *Smith v. Tozer*, 11 Civ. Pro. Rep. (N. Y.) 343. And see *Bingham v. Disbrow*, 37 Barb. (N. Y.) 34.

Where an order was made vacating an order setting aside the one instituting the proceedings, the justice making the order had the power to direct the debtor to appear for examination under the original order instituting proceedings, though the day therein named had long since expired. *Joyce v. Spafford*, 9 Civ. Pro. Rep. (N. Y.) 342.

3. *La Fontain v. Southern Underwriters Assoc.*, 79 N. Car. 514; *Righton v. Pruden*, 73 N. Car. 61.

In *Indiana*, other creditors of the judgment debtor cannot join with the one instituting supplementary proceedings and share *pro rata* in the result. *Keightley v. Walls*, 27 Ind. 384; *Butler v. Jaffray*, 12 Ind. 504.

4. *Gibson v. Haggerty*, 37 N. Y. 555;

2. Who May Maintain.—A judgment creditor, that is, the person who is entitled to collect or otherwise enforce in his own right a judgment for a sum of money, or which directs the payment of a sum of money,¹ may institute and maintain supplementary proceedings, if the requisite jurisdictional facts exist.²

The proceedings may be instituted also by an agent of the judgment creditor who has received proper authority so to do;³ by an assignee, whether the assignment be general, special, or by operation of law;⁴ by the receiver of a corporation who holds a judgment;⁵ or by an attorney to collect the claim for his client, if he is properly authorized;⁶ and if such attorney has a lien on the judgment for his own costs and fees, which his client refuses to pay, he may enforce the judgment, through these proceedings, to collect the sum due him, even without the consent of his client.⁷ In the latter case the amount of the fees and costs of the

97 Am. Dec. 752; *Rodman v. Henry*, 17 N. Y. 482; *Rice v. Jones*, 103 N. Car. 226; *Osborne v. Reardon*, 79 Iowa 175.

In *Indiana*, if the presence of the judgment debtor is necessary to determine the question in dispute, he must be made a party to the proceedings against his debtor or bailee. *Earl v. Skiles*, 93 Ind. 178; *Cooke v. Ross*, 22 Ind. 157; *Wall v. Whisler*, 14 Ind. 228; *Chandler v. Caldwell*, 17 Ind. 256; *Hoadley v. Caywood*, 40 Ind. 239.

New parties may be brought in and required to answer in respect to any interest or conflicting claim which they may assert to the property, or indebtedness which it is sought to reach by the proceedings. *American White Bronze Co. v. Clark*, 123 Ind. 230; *Munds v. Cassidey*, 98 N. Car. 558.

The receiver, appointed to consider the account stated by an executor, where two parties are interested equally in the fund, is empowered to adjust the account between the parties and to decide the interests of each. *Munds v. Cassidey*, 98 N. Car. 558.

1. *New York Code Civ. Proc.*, § 3343, subd. 13.

As to the rights of the assignee or transferee of the judgment, see *New York Code Civ. Proc.*, § 1909.

2. *New York Code Civ. Proc.*, § 2435.

In *South Carolina*, any creditor, who can show the existence of the proper jurisdictional facts, is entitled to maintain supplementary proceedings, even though another creditor is also exercising his right in the same direction. *Sparks v. Davis*, 25 S. Car. 381.

3. *Hawes v. Barr*, 7 Robt. (N. Y.) 452.

4. *Frederick v. Decker*, 18 How. Pr. (N. Y.) 96; *Orr's Case*, 2 Abb. Pr. (N. Y.) 457; *Crill v. Cornmeyer*, 56 How. Pr. (N. Y.) 276; *King v. Kirby*, 28 Barb. (N. Y.) 49; *Ross v. Clusman*, 3 Sandf. (N. Y.) 676.

Even though the assignment is made after execution returned, the assignee may still have the benefit of the proceedings. *King v. Kirby*, 28 Barb. (N. Y.) 49.

Personal Representatives.—As to personal representatives, see *New York Code Civ. Proc.*, § 1376.

Where a judgment creditor was entitled at the time of his death to institute supplementary proceedings against his debtor, the right survives to his personal representatives. *Pardee v. Tilton*, 20 Hun (N. Y.) 76.

It is not necessary that the personal representatives should have the judgment revived and continued in their name before they proceed to enforce it. *Walker v. Donovan*, 6 Daly (N. Y.) 552.

5. The proceedings should be instituted by the receiver in the name of the corporation, and in such proceedings another receiver may be appointed. *Wright v. Nostrand*, 94 N. Y. 31.

6. **Attorney.**—The rule in the text seems now to be the law, and gives an attorney the same standing as an agent. When the proceeding was considered to be a part of the preceding action, the attorney, by his original retainer, was authorized to begin the proceedings. *Ward v. Roy*, 69 N. Y. 96.

7. *Russell v. Somerville*, 10 Abb. N. Cas. (N. Y.) 395, note.

Even though the cause of action is

attorney must be liquidated, and he is entitled to collect on the judgment only such amount.¹

In *New York*, the proper officers of a town or village may institute these proceedings for the collection of a tax in amount over ten dollars.²

3. Who May be Examined—*a.* AS JUDGMENT DEBTORS.—Generally speaking, the requisite jurisdictional facts existing, supplementary proceedings may be instituted against any judgment debtor.³ But if the judgment debtor is confined on process against his body, his arrest is a satisfaction of the judgment as long as it continues, and prevents further proceedings.⁴ Where the property of the judgment debtor is in the custody of the *United States* in bankruptcy proceedings, supplementary proceedings cannot be

one which from its nature is unassignable and on which the attorney is denied a lien, yet, on the recovery of judgment, the lien of the attorney attaches thereto, and he may enforce it by supplementary proceedings. *Pulver v. Harris*, 52 N. Y. 73.

Where a judgment creditor made a general assignment for the benefit of creditors, it was held that the lien of an attorney on a judgment held by the judgment creditor survived, and that he could enforce his lien by these proceedings. *Merchant v. Sessions*, 5 Civ. Pro. Rep. (N. Y.) 24.

Payment of the judgment by the judgment debtor to the judgment creditor, does not extinguish the attorney's lien, but he may still proceed to enforce it against the judgment debtor where he himself is personally liable for the costs if he fails to succeed. *Eberhardt v. Schuster*, 10 Abb. N. Cas. (N. Y.) 392, note.

Where a judgment belonging to the judgment creditor passes to a receiver, an attorney who has a lien on the judgment for his services can enforce it only after having obtained leave of the court so to do. *Moore v. Taylor*, 2 How. Pr. N. S. (N. Y.) 343.

The right of the attorney to institute the proceedings lapses with the death of the plaintiff. *Amoré v. La Mothe*, 5 Abb. N. Cas. (N. Y.) 146.

The amount of an attorney's fees when not liquidated is presumed to be the taxable costs. *Eberhardt v. Schuster*, 10 Abb. N. Cas. (N. Y.) 392, note; *Brown v. New York*, 9 Hun (N. Y.) 587. He may undoubtedly fix his fees by special agreement, or may prove the value of his services.

1. *Ward v. Roy*, 69 N. Y. 96.

2. See *New York Laws* 1867, ch.

361; *Laws* 1879, ch. 446; *Laws* 1881, ch. 640.

3. *New York Code Civ. Proc.*, §§ 2435, 2436.

In *Iowa*, though, by statute, execution can be issued against the property of one not bound by a judgment, supplementary proceedings can be begun and maintained only against a judgment debtor. *Bailey v. Dubuque*, etc., R. Co., 13 Iowa 97.

In *North Carolina*, where the judgment debtor was declared insane and put under the care of a guardian after the judgment was rendered against him, it was held that supplementary proceedings could still be instituted. *Blake v. Respass*, 77 N. Car. 193.

In *Kansas*, where a judgment creditor of an incorporated company obtains from the district court rendering the judgment in the case an execution against the property of a stockholder of such corporation, upon notice and motion under § 32, ch. 23, Gen. St. 198, it has been held that such stockholder against whom the execution is issued is not a judgment debtor as contemplated by § 483, ch. 80, Gen. St. 724, so as to subject him to the proceedings in aid of executions authorized by that section. *Hentig v. James*, 22 Kan. 326.

4. *Chapman v. Hatt*, 11 Wend. (N. Y.) 41.

A debtor arrested on execution against the person, who is admitted to the jail limits, is deemed to be imprisoned (*Code Civ. Proc.*, § 2200), and while such imprisonment continues, the right of the judgment creditor to proceed against the property of the debtor by supplementary proceedings or otherwise is suspended. *Rothschild v. Quenzer*, N. Y. Daily Reg. Sept. 14,

instituted against him.¹ Where the judgment debtor is an infant, he may still be examined,² and where a married woman is the subject of the proceeding, she may now be examined.³ A foreign consul cannot be examined as a judgment debtor under the provisions of the *New York* code; and if an order for his examination has been obtained and served, he cannot be attached for a refusal to obey it.⁴ A sheriff is liable to be examined in these proceedings on judgment obtained against him.⁵ The personal representatives of a deceased judgment creditor cannot be proceeded against in order to investigate the judgment debtor's property.⁶ The same rule holds in the case of trustees, unless the court has imposed, as a penalty for bad management, liability for costs, in which case proceedings may be begun against them.⁷ In the case of joint debtors, where several have been served with a summons, the rest failing to appear, and the execution has been properly issued against their joint property, these proceedings can be instituted on the judgment recovered, against one or more of the joint debtors at different times, or together, and their joint property, as well as the individual property of those made parties in the action, may be reached.⁸

The provisions concerning supplementary proceedings do not apply in *New York*, where the judgment debtor is a corporation created by or under the laws of the state, or a foreign corporation or joint-stock association which does business within the state, or has within the state a business agency, or a fiscal agency, or an agency for the transfer of its stock, except in those actions

1881; *Hayes v. McCahill*, N. Y. Daily Reg. Feb. 16, 1881.

1. *Havens v. National City Bank*, 4 Hun (N. Y.) 131.

2. *Lederer v. Ehrenfeld*, 49 How. Pr. (N. Y.) 403.

3. *Thompson v. Sargent*, 15 Abb. Pr. (N. Y.) 452.

In *South Carolina*, the rule in the text was upheld, even though the execution issued on the judgment did not state, as required by statute, that the amount of the judgment was to be collected from the married woman's sole and separate estate. *Clinkscales v. Hall*, 15 S. Car. 602.

4. *Griffin v. Dominquez*, 2 Duer (N. Y.) 658.

As a member of the legislature cannot be punished for disobedience to an order requiring him to appear for examination in supplementary proceedings during a session of the legislature, an order requiring such attendance should not be granted, and will be vacated as having been improvidently issued. *Everard v. Brennan*, 2 N. Y. City Ct. Rep. 351.

5. *Potts v. Davidson*, 1 How. Pr. N. S. (N. Y.) 216.

6. *Collins v. Beebe* (Supreme Ct.), 7 N. Y. Supp. 442.

In *South Carolina*, where a judgment was entered in probate court on a final settlement of an account against the administrator, it was held that the judgment was personal, and that these proceedings could be instituted. *Rhodes v. Casey*, 20 S. Car. 491.

7. *In re Jung*, 16 N. Y. Wkly. Dig. 562. A trustee cannot in a personal capacity maintain supplementary proceedings against himself in a representative capacity. *Matter of Livingston*, 27 Hun (N. Y.) 607.

8. *New York Code Civ. Proc.*, § 2461; *Jones v. Lawlin*, 1 Sandf. (N. Y.) 722; *Emery v. Emery*, 9 How. Pr. (N. Y.) 130; *Weiller v. Lawrence*, 81 N. Car. 65; *Lewis v. Rosler*, 19 W. Va. 61.

A joint debtor who has not been served with a summons may be examined in these proceedings concerning the joint property. *Perkins v. Kendell*, 3 Civ. Pro. Rep. (N. Y.) 240.

The proceeding before execution

or special proceedings brought by or against the people of the state.¹ The statutes of other states on this point differ.²

b. AS THIRD PARTIES. — Any person or corporation having possession of personal property of the judgment debtor, or being indebted to the judgment debtor, is subject to these proceedings.³

The wife of the judgment debtor may be examined concerning her husband's property in her possession, but she cannot be called upon to disclose confidential communications made to her by him.⁴

returned may be maintained as well as that after the return of the execution. *Weiller v. Lawrence*, 81 N. Car. 65.

1. *New York Code Civ. Proc.*, § 2463; *superseding or overruling* *Hammond v. Hudson River Iron, etc., Co.*, 11 How. Pr. (N. Y.) 29; *Hinds v. Canandaigua, etc., R. Co.*, 10 How. Pr. (N. Y.) 487; *Sherwood v. Buffalo, etc., R. Co.*, 12 How. Pr. (N. Y.) 136; *Courtols v. Harrison*, 1 Hilt. (N. Y.) 109; 3 *Edw. Ch.* (N. Y.) 96; 12 How. Pr. (N. Y.) 359; *McBride v. Farmers' Bank*, 28 Barb. (N. Y.) 476; *Lowber v. New York*, 5 Abb. Pr. (N. Y.) 268; 7 Abb. Pr. (N. Y.) 255. Nor can a third person be examined in a proceeding where the judgment debtor against whom it was instituted is a corporation. *Fitchburgh Nat. Bank v. Bushwick Chem. Works*, 13 Civ. Pro. Rep. (N. Y.) 155. Such proceedings may be instituted against a foreign corporation having no agent and doing no business in the state. *Logan v. McCall Pub. Co.*, 140 N. Y. 447.

2. In *Indiana*, *Iowa*, *North Carolina*, and *Wisconsin*, private corporations are subject to supplementary proceedings. *Tompkins v. Floyd County Agr. Assoc.*, 19 Ind. 197; *Toledo, etc., R. Co. v. Howes*, 68 Ind. 458; *Wallace v. Lawyer*, 54 Ind. 501; 23 Am. Rep. 661; *Estey v. Fuller Implement Co.*, 82 Iowa 678; *La Fontain v. Southern Underwriters' Assoc.*, 83 N. Car. 132; 79 N. Car. 514; *Ballston Spa Bank v. Marine Bank*, 18 Wis. 490.

In *New Jersey*, corporations cannot be proceeded against. *Conner v. Todd*, 48 N. J. L. 361.

3. *New York Code Civ. Proc.*, § 2441; *Tompkins v. Floyd County Agr. Assoc.*, 19 Ind. 197; *Union Bank v. Union Bank*, 6 Ohio St. 254; *Bronzan v. Drobaz*, 93 Cal. 647. In *New York*, the property or debt must amount to more than \$10. *New York Code Civ. Proc.*, § 2441.

In *Osborne v. Reardon*, 79 Iowa 175, it was held that the provisions of the

Iowa Code (§§ 3135, 3149), did not authorize the examination of third parties.

In *Wisconsin*, the defendant only can be required to appear. *Blabon v. Gilchrist*, 67 Wis. 38.

The proceedings cannot be maintained against a receiver of a foreign corporation appointed in another state to compel him to appear and testify concerning a debt of the corporation to the judgment debtor. *Smith v. McNamara*, 15 Hun (N. Y.) 447.

Where a bank was made the depository of the *United States* bankruptcy court, it was held that funds so deposited could not be reached by these proceedings. *Havens v. National City Bank*, 4 Hun (N. Y.) 131.

A receiver cannot be examined as to property in his possession as receiver, even though the affidavit states that he holds the property "either as receiver, etc., or individually." *Fitchburgh Nat. Bank v. Bushwick Chem. Works*, 13 Civ. Pro. Rep. (N. Y.) 155.

A corporation may be examined through its officers as a third person and compelled by a subpoena *duces tecum* to produce its books. *Pendergast v. Dempsey*, 18 Civ. Pro. Rep. (N. Y.) 198; *Semmes v. Noell*, 18 Civ. Pro. Rep. (N. Y.) 200, note.

Municipal Corporation.—The public moneys of a municipal corporation collected by taxation for public purposes, it was held could not be reached on a judgment rendered against it. *Lowber v. New York*, 7 Abb. Pr. (N. Y.) 248.

In *Indiana*, a municipal corporation cannot be compelled by these proceedings to apply salary due to the judgment debtor on the judgment. *Wallace v. Lawyer*, 54 Ind. 501; 23 Am. Rep. 661.

4. *New York Code Civ. Proc.*, §§ 828, 831; *Lockwood v. Worstell*, 15 Abb. Pr. (N. Y.) 430, note. *Contra*, but *overruled*, *Macondray v. Wardle*, 7 Abb. Pr. (N. Y.) 3; *Andrews v. Nelson*, 7 Abb. Pr. (N. Y.) 3, note.

Wisconsin.—In *O'Brien's Petition*, 24 Wis. 547, it was held that a judgment

Public officers holding public moneys in trust, cannot be compelled by these proceedings to testify concerning it, or concerning salaries due to employés.¹

V. NECESSARY JURISDICTIONAL FACTS—1. In General.—It is essential to the maintenance of supplementary proceedings that the necessary jurisdictional facts should exist;² otherwise there can be no jurisdiction, even though the judgment debtor appears and submits to examination without objection.³ Jurisdiction once acquired continues until the termination of the proceedings.⁴

2. The Judgment.—To support the proceedings the judgment must have been founded on a personal service or an appearance.⁵

debtor's wife might be compelled to disclose whether she had property of her husband under her control. But in *Blabon v. Gilchrist*, 67 Wis. 38, it has been held that the law is now changed in that state, and that at the present, where the judgment debtor is a married woman, her husband is not competent to witness for or against her in these proceedings, except as to matters transacted by him as her agent.

1. *Buchanan v. Alexander*, 4 How. (U. S.) 20; *Remmy v. Gedney*, 57 How. Pr. (N. Y.) 217, and cases cited; *Waldman v. O'Donnell*, 57 How. Pr. (N. Y.) 215; *Wallace v. Lawyer*, 54 Ind. 501; 23 Am. Rep. 661; *Anonymous*, 1 Code Rep. N. S. (N. Y.) 211.

So, where a judgment debtor is entitled to a share of the fund in the surrogate's court, the surrogate can be compelled to testify in supplementary proceedings, as to the debtor's share in the fund. *Davis v. Davis*, 4 Redf. (N. Y.) 355.

In *Ohio*, public disbursing officers can be compelled in supplementary proceedings to testify as to and to pay over salaries of judgment debtors in the public employ. *Newark v. Funk*, 15 Ohio St. 462.

2. *New York Code Civ. Proc.*, § 2458; *Barber v. Briscoe*, 9 Mont. 341.

3. *Carter v. Clark*, 7 Robt. (N. Y.) 490; *De Comeau v. People*, 7 Robt. (N. Y.) 498; *Sackett v. Newton*, 10 How. Pr. (N. Y.) 560.

4. *Webber v. Hobbie*, 13 How. Pr. (N. Y.) 382.

5. *New York Code Civ. Proc.*, § 2458; *Bartlett v. McNeil*, 60 N. Y. 53; *Mason v. Hackett*, 35 Hun (N. Y.) 238.

An order of the court directing the purchaser at a judicial sale to pay a specified sum as damages for his refusal to compel the purchase, is a judgment for the purpose of instituting

these proceedings. *Lydecker v. Smith*, 44 Hun (N. Y.) 454.

Supplementary proceedings can be maintained on a money decree rendered in an equity suit in a federal court. *Sage v. St. Paul, etc., R. Co.*, 47 Fed. Rep. 3. See *Wright v. Preston*, 55 Ala. 570.

A defendant served with a summons under a wrong name, and not having appeared in the action, even though he does not appeal from the judgment, may raise the question in these proceedings. *McGill v. Weil*, 10 N. Y. Supp. 246.

Appearance or Summons Necessary.—While the former code of *New York* authorizing these proceedings did not in its terms require the personal service of the summons upon the judgment debtor, or, in the alternative, his appearance as a condition precedent, still it was decided by the courts that such pre-requisites must exist before the proceedings could be instituted. *Bartlett v. McNeil*, 62 N. Y. 53.

Judgment for Costs.—Supplementary proceedings may now be instituted on any judgment rendered in a court of record for the sum of \$25 in amount, whether the judgment be entirely for costs or not. *Davis v. Herrig*, 65 How. Pr. (N. Y.) 290; *Davis v. Jones*, 8 Civ. Pro. Rep. (N. Y.) 43.

Under the former code, the judgment of a court not of record to support these proceedings must have been for \$25, exclusive of costs. *Potter v. Low*, 16 How. Pr. (N. Y.) 549; *Wolf v. Jordan*, 22 Hun (N. Y.) 108; *Anonymous*, 32 Barb. (N. Y.) 201; *Butts v. Dickinson*, 20 How. Pr. (N. Y.) 230; 12 Abb. Pr. (N. Y.) 60.

New York Code Civ. Proc., § 2458, does not prevent such proceedings upon a judgment for costs only, where execution on the judgment was returned unsatisfied prior to September

This requirement is, of course, inapplicable where the judgment upon which the proceedings are founded is against the plaintiff.¹

On a judgment obtained in a federal court, the judgment creditor may, under authority of Act of Congress, institute such supplementary proceedings as the laws of the state in which the court is located permit.²

Where the judgment debtor has received a discharge in bankruptcy or insolvency proceedings, he cannot be proceeded against in supplementary proceedings on a judgment obtained prior to his discharge.³

3. The Execution.—*a. IN GENERAL.*—In *New York*, the execution must have been issued out of a court of record; and, either, *first*, to the sheriff of the county where the judgment debtor has, at the time of the commencement of the special proceedings, a place for the regular transaction of business in person; or, *second*,

1, 1880. (Id. § 3352.) *Bean v. Tonnelle*, 24 Hun (N. Y.) 353; 1 Civ. Pro. Rep. (N. Y.) 33, and see note to latter report; *distinguishing* *Armstrong v. Cummings*, 1 Civ. Pro. Rep. (N. Y.) 38, note; 2 Month. Law Bull. 94; and *overruling*, in effect, *Baldwin v. Perry*, 1 Civ. Pro. Rep. (N. Y.) 39, note.

As the present code (*New York Code Civ. Proc.*, § 3043) provides that execution on judgments from district and justice's courts, if for a sum less than \$25 exclusive of costs, cannot be issued against real estate of the judgment debtor, the rule of the former code is for all practical purposes preserved as far as judgments of these courts are concerned. To sustain these proceedings a judgment of the municipal court of the city of Rochester must be for at least \$25, exclusive of costs. *Mason v. Hackett*, 21 N. Y. Wkly. Dig. 79; *Laws of New York*, 1880, ch. 14, § 6.

Judgment for Interest and Disbursements.—Although the principal sum due upon the judgment has been collected, supplementary proceedings may be maintained to recover the interest and disbursements. *Johnson v. Tuttle*, 17 Abb. Pr. (N. Y.) 315.

The mere clerical error of omitting the words "for judgment due recovery, or some equivalent expression" by the judge in indorsing judgment on the complaint, will not have the effect of invalidating an order in supplementary proceedings on the ground that it is not based on a proper and valid order for judgment. *Henlein v. Graham*, 32 S. Car. 303.

Judgment Barred by Statute of Limi-

tations.—It has been held that proceedings supplementary to execution may be maintained on a judgment recovered in a justice's court at any time within ten years after it was rendered. Section 382 of the Code does not apply. *Green v. Hauser*, 31 N. Y. Rep. 17. See also *Rose v. Henry*, 37 Hun (N. Y.) 397; but see *Davidson v. Horn*, 47 Hun (N. Y.) 51. See generally *Simpson v. Hook*, 6 Ohio C. Ct. 27.

1. *Bean v. Tonnelle*, 24 Hun (N. Y.) 353; 1 Civ. Pro. Rep. (N. Y.) 33; *Davis v. Herrig*, 65 How. Pr. (N. Y.) 290.

2. *Gregory v. Hewson*, 1 Bond (U. S.) 277; *Ex p. Boyd*, 105 U. S. 647.

But no proceedings supplementary to execution can be taken in a state court on the judgment of a federal court, even though the docketing of the judgment of the federal court in the state court is provided for. *Davis v. Breens*, 11 N. Y. Wkly. Dig. 436; *Tompkins v. Purcell*, 12 Hun (N. Y.) 662.

3. *Smith v. Paul*, 20 How. Pr. (N. Y.) 97; *World Co. v. Brooks*, 7 Abb. Pr. N. S. (N. Y.) 212.

The discharge of a debtor in bankruptcy proceedings is a bar to the institution of supplementary proceedings on a judgment obtained before the actual discharge but after a previous refusal to grant the discharge. *Leo v. Joseph*, 56 Hun (N. Y.) 644; 9 N. Y. Supp. 612.

The mere adjudication of a judgment debtor a bankrupt does not operate as a stay against supplementary proceedings in a state court. *Uhl v. Neuberger*, 11 N. Y. Wkly. Dig. 296 and *Brackett v. Dayton*, 34 Minn. 219. Accordingly, it was held that the right to maintain

if the judgment debtor is then a resident of the state, to the sheriff of the county where he resides; or, *third*, if he is not then a resident of the state, to the sheriff of the county where the judgment roll is filed; unless the execution was issued out of a court other than that in which the judgment was rendered, and, in that case, to the sheriff of the county where the transcript of the judgment is filed.¹

In order that an execution may be issued from a court of record, it must direct the sheriff to satisfy the judgment, not only out of the personal property of the judgment debtor, but, if sufficient personal property cannot be found, out of the real property belonging to him; that is to say, in order to authorize supplement-

supplementary proceedings was not barred, where neither the debt had been proved in bankruptcy, nor a stay of proceedings granted by the bankruptcy court, until about fourteen years after the return of an execution unsatisfied. *Cleveland v. Johnson*, 5 Misc. (N. Y.) 484.

Where the debt has not been proved, there is no stay, unless one is granted by the court in bankruptcy upon the application of the bankrupt. *Rosenthal v. Plumb*, 25 Hun (N. Y.) 336; *Uhl v. Neuberger*, 11 N. Y. Wkly. Dig. 296.

1. *New York Code Civ. Proc.*, § 2458; *Anway v. David*, 9 Hun (N. Y.) 296.

When the execution is issued in the county where the judgment debtor resides, it must be the county where he resides at the time the execution is issued. *Jesup v. Jones*, 32 How. Pr. (N. Y.) 191; *Bingham v. Disbrow*, 37 Barb. (N. Y.) 24; 14 Abb. Pr. (N. Y.) 251; *aff'd* 5 Trans. App. (N. Y.) 198.

If the judgment debtor has any place of business in the county, although his principal place of business and his residence are in another, the execution can be issued in the county where his place of business is, and proceedings based thereon are valid. *McEwan v. Burgess*, 25 How. Pr. (N. Y.) 92; 15 Abb. Pr. (N. Y.) 473.

Where an execution has been issued upon a judgment recovered in the superior court of the city of New York to the sheriff of the county where the judgment debtor resides at the time of the issuing of the execution (other than New York county), and after its return unsatisfied, such judgment debtor removes his residence to the city of New York, it is not necessary to issue a second execution to the sheriff of New York county in order to obtain from a justice of the superior court an order for the examination of

the judgment debtor. *Gould v. Moore*, 51 How. Pr. (N. Y.) 188.

Execution may be issued against the property of a married woman and proceedings taken on its return. *New York Code Civ. Proc.*, § 1206; *Thompson v. Sargent*, 15 Abb. Pr. (N. Y.) 452.

In *Kansas*, no execution can be issued against a garnishee to reach property in his hands belonging to the judgment debtor. Therefore, supplementary proceedings cannot be begun against the garnishee. *Arthur v. Hale*, 6 Kan. 161.

Washington.—Garnishment proceedings under the code, section 524, providing that after the issue of an execution, the judge, on proof by affidavit or otherwise that any person has property of the judgment debtor, or owes him more than \$50, may require such person to appear and answer concerning the same, are void for want of jurisdiction, where no execution was ever issued. *Timm v. Stegman* (Wash. 1893), 32 Pac. Rep. 1004.

In *Indiana*, the execution against property must be issued to the sheriff of the county where the judgment debtor resides, or if he is a non-resident of the state, then to the county where the judgment was rendered. *Fowler v. Griffin*, 83 Ind. 297; *McKinney v. Snider*, 116 Ind. 160.

In *Minnesota*, an execution can properly be issued to the sheriff of a county attached to the one for judicial purposes in which the judgment debtor resides, and supplementary proceedings can be based on the return thereof. *Beebe v. Fridley*, 16 Minn. 518.

Execution against Joint Property.—An action was begun against several joint debtors, all of whom were not personally served with a summons, and judgment was rendered in form against them all. An execution, issued against

tary proceedings, all legal remedies against the judgment debtor must be first exhausted.¹

b. VOID AND VOIDABLE.—Supplementary proceedings cannot be based on an execution which is utterly void.² But if the execution was merely defective for informality or irregularity, such as could have been amended on motion, the proceedings supplementary are not affected, for the court will disregard such defect.³

the joint property of all, and the individual property only of those served with the summons, was returned unsatisfied. This was considered sufficient to authorize the institution of supplementary proceedings against the debtors not served with summons, to examine them regarding the joint property. *Perkins v. Kendall*, 3 Civ. Pro. Rep. (N. Y.) 240.

In *Indiana*, however, the execution must have been issued against the property of all the joint debtors individually to authorize supplementary proceedings. *Dandistel v. Kronenberger*, 39 Ind. 405.

1. *New York Code Civ. Proc.*, § 1369.

In *New Jersey*, proceedings supplemental may be instituted on an execution issued against personal property of the debtor. *Westfall v. Dunning*, 50 N. J. L. 459.

An execution issued out of a district court in the city of New York to a marshal, or out of a justice's court to a constable, not being against real property, does not exhaust the remedy at law, and so will not sustain supplementary proceedings. *Muldowney v. Corney*, 3 Daly (N. Y.) 170; *Silverman v. Henant*, 40 How. Pr. (N. Y.) 88.

But where judgments of such courts, rendered for more than \$25, exclusive of costs, have been properly docketed in the county clerk's office, and executions issued thereon to the sheriff by a county clerk on such executions, these proceedings can be instituted and maintained. *New York Code Civ. Proc.*, §§ 3043, 3220, and 3017. See also *Gray v. Lieben*, 8 Civ. Pro. Rep. (N. Y.) 48.

Where the execution against the property of the judgment debtor on a judgment rendered in a justice's court is issued by the clerk, it is presumed that he so issued it on the requisite facts certified to him by the justice. *Fowler v. Griffin*, 83 Ind. 297.

2. *Clarke v. Miller*, 18 Barb. (N. Y.) 269. In this case the judgment was entered in the court of common pleas for the city and county of New York,

and the execution was issued from the supreme court. Supplementary proceedings based thereon were held to be void.

3. *Wright v. Nostrand*, 94 N. Y. 31. In this case, an execution was issued out of the superior court "without stating what superior court," though the sheriff made the return for the superior court for the city of New York, which was the proper court. At special term, the proceedings before the said execution were held to be valid. This decision was finally held by the court of appeals, overruling the general term, to be sound. So an unauthorized direction to the sheriff regarding the return of the execution, not affecting his duty under the law, does not invalidate supplementary proceedings based thereon. *Hutchinson v. Brand*, 9 N. Y. 208.

An affidavit of an execution returned unsatisfied is sufficient to give the judge jurisdiction to grant the order, under Code, § 2458, in proceedings supplementary to execution, that the defendant thereon be examined as to his property; although such execution and return had, prior to the making of the affidavit, been vacated and the judgment reduced in amount. *Hoag v. Kehoe* (N. Y. 1886), 6 Cent. Rep. 377.

An execution is not void or voidable by reason of having no seal or a wrong seal thereon, or of any mistake or omission in the *teste* thereof, or in the name of the clerk, and supplementary proceedings based thereon are not invalidated. *New York Code Civ. Proc.*, § 24; *Bareither v. Brosche*, 13 N. Y. Supp. 561; 19 Civ. Pro. Rep. (N. Y.) 444.

The failure of the county clerk to subscribe or indorse an execution issued by him on a justice's judgment, does not invalidate the proceedings begun thereon. *Hill v. Haynes*, 54 N. Y. 156.

In *South Carolina*, the omission to direct that an execution be levied against the sole and separate property only of a married woman, as was required by statute, was held to be an irregularity

c. **SECOND EXECUTION.**—During the maintenance or after the termination of supplementary proceedings, a second execution may be issued on the same judgment; ¹ but the second execution so issued suspends the other remedies of the plaintiff until a return on the execution is made.² And where it appears that the sheriff has levied upon property belonging to the debtor and sufficient to pay the judgment, the judgment creditor must elect between the execution and the supplementary proceedings.³

VI. ORDER TO EXAMINE JUDGMENT DEBTOR—1. **After Execution Returned**—a. **WITHIN WHAT TIME.**—After the return of the execution unsatisfied, in whole or in part, and within the time limited by the statute, the judgment creditor, upon proof of the facts by affidavit, or other competent written evidence, is entitled to an order requiring the judgment debtor to attend and be examined concerning his property, at a time and place specified in the order.⁴

which could not be questioned collaterally; therefore, proceedings supplementary to execution founded thereon were held to be valid. *Clinkscales v. Hall*, 15 S. Car. 602.

Execution Issued Without Leave of the Court.—Ten years having elapsed since entry of judgment and no previous execution having been issued, an order based on an execution issued without the required leave of the court was held to be voidable only and proceedings based thereon valid. *Bank of Genesee v. Spencer*, 18 N. Y. 150; *Lynch v. Tomlinson*, N. Y. Daily Reg. Oct. 30, 1883; *Winebrener v. Johnson*, 7 Abb. Pr. N. S. (N. Y.) 202; *U. S. Land, etc., Co. v. Pike*, 2 N. Y. Month. Law Bull. 31. *Contra Belknap v. Hasbrouck*, 13 Abb. Pr. (N. Y.) 418, note.

1. *Smith v. Mahoney*, 3 Daly (N. Y.) 285; *Gates v. Young*, 17 N. Y. Wkly. Dig. 55; *Lilliendahl v. Fellerman*, 11 How. Pr. (N. Y.) 528; *Farquharson v. Kimball*, 18 How. Pr. (N. Y.) 33; *Owen v. Dupignac*, 9 Abb. Pr. (N. Y.) 180; *Smith v. Davis*, 63 Hun (N. Y.) 100; *Vegelahn v. Smith*, 95 N. Car. 254.

2. *Steinhardt v. Michalida*, 15 Civ. Pro. Rep. (N. Y.) 323.

3. *Smith v. Davis*, 63 Hun (N. Y.) 100.
4. *New York Code of Civ. Proc.*, § 2435, limits the time to ten years.

In *Missouri*, the proceedings must be begun within five years after the return of the execution.

Wisconsin, Rev. Stat., § 3030 provides that at any time after the return of execution the judgment creditor may begin supplementary proceedings, but this has been construed to mean that the

proceedings must be begun within a reasonable time after the return of the execution, and that ten years is an unreasonable time. *Woodward v. Hall*, 75 Wis. 406.

New York.—It was held in *Baumler v. Ackerman*, 63 Hun (N. Y.) 40, that supplementary proceedings must be taken within ten years after the return of the first execution. In this case a second execution was taken out fifteen years after the first, and an attempt was made to found supplementary proceedings upon the second execution.

In *Levy v. Kirby*, 51 N. Y. Super. Ct. 69, it was held that an order in supplementary proceedings was justified by the return unsatisfied of a second execution regularly issued under the judgment, though such order was issued more than ten years subsequent to the return of the first execution.

Even though the right to institute the proceedings accrued before the Code of Civil Procedure became a law, still the ten years begins to run from the time the first execution was issued, for section 3352 of the *New York Code of Civil Procedure*, preserving rights under the old code, does not save the twenty-year limitation within which proceedings could have been begun, unless the right to do so was invoked within two years after the Code of Civil Procedure took effect. *Conyngham v. Duffy*, 125 N. Y. 200, *disapproving* *Bean v. Tonnelle*, 24 Hun (N. Y.) 353; *Cleveland v. Johnson*, 5 Misc. (N. Y.) 484. But see *Campbell v. Eben*, 2 N. Y. Supp. 615.

Where the judgment of a justice's court was docketed with the county

b. RETURN OF SHERIFF.—The sheriff must have returned the execution unsatisfied in whole or in part,¹ and the ordinary legal

clerk, supplementary proceedings based thereon are not barred by the lapse of six years. *Green v. Hauser*, 18 Civ. Pro. Rep. (N. Y.) 354; *Bolt v. Hauser*, 57 Hun (N. Y.) 567.

But where the judgment was not docketed it has been held otherwise. *Davidson v. Horn*, 47 Hun (N. Y.) 51.

It was held in *Jones v. Lawlin*, 1 Sandf. (N. Y.) 722, that the provisions of the old code in relation to supplementary proceedings are applicable to a judgment recovered before that code went into effect, although the execution was issued afterwards.

It was held in *Anonymous*, 3 Duer (N. Y.) 673, that where the judgment was recovered and the execution was returned before the old code became operative, the provisions of such code governing supplementary proceedings did not apply.

It was held in *Dickinson v. Cook*, 16 Barb. (N. Y.) 509, that the provisions of that code relating to supplementary proceedings applied where the execution was issued prior to the adoption of the code.

The presumption of the payment of a judgment after the lapse of twenty years created by the *New York* statute, does not operate to abate supplementary proceedings instituted upon the judgment before the expiration of the twenty years. *Driggs v. Williams*, 15 Abb. Pr. (N. Y.) 477.

1. Where the sheriff properly indorsed an execution "*nulla bona*," and sent it by a messenger to the proper clerk's office, where it arrived after the judgment creditor had begun supplementary proceedings, such a return was held to be sufficient, fractions of a day being disregarded for jurisdictional purposes, unless injustice will thereby be caused. *Jones v. Porter*, 6 How. Pr. (N. Y.) 286; *Barker v. Dayton*, 28 Wis. 367.

Austin v. Byrnes, 12 Civ. Pro. Rep. (N. Y.) 332. In this case, where the judgment debtor claimed that the judgment had been paid, it was held that the practice of the debtor in such a case was not to make a motion to vacate the supplementary proceedings, but one to declare the judgment satisfied.

In *Bank of Montreal v. Gleason* (Supreme Ct.), 1 N. Y. Supp. 658, it was held to be no defense to the pro-

ceedings after the sheriff's return unsatisfied, that defendant has real or personal property out of which the judgment could be made.

Sufficiency of Return.—A sheriff made the following return: "In pursuance of the demand of the plaintiff's attorneys I make the following return to the within execution: I have collected nothing under, and have not found any personal property out of which the said execution, or any part of the same, can be made; but I have thereunder levied upon the real estate mentioned in the annexed notice of sale, and have advertised the same for sale as in said notice provided. I have found no other property out of which to satisfy the same." It was held that the return was not such a one as justified an order in supplementary proceedings, and that it was not enough to say that upon the existing facts it ought to have been sufficient. The proper remedy was to require the sheriff to make the proper return, and if he refused, to move to compel him to do so on affidavits showing the facts. *Marx v. Spaulding*, 35 Hun (N. Y.) 478.

In *Indiana*, a return "*nulla bona*" by the sheriff was held sufficient to form a basis for the proceedings. *Sherman v. Carvill*, 73 Ind. 126. Also in *Minnesota*; and such return is said to be presumptive evidence that the sheriff has made a reasonable search for property and found none. *Flint v. Webb*, 25 Minn. 263.

In *Ohio*, a return "no good" has been held insufficient. *State Bank v. Oliver*, 1 Disney (Ohio) 159.

In *North Carolina*, a personal demand on the debtor is not necessary in order to authorize a proceeding supplementary to execution, a recovery of judgment and return of execution "unsatisfied" being sufficient for that purpose. *Weiller v. Lawrence*, 81 N. Car. 65.

In *Wisconsin*, it was held that it must appear from the face of the return that the sheriff has made reasonable and diligent search for property subject to levy, and that the return unsatisfied was insufficient. *In re Remington*, 7 Wis. 643.

Where the sheriff indorsed on the execution, "could find no property whereof to make the amount," and underneath under the same date the

remedies must have been exhausted, before supplementary proceedings may be instituted.¹

Although the sheriff returns the execution before the expiration of the sixty days, supplementary proceedings, nevertheless, may be instituted, as though it had been returned at the expiration of the sixty days.²

attorney indorsed "returned as above after diligent search," it was held sufficient to show diligence. *Second Ward Bank v. Upmann*, 12 Wis. 499.

There must be a return unsatisfied. *Ahlhauser v. Doud*, 74 Wis. 400.

Minnesota.—When an execution issued to the proper county is returned unsatisfied in whole or in part, the judgment creditor, without showing any other fact, is entitled to an order in supplementary proceedings requiring the debtor to appear and answer concerning his property. *Kay v. Vischers*, 9 Minn. 270; *Flint v. Webb*, 25 Minn. 263.

New Jersey.—An execution returned in the manner pointed out by the act concerning executions, on which a sum not less than \$50 remains due, and a petition in compliance with the requirements of the act, are the jurisdictional facts upon which the power to make an order for discovery in supplementary proceedings rests. *Seyfert v. Edison*, 47 N. J. L. 428.

In *Kansas*, it is held that it is unnecessary that an execution be returned unsatisfied where the debtor is totally insolvent. *Taylor v. Dunlap Stone, etc., Co.*, 38 Kan. 547.

In *Iowa*, it was held that return of an execution, "no property found," was a sufficient basis for proceedings supplementary to execution to ascertain the nature and extent of the judgment debtor's interest to certain real estate and to subject the same to the payment of the judgment. *McCormick Harvesting Mach. Co. v. Gates*, 75 Iowa 343.

1. *First Nat. Bank v. Martin*, 49 Hun (N. Y.) 571; *In re Remington*, 7 Wis. 643.

In *First Nat. Bank v. Martin*, 49 Hun (N. Y.) 571, real estate belonging to the judgment debtor was not taken on execution, but the execution was returned "unsatisfied." It was therefore held that the remedy at law had not been exhausted.

In *Wisconsin*, the making of an order in supplementary proceedings appointing a receiver is a sufficient

adjudication of the fact that the judgment debtor had property or effects applicable to the judgment which he refused to apply. *Fulton v. Burton*, 78 Wis. 321.

In *North Carolina*, in order to authorize the grant of an order of examination under proceedings supplementary to execution, it should be made to appear, that there is no known property liable to execution, which is proved by the sheriff's return "unsatisfied;" that there is no equitable estate in land within the lien of judgment, and there is property, choses in action, and things of value unaffected by any lien and incapable of levy. *Hinsdale v. Sinclair*, 83 N. Car. 338.

It has been held that if the return did not state whether or not there were any equitable liens, it was to be presumed that none existed, and, where no goods were found, the proceedings were authorized. *Hutchison v. Symons*, 67 N. Car. 156. But where the return shows that such equitable liens in land exist, supplementary proceedings cannot be maintained, unless it is also shown by competent evidence that the lien is insufficient to satisfy the judgment. *McKeithan v. Walker*, 66 N. Car. 95. So the proceedings may be instituted before the return of the execution, if it is also shown that the property to be levied on is sufficient to satisfy the judgment, though when such an order is issued the property reached thereunder cannot be applied until the execution is returned wholly or partly unsatisfied. *Hutchison v. Symons*, 67 N. Car. 156; *McKeithan v. Walker*, 66 N. Car. 95. Except where the property levied on is a lien in lands, supplementary proceedings form the only remedy of which the judgment debtor can have the benefit. *McCaskill v. Lancashire*, 83 N. Car. 393.

2. *Spencer v. Cuyler*, 17 How. Pr. (N. Y.) 157; 9 Abb. Pr. (N. Y.) 382; *Simpkins v. Page*, 1 Code Rep. (N. Y.) 107; *First Nat. Bank v. Dering*, 8 N. Y. Wkly. Dig. 261; *Hart v. Stearns*, 4 N. Y. Wkly. Dig. 540; *Tomlinson, etc.*,

c. **THE AFFIDAVIT**—(1) *In General*.—The facts on which the order for examination is founded are required, generally, to be set forth by affidavit.¹

(2) *Who May Make the Affidavit*.—The affidavit may be made by the judgment creditor, or by the owner of the judgment, or by the attorney or agent who has charge of its collection,² provided that the affidavit shows on its face the connection of the deponent with the case and that he knows the facts.³

Mfg. Co. v. Shatto, 34 Fed. Rep. 380; *Engle v. Bonneau*, 2 Sandf. (N. Y.) 679; *Livingston v. Cleaveland*, 5 How. Pr. (N. Y.) 396; *Tyler v. Willis*, 33 Barb. (N. Y.) 327; *Tyler v. Whitney*, 12 Abb. Pr. (N. Y.) 465. See also *Field v. Chapman*, 15 Abb. Pr. (N. Y.) 434; *Fenton v. Flagg*, 24 How. Pr. (N. Y.) 499; *Sherwood v. Littlefield*, 1 Code Rep. (N. Y.) 85, *overruled*.

Even though the sheriff made no demand for property which he might have levied on, his return is conclusive as long as it stands. *Fenton v. Flagg*, 24 How. Pr. (N. Y.) 499; *Flint v. Webb*, 25 Minn. 263.

The objection to the return cannot be raised collaterally. *Tyler v. Whitney*, 12 Abb. Pr. (N. Y.) 465.

The attorney for the judgment creditor may request the sheriff to make a return before the sixty days have expired, if the request is made in good faith, and it is also apparent that there is no property subject to levy; but where no real effort is made to levy on the property of the judgment debtor, and the execution is prematurely returned at the request of the attorney, supplementary proceedings instituted on such a return will be vacated on motion, on the ground that the return was made in bad faith, and that the remedy at law has not been exhausted. *Farquaharson v. Kimball*, 9 Abb. Pr. (N. Y.) 385, note; *Tyler v. Whitney*, 12 Abb. Pr. (N. Y.) 465; *Spencer v. Cuyler*, 17 How. Pr. (N. Y.) 157; 9 Abb. Pr. (N. Y.) 382; *First Nat. Bank v. Dering*, 8 N. Y. Wkly. Dig. 261; *Second Ward Bank v. Upmann*, 12 Wis. 499.

It was formerly held that even though the request of the attorney for the judgment debtor that the execution be returned was made in good faith, the return was invalid, and supplementary proceedings could not be based thereon. *Nagle v. James*, 7 Abb. Pr. (N. Y.) 234; *Pudney v. Griffiths*, 15 How. Pr. (N. Y.) 410; 6 Abb. Pr. (N. Y.)

211; *Ritterband v. Maryatt*, 12 N. Y. Leg. Obs. 158.

1. *New York Code of Civ. Proc.*, § 2435, says: "The judgment creditor, upon proof of the facts by affidavit or other competent written evidence, is entitled to an order requiring the judgment debtor to attend," etc. The "other competent written evidence" may consist of certified copies of the papers in the case, as, for example, of the execution and the sheriff's return thereupon. *Scott v. Durfee*, 59 Barb. (N. Y.) 390, note; *Rugg v. Spencer*, 59 Barb. (N. Y.) 383; *Collier v. De Revere*, 7 Hun (N. Y.) 61; *Hart v. Stearns*, 4 N. Y. Wkly. Dig. 540.

In *Indiana*, it was held that where an application is made for an order after the execution has been returned, an affidavit is required; while for proceedings before the return, no affidavit is required. *Mason v. Weston*, 29 Ind. 561; *Brisco v. Askey*, 12 Ind. 666. And so as to evidence that execution has issued. *Balz v. Benninghof*, 5 Ind. App. 522.

In *California*, no affidavit is required on which to base the proceedings. *Collins v. Angell*, 72 Cal. 513.

In *Iowa*, where a second proceeding for the examination of the judgment debtor in supplementary proceedings is ordered in open court at the conclusion of proceedings on the first examination, the second proceedings are regarded as but a continuation of the first and no second affidavit is required as a basis for the second proceedings. *McDonnell v. Henderson*, 74 Iowa 619.

2. *Miller v. Adams*, 52 N. Y. 409; *Conway v. Hitchins*, 9 Barb. (N. Y.) 378; *Eden v. Everson*, 65 Ind. 113.

3. *Frederick v. Decker*, 18 How. Pr. (N. Y.) 96; *Lindsay v. Sherman*, 1 Code Rep. N. S. (N. Y.) 525; *Hough v. Kohlin*, 1 Code Rep. N. S. (N. Y.) 232.

Where the deponent, instead of alleging that he is the attorney for the judgment creditor, describes himself as such,

(3) *What the Affidavit Must Contain.*—The affidavit must show the deponent's relation to the case and the nature of it;¹ that a judgment upon personal service of the summons or upon the appearance of the defendant² was duly³ rendered in favor of the judgment creditor⁴ against the judgment debtor, naming the amount of the judgment,⁵ with the report and time of its rendering,⁶ that the judgment was docketed,⁷ with the time and place

it was held sufficient. *Miller v. Adams*, 52 N. Y. 409.

In *New Jersey*, the party himself must make the affidavit in the proceedings, and an affidavit by his agent will not fulfill the requirement of the statute. *Westfall v. Dunning*, 50 N. J. L. 459.

1. *Brown v. Walker*, 28 N. Y. St. Rep. 36; *Lindsay v. Sherman*, 5 How. Pr. (N. Y.) 308; *Hough v. Kohlin*, 1 Code Rep. N. S. (N. Y.) 232.

An agent who makes the affidavit should state the nature of the agency. *Hawes v. Barr*, 7 Robt. (N. Y.) 452.

If the affidavit states that it is made by the attorney of the judgment creditor in the action, special authority to begin supplementary proceedings is not required, for if the evidence of authority is not fully enough shown, the judge to whom the application for the order is made may require further proof. *Kress v. Morehead*, 8 N. Y. St. Rep. 858.

Where personal representatives of a deceased judgment creditor are instituting proceedings supplementary to execution, it is not necessary that the death of the creditor or the appointment of the personal representatives should be made to appear by affidavit. It is necessary that the facts exist, but no formal proof thereof is required. *Collier v. De Revere*, 7 Hun (N. Y.) 61. Compare *Walker v. Donovan*, 53 How. Pr. (N. Y.) 3.

2. *New York Code of Civ. Proc.*, § 2458.

If the right to the proceedings existed prior to September 1st, 1880, the facts as to service or appearance, if judgment against the defendant had been recovered, need not be alleged. *Folwell v. Cambeis*, 14 N. Y. Wkly. Dig. 115; *Bean v. Tonnelles*, 24 Hun (N. Y.) 353.

In the city court of New York if the judgment is referred to in the affidavit, the rule in the text as to proof of personal service or appearance is not enforced. *Sayer v. MacDonald*, 2 How. Pr. N. S. (N. Y.) 119.

3. This word is necessary where the

court is one of special jurisdiction. *Conway v. Hutchins*, 9 Barb. (N. Y.) 378.

4. Where the affidavit did not disclose in whose favor the judgment was rendered, though it did appear that it was rendered against the defendant, the affidavit was held to be sufficient. *Kress v. Morehead*, 8 N. Y. St. Rep. 858.

In *California*, an affidavit which alleged that the plaintiff had "recovered the judgment, which judgment was duly entered, etc.," was held sufficient to show a recovery of the judgment on which the proceedings could be based. *High v. Bank of Commerce*, 95 Cal. 386.

5. While under the present code it is ordinarily unnecessary to allege in terms that the judgment was for the sum of \$25 or over, this allegation must be made or the fact must appear when the judgment was obtained in a court not of record. *Whitlock's Case*, 1 Abb. Pr. (N. Y.) 320.

Where a judgment was recovered in a justice's court, and the transcript filed in the county court, on which execution was issued and returned partly unsatisfied, and then an application for an order for the examination of the judgment debtor was made on an affidavit which specified the amount of the judgment, but did not state how much of it was still unpaid, it was held that the failure to so specify the amount unpaid was an irregularity, which, being raised at the first opportunity, compelled the vacating of the order granted thereon. *Douglass v. Mainzer*, 40 Hun (N. Y.) 75.

6. An affidavit entitled in the supreme court, stating "judgment was recovered in this action," was held to mean that the judgment was recovered in the supreme court. *Webster v. Sawens*, 3 How. Pr. N. S. (N. Y.) 320. And an affidavit alleging that the judgment was recovered in the justice's court in the town of Middletown before a justice of the peace, giving his name, was held sufficient. *Kress v. Morehead*, 8 N. Y. St. Rep. 858.

7. *Hawes v. Barr*, 7 Robt. (N. Y.) 452.

of the docketing, and the filing of the transcript, if the judgment was obtained in a different county.¹ In the latter case it must appear that execution was issued after the filing of the transcript.² The affidavit must therefore show that an execution against both real and personal property upon the said judgment was issued out of a court of record³ against the property of the defendant,⁴ naming the time, and the sheriff, and the county, to which it is-

Where a judgment was docketed as against Ira Weed and *Mrs. Weed*, and it was also stated that the judgment was recovered against Ira Weed and *Mary Weed*, it was held that the judgment had not been properly docketed, and the proceedings based thereon must be dismissed. *Kennedy v. Weed*, 10 Abb. Pr. (N. Y.) 62.

1. Where the order is obtained on a judgment in the same court, it being a court of record, it is not necessary to show that the transcript has been filed with the county clerk, though when the judgment is obtained in a district court of the city of New York, or in a justice's court, the filing of the transcript is necessary. *Kennedy v. Thorp*, 2 Daly (N. Y.) 258; *Bingham v. Disbrow*, 37 Barb. (N. Y.) 24.

Where the affidavit stated that the judgment roll was filed in the proper county, the omission to state that it was docketed, was held immaterial, docketing being the duty of the clerk, and the transcript being based thereon it must be presumed that the clerk did his duty. *Ludlow v. Mead*, 21 N. Y. St. Rep. 435; *Gloeckner v. Carleton*, N. Y. Daily Reg., March 22d, 1881. But see *Hawes v. Barr*, 7 Robt. (N. Y.) 452.

2. *Simms v. Frier*, 2 N. Y. Month. Law Bull. 97.

Where it was recited in the affidavit that the transcript was filed, and the execution issued on the same day, giving dates, it was held that the execution must be presumed to have been issued after the filing of the transcript. *Webster v. Sawens*, 3 How. Pr. N. S. (N. Y.) 320.

3. Where an affidavit stated that a judgment had been rendered and perfected in the supreme court, and that an execution against the property of the judgment debtor was "duly issued upon said judgment and delivered to the sheriff of the county of Oneida," this was held to sufficiently show that the execution had been issued out of the court of record. *Joyce v. Spafard*, 9 Civ. Pro. Rep. (N. Y.) 342.

Where the proceedings are instituted

in the city court of New York, it is not necessary to state that that court is a court of record. *Sayer v. MacDonald*, 2 How. Pr. N. S. (N. Y.) 119.

The affidavit on which is based an order for the examination of the judgment debtor in supplementary proceedings must have a natural and rational construction, and therefore, where it was recited that the judgment had been properly recovered and docketed, and that an execution had issued against the property of the defendant and been returned unsatisfied, but there was no statement that the execution had been issued upon the recited judgment, it was held that this latter fact was properly inferred from the language of the affidavit. *Lamonte v. Pierce*, 34 Wis. 483.

Where the judgment was obtained in a justice's court, and the affidavit stated that the execution was issued "out of the county court," it was held insufficient. *Merritt v. Judd*, 9 N. Y. Supp. 491.

Washington.—In *Timm v. Stegman* (Wash. 1893), 32 Pac. Rep. 1004, it was held that it was not necessary for the affidavit to state that execution had issued.

4. *People v. Hulburt*, 5 How. Pr. (N. Y.) 446. But see *McArthur v. Lansburgh*, 1 Code Rep. N. S. (N. Y.) 211.

Where the judgment was recovered against the joint property of all, and the individual property of some, of a number of joint debtors, partners, and the execution so issued, these facts must be alleged in the affidavit. *Emery v. Emery*, 9 How. Pr. (N. Y.) 130.

Where the judgment was against the trustee in his representative capacity, and the sheriff was directed to satisfy the execution for the collection of costs of said judgment from the trust property, that fact should be stated in the execution, and where the execution was issued against the defendant as assignee, this was held to be insufficient. *New York Code of Civ. Proc.*, § 1371; *Felt v. Dorr*, 29 Hun (N. Y.) 14.

sued.¹ The residence of the defendant at the time of the institution of the proceedings should be stated to be in said county, or the residence or non-residence and place of personal transaction of business;² also that the execution has been returned wholly or partly unsatisfied,³ and the sum still due;⁴ also that application is made within the requisite time from the return of the execution,⁵ and that no previous application⁶ for the order has been made.⁷

1. In *Indiana*, where the complaint in supplementary proceedings failed to show that the execution had been issued either to the county in which the debtor resided, or that the debtor was a non-resident, and that the execution had been issued to the amount in which the judgment was recovered, the complaint was held defective, and the proceedings based thereon void. *McKinney v. Snider*, 116 Ind. 160; *Pouder v. Tate*, 111 Ind. 148.

2. Residence, or place of business, and non-residence, in the alternative, cannot be alleged. *Kellogg v. Freeman*, 2 N. Y. City Ct. Rep. 147; *Arnot v. Wright*, 55 Hun (N. Y.) 561.

3. The judgment creditor's affidavit to that effect is sufficient proof of the return of the execution unsatisfied. *Conway v. Hitchins*, 9 Barb. (N. Y.) 378.

In *Indiana*, a statement that the amount due from a third person, together with other property of the debtor, exceeds the amount exempt by law, is not a sufficient statement that there is property belonging to the debtor not exempt. *McKinney v. Snider*, 116 Ind. 160.

In *North Carolina*, the affidavit on which proceedings for the examination of the judgment debtor are to be based should specifically negative the possession by the judgment debtor of equitable interests subject to execution, otherwise it is insufficient. *Weiller v. Lawrence*, 81 N. Car. 65; *McKeithan v. Walker*, 66 N. Car. 95; *Hutchison v. Symons*, 67 N. Car. 156; *Hackney v. Arrington*, 99 N. Car. 110.

An affidavit stating that according to the belief of deponent on information defendants have property, choses in action, or things of value which ought to be subjected to the payment of the judgment, not specifying in any way what the property is, and that on information and belief defendants have no property real or personal that is subject to execution, nor equitable estates in lands within the lien of the judg-

ment, was held to be insufficient under the statute to show that the judgment debtor has property which he refuses to apply towards the satisfaction of the judgment. *Magruder v. Shelton*, 98 N. Car. 545.

4. *Douglass v. Mainzer*, 40 Hun (N. Y.) 75.

5. *McGuire v. Hudson*, 61 Hun (N. Y.) 627.

6. *Diossy v. West*, 1 N. Y. Month. Law Bull. 23.

The supreme court, first department, held that the omission to state whether or not previous application had been made was an irregularity merely, which left it to the discretion of the judge whether or not to dismiss the proceeding. *Bean v. Tonnelle*, 24 Hun (N. Y.) 353.

In other departments of the supreme court it was held that the rule in the text did not apply to these proceedings. *Schanck v. Conover*, 56 How. Pr. (N. Y.) 437.

Where an affidavit stated that no previous application had been made for the order, except that the previous order obtained had been by stipulation of the parties withdrawn without prejudice to a renewal of the application, and that there had been still another order set aside on motion, the affidavit was held sufficient, on the ground that the first order was a nullity and that it was not necessary to mention it. *Ludlow v. Mead*, 21 N. Y. St. Rep. 435.

In the city of New York the rule as to previous application does not apply. *Sayer v. MacDonald*, 2 How. Pr. N. S. (N. Y.) 119.

7. *New York Code of Civ. Proc.*, §§ 2435, 2458; *Bingham v. Disbrow*, 37 Barb. (N. Y.) 24; *Wegman v. Childs*, 44 Barb. (N. Y.) 403.

In *Michigan*, the same facts must be shown as are required on which to base a creditor's bill. *Albany City Bank v. Dorr*, Walk. (Mich.) 317.

In *Indiana*, an affidavit on which supplementary proceedings were based, stated that a third person was indebted

d. THE ORDER.—As the adjudications on questions relating to the form of the order and the second order have been rendered by the courts of the State of *New York*, it is to be borne in mind that the following statements are founded upon discussions of the provisions of the code of that state.

(1) *Form of the Order.*—The order is obtained *ex parte* at chambers,¹ and therefore should be entitled as before a judge out of court.² Strictly, the order should be entitled as a special proceeding, with the name of the judgment creditor or of the owner of the judgment as plaintiff, and the judgment debtor as defendant.³ Under the former code the proceedings were part of the original action, and were so entitled,⁴ and the old rule is generally followed in practice to-day. An order for examination made by an inferior court on a judgment of the supreme court, is properly entitled in the supreme court.⁵

It is not ordinarily necessary or usual to recite the jurisdictional facts on which the order is based.⁶ If, however, the recital of facts is attempted, it must be made correctly, otherwise, if objection is made in time, the order will be set aside.⁷ Where the judgment was obtained in an inferior court, and the proceedings instituted in the higher one, all the jurisdictional facts must be recited in the order.⁸

The order in terms should direct the judgment debtor to attend and be examined concerning his property, at a time⁹ and place

to the judgment debtor in the value of certain lands conveyed by the third person to the debtor. This was held to present no question of fraud, and proof of such conveyance in consideration of an agreement by the third person to pay certain debts of the debtor and to support him during life, does not support the conclusion that the third person is indebted in a sum equal to the value of the lands as charged. *Pounds v. Chatham*, 96 Ind. 342.

Evidence of Issue of Execution.—In supplementary proceedings, as the facts must be established as in other civil actions, the affidavit cannot be used at the trial for the purpose of supplying a deficiency in the proof that an execution has been issued on the judgment. *Balz v. Bennighof*, 5 Ind. App. 522.

1. *Hulsaver v. Wiles*, 11 How. Pr. (N. Y.) 446.

2. *Davis v. Turner*, 4 How. Pr. (N. Y.) 190.

3. *Milliken v. Thomson*, 12 Civ. Pro. Rep. (N. Y.) 168.

4. *Ross v. Clussman*, 3 Sandf. (N. Y.) 676.

But under the former code, entitling the proceeding in the wrong court,

was only an irregularity. *People v. Oliver*, 66 Barb. (N. Y.) 570.

5. *Ackerly v. Portz*, 60 Hun (N. Y.) 579; 39 N. Y. St. Rep. 17; 20 Civ. Pro. Rep. (N. Y.) 382.

Where judgment obtained in the justice's court is docketed in a county court, the proceedings should be entitled in the county court. *People v. Oliver*, 66 Barb. (N. Y.) 570. And see *Lynch v. Riley*, 22 N. Y. Wkly. Dig. 357.

6. *People v. Oliver*, 66 Barb. (N. Y.) 570.

If the order recites that the facts necessary to obtain it were proved by the affidavit, that is considered sufficient without reciting the facts themselves in the order. *Rugg v. Spencer*, 59 Barb. (N. Y.) 383.

7. *Hatch v. Weyburn*, 8 How. Pr. (N. Y.) 163; *Hulsaver v. Wiles*, 11 How. Pr. (N. Y.) 446.

8. *Day v. Brosnan*, 6 Abb. N. Cas. (N. Y.) 312.

9. An order made returnable on Sunday, and, probably, upon a holiday or election day, is totally defective and cannot be amended. *Arctic F. Ins. Co. v. Hicks*, 7 Abb. Pr. (N. Y.) 204; 3 Rumsey on Practice 436.

specified in the order.¹ As the places where the judgment debtor can be compelled to come for examination are restricted, the place specified in the order must come within the restrictions.²

As the time and specific place of examination are in the discretion of the judge instituting the proceedings, the regular eight days' notice of motion provided for in most cases is not applicable thereto.³

Except where the order made by a supreme court justice in one district is returnable before a judge in another,⁴ the order must in terms be made returnable before the judge who made it, or before a referee named therein.⁵ Disregard of this rule is an irregularity only, for which the proceedings will be dismissed, if objection is taken in time, but which may be waived.⁶

Where the facts warrant it, an order for the attendance of the judgment debtor and also of third persons, and appointing a referee, may be made on one affidavit.⁷

(2) *Second Order*.—Where the first order for examination is set aside before its final termination, on the ground of irregularity,⁸ or is abandoned by consent of both parties, or inadvertently is allowed to lapse, a second order is permissible.⁹ If, however, the proceedings under the first order have been carried to a termination, they are *res judicata* as to the property of the judgment debtor at the time the order was granted.¹⁰ To obtain the second order, the proceedings under the first must be recited in the affidavit, and there must be shown the untimely lapsing of the proceedings under the first order, or reasonable grounds for believing that the judgment debtor, subsequently to the first order, has acquired property applicable to the payment of the judgment, which property he has in his possession.¹¹ In the discretion of the judge, the judgment debtor may then be required to appear for examina-

1. *New York Code Civ. Proc.*, § 2435.

An omission to state the place of examination, even though an adjournment is taken, and the debtor notified of the time and place, is a fatal defect. *Kelty v. Yerby*, 31 *How. Pr. (N. Y.)* 95. But if the order is made returnable at a time and place to be specified by a referee designated in the order, it is not irregular. *Redmond v. Goldsmith*, 2 *N. Y. Month. Law Bull.* 19.

2. *Anway v. David*, 9 *Hun (N. Y.)* 296. See also *infra*, this title, *Attendance for Examination*.

3. *Diossy v. West*, 1 *N. Y. Month. Law Bull.* 23; *Weiller v. Lawrence*, 81 *N. Car.* 65.

4. *New York Code Civ. Proc.*, § 2434.

5. *Hulsaver v. Wiles*, 11 *How. Pr. (N. Y.)* 446; *Hatch v. Weyburn*, 8 *How. Pr. (N. Y.)* 163.

6. *Shults v. Andrews*, 54 *How. Pr. (N. Y.)* 376; *Dresser v. Van Pelt*, 15

How. Pr. (N. Y.) 19; *Haggerty v. Rogers*, 15 *Abb. Pr. (N. Y.)* 314 n.

Where the words "or some other judge at chambers" were added, it was held to be mere surplusage. *Bank for Savings v. Hope*, 8 *Daly (N. Y.)* 316; *Dresser v. Van Pelt*, 15 *How. Pr. (N. Y.)* 19.

7. *Hulsaver v. Wiles*, 11 *How. Pr. (N. Y.)* 446; *Sickels v. Hanley*, 4 *Abb. N. Cas. (N. Y.)* 231.

8. *Methodist Book Concern v. Hudson*, 1 *How. Pr. N. S. (N. Y.)* 517; *Shults v. Andrews*, 54 *How. Pr. (N. Y.)* 380; *Hamilton v. Morange*, 2 *N. Y. Month. Law Bull.* 58.

9. *Carter v. Clarke*, 7 *Robt. (N. Y.)* 490; *Jurgenson v. Hamilton*, 5 *Abb. N. Cas. (N. Y.)* 149; *Hamilton v. Morange*, 2 *N. Y. Month. Law Bull.* 58.

10. *McCullough v. Clark*, 41 *Cal.* 208.

11. *Rallings v. Pitman*, 49 *N. Y. Super. Ct.* 307.

tion concerning his subsequently acquired property.¹ The second order does not affect incidental proceedings under the first order,² though two orders for the examination of the judgment debtor cannot exist and be enforced at the same time.³

2. Before Execution Returned.—At any time after the issuing of an execution against property as hereinbefore described,⁴ and before the return thereof, the judgment creditor, upon proof by affidavit, or other competent written evidence, that the judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, is entitled to an order requiring the judgment debtor to attend and be examined concerning his property at a time and place specified in the order.⁵

All the facts required to obtain the order for examination after execution returned, except that of execution returned unsatisfied, must be proved, to obtain this order, with the additional one that

1. *Goodall v. Demarest*, 2 Hilt. (N. Y.) 534; *Carter v. Clarke*, 7 Robt. (N. Y.) 43; *Canavan v. McAndrew*, 20 Hun (N. Y.) 46; *Sellig v. McIntyre*, 5 N. Y. Month. Law Bull. 69; *Hudson v. Plets*, 11 Paige (N. Y.) 180.

The rule that a second order will be granted only on good cause shown, is not jurisdictional, but discretionary, the jurisdictional facts being the same as in the first proceeding. Therefore, where a second order is obtained *ex parte* on the return day, further affidavits may be put in by the creditor, showing that it is not intended to harass the debtor, but that the latter has acquired further property applicable to judgment since the first order was granted. *Marshall v. Link*, 36 N. Y. St. Rep. 60; 13 N. Y. Supp. 224.

Where a long time has elapsed since the first order was made, a second order is more readily allowed, especially to a receiver or assignee of the original judgment creditor. *Grocer's Bank v. Bayaud*, 21 Hun (N. Y.) 203; *Jurgenson v. Hamilton*, 5 Abb. N. Cas. (N. Y.) 149; *Irwin v. Chambers*, 40 N. Y. Super. Ct. 432; *Clarke v. Londrigan*, 40 N. J. L. 310.

A prior application must be recited, or a second proceeding will not be allowed. *Cromwell v. Spofford*, 4 Civ. Pro. Rep. (N. Y.) 273.

Indiana.—A subsequent proceeding supplemental to execution may be instituted for the recovery of money and property which has been acquired since the commencement of the first proceeding supplemental to execution, or which was not involved in the first supplementary proceedings. *Baker v. State*, 109 Ind. 47.

2. *Walter v. Pecare*, 32 N. Y. St. Rep. 841; *Wright v. Nostrand*, 94 N. Y. 31.

3. *Gaylord v. Jones*, 7 Hun (N. Y.) 480.

4. See *supra*, this title, *Necessary Jurisdictional Facts*.

5. *New York Code Civ. Proc.*, § 2436.

In 3 Rumsey on Prac., p. 412, it is said: "These proceedings are rather in aid of an execution, than supplementary thereto. They enable the plaintiff to discover the property of the judgment debtor who is concealing it. Where the property is beyond the reach of an execution, or is, for some reason, not subject to levy, it enables the court or judge at once to appoint a receiver, in order to reach it by that remedy. The facts entitling the judgment creditor to this remedy, should be clear; and he is required to comply closely with the requirements of the section, and to show to the satisfaction of the judge that the judgment debtor not only has property, but that he unjustly refuses to apply it to the payment of the judgment. Where, however, the affidavit shows such facts, the order may be granted, and the examination may be as complete as in a case where the order is granted after the return of an execution."

In *Indiana*, the proceedings are much like those in *New York*. See *Cushman v. Gephart*, 97 Ind. 46; *Earl v. Skiles*, 93 Ind. 178; *Lowry v. McAlister*, 86 Ind. 543; *Dandistel v. Kronenberger*, 39 Ind. 405; *Fillson v. Scott*, 15 Ind. 187.

In *Wisconsin*, the proceedings are to reach property not subject to execution, and also property subject to execution, which the defendant unjustly

the debtor has property which he unjustly refuses to apply to satisfy the judgment.¹ In the proof of this last point all the facts or circumstances of the case should be shown, so that the judge may decide therefrom whether the judgment creditor is entitled or not to the order. The failure so to show the facts is not a jurisdictional defect, and a statement in the words of the statute alone, while insufficient and irregular, is not fatal.²

The affidavit should be made by the party and not by an attorney.³ And where the facts are alleged on information and belief, the source of the information and ground for belief should be set forth.⁴

If the requisite jurisdictional facts exist, the failure to show them sufficiently is an irregularity only, which may be cured by amendment.⁵

To constitute an unjust refusal by the judgment debtor to apply his property to the satisfaction of the judgment, a proper demand made on the judgment debtor for such application must be shown.⁶

The requirements as to the order and the judge who can make it, etc., are similar to those concerning the order after execution returned.⁷

VII. WARRANT OF ARREST—1. Instead of Order for Examination.—Under the *New York* procedure, a warrant of arrest may issue,

refuses to apply. It must be alleged, not only that the debtor refuses to apply the property, but that he keeps it concealed out of reach of the sheriff. *Smith v. Weeks*, 60 Wis. 94.

1. *Sackett v. Newton*, 10 How. Pr. (N. Y.) 560; *Driggs v. Smith*, 47 How. Pr. (N. Y.) 215.

An affidavit in the language of *New York* Code Civ. Proc., § 2436, is insufficient, unless facts and circumstances show a specific demand and unjust refusal of the debtor to apply his property towards the satisfaction of the judgment. *Allen v. Affleck*, N. Y. Daily Reg., March 30th, 1881.

2. *First Nat. Bank v. Wilson*, 13 Hun (N. Y.) 232.

3. *Klinke v. Levy*, N. Y. Daily Reg., Nov. 22d, 1883.

4. *Manken v. Pape*, 65 How. Pr. (N. Y.) 453; *Bowery Bank v. Widmayer*, 9 N. Y. Supp. 629.

5. *First Nat. Bank v. Wilson*, 13 Hun (N. Y.) 232; *Wright v. Nostrand*, 94 N. Y. 31.

The admission of the proper negative averment in the affidavit as to the existence of equitable interests which may be subjected by sale, may be remedied by amendment at the hearing. *Weiller v. Lawrence*, 81 N. Car. 65.

6. *Manken v. Pape*, 65 How. Pr. (N. Y.) 453; *Hutson v. Weld*, 38 Hun (N. Y.) 142; *Levy v. Beacham*, 64 Hun (N. Y.) 62; *First Nat. Bank v. Wilson*, 13 Hun (N. Y.) 232. See *Stewart v. Biddlecum*, 2 N. Y. 103.

Where a judgment debtor absolutely refused to apply any of his choses in action to the payment of the judgment, he cannot, after the institution of the proceedings against him for unjustly refusing to comply with the demand made upon him, object that no proper person was present at the time of the demand to receive the property demanded. *Stewart v. Biddlecum*, 2 N. Y. 103.

In *Ohio*, a demand need not be alleged, for it is held that it is the duty of the debtor to apply his property to the judgment without a demand. *Edgerton v. Hanna*, 11 Ohio St. 323.

In *North Carolina*, the issuing and delivery of an execution to the sheriff constitutes a demand, and refusal of this only need be shown. *Weiller v. Lawrence*, 81 N. Car. 65; *Hinsdale v. Sinclair*, 83 N. Car. 338; *Hutchison v. Symons*, 67 N. Car. 156.

7. See *supra*, this title, *Order to Examine Judgment Debtor—After Execution Returned*.

instead of an order for examination, on a showing that there is danger that the judgment debtor will leave the state or conceal himself, and that there is reason to believe that he has property which he refuses to apply to the payment of the judgment.¹

2. After Order for Examination.—So, under the *New York* procedure, where the facts specified in the preceding section are made to appear as therein stated, at any time after the making of an order requiring the judgment debtor to attend and be examined, and before the close of his examination, the judge may issue a warrant as therein prescribed; and, if necessary, may direct the adjournment, or, if the return day of the order has lapsed, the continuance of the proceedings under the order, until after the return of the warrant and his decision thereupon.²

VIII. INJUNCTION AGAINST TRANSFER OF PROPERTY—1. In General.

—The judge by whom the order or warrant was granted in these proceedings, or to whom it is returnable, may make an injunction

1. *New York* Code Civ. Proc., § 2437. It must appear or be presumable that the debtor is within the state when the warrant is applied for on the ground of concealment, otherwise the warrant, if granted, will be vacated. *Rohshand v. Waring*, 1 Abb. N. Cas. (N. Y.) 311.

It will not do to allege concealment and fraud in the alternative, though both may be alleged as existing together if such be the fact. *Lee v. Heirberger*, 1 Code Rep. (N. Y.) 38.

"The warrant of arrest furnishes substantially the same remedy in these proceedings as was formerly furnished by a writ of *ne exeat*, and with the additional feature that it may be issued, not only in cases where there is danger that the judgment debtor will leave the state, but also where he unjustly conceals himself within the state, for the purpose of avoiding the payment of the judgment, or to prevent a levy from being made upon his property." 3 *Rumsey on Practice* 431.

In order to obtain the warrant the judgment creditor need give no security, but the issue of the warrant is entirely in the discretion of the judge. 3 *Rumsey on Practice* 432.

The warrant may be obtained by an assignee of the judgment. *King v. Kirby*, 28 Barb. (N. Y.) 49.

On proper proof the warrant may issue against a non-resident judgment debtor who is within the state. *Denning v. Schieffelin*, 26 N. Y. St. Rep. 96. In such a case it must be proved, not only that there is reason to believe that the debtor has property which he un-

justly refuses to apply, but that he actually has the property; and, it seems that what the property is, must be shown. *Heller v. DeLeon*, 26 N. Y. St. Rep. 102.

While the warrant cannot be returnable before a referee, one may be appointed afterwards in the proceedings. *Latham v. Westervelt*, 16 Barb. (N. Y.) 421.

In the additional proof required to secure the warrant of arrest, the facts and circumstances showing the danger of escape, or the concealment and the possession, and unjust refusal by the judgment debtor to apply the property, should be positively set out, together with a statement to that effect in the terms of the statute. The affidavit showing the particulars warranting the order of arrest should not be on information and belief; the facts must be positively and not inferentially stated. *Netzel v. Mulford*, 59 How. Pr. (N. Y.) 452. "For, as the creditor may be his own witness for the purpose of directing the warrant, and may choose his own time for arresting the debtor, it is not too much to require that he should in the first instance make out a plain case." *Bronson, J.*, in *People v. Recorder of Albany*, 6 Hill (N. Y.) 429, quoted by *Lawrence, J.*, in *Netzel v. Mulford*, 59 How. Pr. (N. Y.) 452.

2. New York Code Civ. Proc., § 2438. Where a warrant is issued after the order for examination, as provided for in the text, the two proceedings are entirely independent, and the creditor may abandon the proceedings under

order¹ restraining any person or corporation, whether a party or not a party to the special proceeding,² from making or suffering any transfer or other disposition of or interference with the property of the judgment debtor, or the property or debt concerning which any person is required to attend and be examined, until further direction in the premises.³ Such an injunction order may be made simultaneously with the order or warrant by which the special proceedings are instituted, and upon the same papers; or afterwards, upon an affidavit showing sufficient grounds therefor. The judge or the court may, as a condition of granting an application to vacate or modify the injunction order, require the applicant to give security in such a sum and in such a manner as justice requires.⁴

the order, or keep them alive, as he chooses; the subsequent vacation of the order does not require the vacation of the warrant. *Frost v. Craig*, 18 Civ. Pro. Rep. (N. Y.) 296; 9 N. Y. Supp. 528; 30 N. Y. St. Rep. 848.

Vacating or Modifying the Warrant.—The warrant may be vacated or modified in the same manner as an order in these proceedings. *New York Code Civ. Proc.*, § 2439.

Irregularities in the recitals in the warrant cannot be taken advantage of by the judgment debtor, unless they are specified in the motion to vacate or modify. *Frost v. Craig*, 18 Civ. Pro. Rep. (N. Y.) 296; 9 N. Y. Supp. 528; 30 N. Y. St. Rep. 848.

1. An injunction order made in these proceedings is different from an injunction granted as a provisional remedy, but some reason should appear in the affidavit showing the necessity for an injunction before the judge will exercise his discretion in forbidding a transfer of the property of the judgment debtor. *Green v. Bullard*, 8 How. Pr. (N. Y.) 313.

In *Wisconsin*, the court, a judge, or commissioners, may grant the order. *In re Perry*, 30 Wis. 268.

A judgment debtor left the jurisdiction of the court and refused to return to be examined in supplementary proceedings after service of the order upon him. Trustees were appointed under a certain will and directed to pay him an annuity. It was held that a motion to dissolve an injunction granted under an order for the examination of one of the trustees, restraining all further payments of the annuity to the debtor, should be denied. *Seaman v. Pike*, N. Y. Daily Reg., Nov. 24th, 1883.

2. Seeley v. Garrison, 10 Abb. Pr. (N. Y.) 460.

One who is served with an order restraining him, together with his attorneys, agents, and servants, is not only liable for his own personal breach of the order, but also for that of his attorneys, agents, and servants, provided they act by his order or with his consent, express or implied. *Batterman v. Finn*, 32 How. Pr. (N. Y.) 501.

Formerly one not a party could not be restrained in these proceedings. *King v. Tuska*, 1 Duer (N. Y.) 635; *Edmonston v. McLoud*, 19 Barb. (N. Y.) 356; *affirmed* 16 N. Y. 543.

Where the order is issued to a corporation, the officers responsible for its management are bound by it. See *Davis v. New York*, 1 Duer (N. Y.) 451. And if they fail to prevent those under their control from violating the injunction, they are also liable. *People v. Sturtevant*, 9 N. Y. 263; 59 Am. Dec. 536.

In *North Carolina*, the court cannot restrain the transfer of property owned by one not a party to the action. *Farmers', etc., Nat. Bank v. Burns*, 109 N. Car. 105; *Coates v. Wilkes*, 94 N. Car. 174.

Where, however, those who had been made parties defendants claimed an interest in the property, to reach which the proceedings were begun, they may be restrained from disposing of it. *Farmers', etc., Nat. Bank v. Burns*, 109 N. Car. 105.

3. The order should specify clearly that which the person served is enjoined from doing. See *Lyon v. Botchford*, 25 Hun (N. Y.) 57.

4. *New York Code Civ. Proc.*, § 2451. No security for the injunction is required of the judgment creditor. 3 Rumsey Pr. 445.

Where the restraining clause in an injunction was omitted, the property

2. Beginning and Termination of the Injunction.—The injunction order takes effect from the time of its service upon the person to be restrained,¹ unless he knows of its issue. In that case he is bound by the order from the time he receives the information, though the order has not then been served on him.²

Discontinuance depends on the terms of the order. Where the duration is not expressly limited, the injunction continues in force until either the proceedings of which it is an incident are discontinued,³ or it is vacated by another order of the court.⁴

Where the proceedings to which it is incidental are void, the injunction order is also void.⁵ But where jurisdictional facts actually exist, other defects in the granting of the order do not render it inoperative until it is vacated or modified by a subsequent order.⁶

of the judgment debtor could be transferred. *Gregory v. Hewson*, 1 Bond (U. S.) 277.

In an action to recover moneys alleged to be due to the plaintiff from the defendant, a defense setting forth supplementary proceedings taken against plaintiff by a judgment creditor, in which the plaintiff and the defendant have been forbidden to transfer, dispose of, or interfere with the property of the plaintiff, is not irrelevant. *Carpenter v. Bell*, 19 Abb. Pr. (N. Y.) 258.

Oral Order—Minnesota.—A finding that an order of court made orally, in proceedings supplementary to execution, restraining a person named as a witness from disposing of certain personal property, did not subject him to liability for having disposed of the property, will be sustained where the evidence is indefinite as to the time when the order was made, and in other particulars. *Benbow v. Kollom* (Minn. 1893), 54 N. W. Rep. 482.

1. *Gerregani v. Wheelwright*, 3 Abb. Pr. N. S. (N. Y.) 264; *Sands v. Roberts*, 8 Abb. Pr. (N. Y.) 343. *Contra* under former code, but *overruled*, *Atkinson v. Sewine*, 43 How. Pr. (N. Y.) 84; 11 Abb. Pr. N. S. (N. Y.) 384.

2. *Hull v. Thomas*, 3 Edw. Ch. (N. Y.) 236; *Livingston v. Swift*, 23 How. Pr. (N. Y.) 1.

The same rule applies to the attorneys, agents, or servants of the party knowing of the issue of the injunction order, provided that he has the control of them regarding the subject-matter of the injunction. *Batterman v. Finn*, 32 How. Pr. (N. Y.) 501.

3. *Ballou v. Boland*, 14 Hun (N.

Y.) 355. See also *Reynolds v. McElhone*, 20 How. Pr. (N. Y.) 454; *Woolf v. Jacobs*, 36 N. Y. Super. Ct. 408; *Allen v. Starring*, 26 How. Pr. (N. Y.) 57.

If the proceedings do lapse, but afterwards the default is opened and the examination continued, the injunction revives and relates back in its effect to the time of the default. *Reynolds v. McElhone*, 20 How. Pr. (N. Y.) 454.

Where an injunction was incorporated into an order of arrest, and the latter was set aside, the injunction was held to be independent and to remain in force. *Wilson v. Andrews*, 9 How. Pr. (N. Y.) 39.

The failure of a referee to be present on an adjourned day, does not vacate the injunction, for the proceedings may be renewed by the judge who instituted them. *Keihan v. Shipherd*, 16 Civ. Pro. Rep. (N. Y.) 183.

4. If the injunction was erroneously granted in the beginning, it should afterwards be vacated by order. *Moser v. Polhamus*, 4 Abb. Pr. N. S. (N. Y.) 442.

An order appointing a receiver in the proceedings discontinues the injunction, unless there is also a restraining clause in the order creating the receivership. *People v. Randall*, 73 N. Y. 416.

A stay of proceedings on appeal does not operate to discontinue the injunction. *Woolf v. Jacobs*, 36 N. Y. Super. Ct. 408.

5. *Kennedy v. Weed*, 10 Abb. Pr. (N. Y.) 62; *Reed v. Champagne*, 5 N. Y. Wkly. Dig. 227.

6. *Arctic F. Ins. Co. v. Hicks*, 7 Abb. Pr. (N. Y.) 204. And see *People*

3. Acts Enjoined.—The injunction order cannot restrain the acquisition or disposition of property which is not subject to supplementary proceedings.¹ The disposition, however, of all other property of the judgment debtor received or earned by him, not only up to the time of the making of the injunction order, but even to the time of its service, is restrained.²

The debtor may receive and dispose of property, the title to which is acquired subsequent to the service of the order.³ Other transfers of property are forbidden.⁴

The judgment debtor, after being served with an injunction order, cannot lawfully confess judgment, if thereby he acts in bad faith and gives to a subsequent creditor a preference over the one

v. Bergen, 53 N. Y. 404; *Erie R. Co. v. Ramsey*, 45 N. Y. 637.

1. See *New York Code Civ. Proc.*, § 2463.

The usual injunction in supplementary proceedings only affects property received, earned, or due before the making of the order. *Atkinson v. Sewine*, 11 Abb. Pr. N. S. (N. Y.) 384. See *infra*, this title, *Property That Can be Reached*.

In *Wisconsin*, it is provided by statute that the injunction granted in supplementary proceedings shall not restrain a judgment debtor from making a necessary assignment under the insolvent laws, unless an express provision to that effect is contained in the injunction. After the institution of the proceedings, but before any further steps had been taken therein, the judgment debtor made a voluntary assignment of all his property for the benefit of his creditors. This assignment was held valid. *Holton v. Burton*, 78 Wis. 321.

In *North Carolina*, where a judgment debtor was the owner of certain notes secured by mortgage, and an order was made in supplementary proceedings restraining the conveyance or disposition by him of any of his property, a subsequent discharge by the debtor of the mortgage and delivery of notes to the mortgagor was held invalid. *Rose v. Baker*, 99 N. Car. 323.

Back Salary.—The payment of back salary earned within sixty days previous to the service of the injunction order cannot be restrained. Nor can the disposition after its receipt be restrained, provided that they are necessary for the support of the family of the judgment debtor. *Hancock v. Sears*, 93 N. Y. 79; *Newell v. Cutler*, 19 Hun (N. Y.) 74, *overruled*.

But the acquisition and disposition of salary earned more than sixty days previous to the service of the order, may be restrained. *Taggard v. Talcott*, 2 Edw. Ch. (N. Y.) 628.

Exempt Property.—So property exempt from levy and sale under execution may be freely received and disposed of by the debtor in spite of the injunction order. *Hancock v. Sears*, 93 N. Y. 79; *McGivney v. Childs*, 41 Hun (N. Y.) 607.

Trust Property.—Where property is left in trust for the judgment debtor, the trust not proceeding from him originally, the payment of the fund or trust property to the judgment debtor cannot be restrained. *Morgan v. Von Kohnstamm*, 9 Daly (N. Y.) 355; 60 How. Pr. (N. Y.) 161.

2. 3 Rumsey Pr. 446. The reason for this is that the receiver's title when he is appointed in the proceedings relates back to the time of the service of the order.

Formerly only property received or earned by the debtor up to the time of the making of the order was bound by the injunction; *Atkinson v. Sewine*, 11 Abb. Pr. N. S. (N. Y.) 384, while that received or earned after the making of the order was not subject to the injunction order. *Campbell v. Genet*, 2 Hilt. (N. Y.) 290. *Contra*, *Sands v. Roberts*, 8 Abb. Pr. (N. Y.) 343.

3. *McGivney v. Childs*, 41 Hun (N. Y.) 607. So where exempt property in the shape of household goods belonging to the judgment debtor at the time the injunction order was served on him was afterwards destroyed by fire and the insurance money therefor was then paid to the judgment debtor, the money so received was held to be not bound by the injunction. *Sands v. Roberts*, 8 Abb. Pr. (N. Y.) 343.

4. *Deposit Nat. Bank v. Wickham*,

who obtained the injunction order.¹ When, however, the confession of judgment is made in good faith and does not affect in any way the lien obtained by a prior creditor, its making is not restrained by an injunction order.²

Where the judge before whom the proceedings are carried on, with all the parties before him, makes an order directing the disposition of property contrary to the injunction order, the judgment creditor cannot object.³

IX. ORDER TO EXAMINE THIRD PERSONS—1. In General.—Upon a showing that an execution has been returned unsatisfied in whole or in part, and that any person or corporation has personal property belonging to the judgment debtor, or is indebted to him, the judgment creditor is entitled to an order requiring that person or corporation to attend and be examined concern-

44 How. Pr. (N. Y.) 421; *Coleman v. Roff*, 45 N. J. L. 7. So the judgment debtor cannot draw money from the bank after he has been served with an injunction order. *People v. Kingsland*, 5 Abb. Pr. N. S. (N. Y.) 90; 3 Abb. App. Dec. (N. Y.) 526.

1. *Fenner v. Sanborn*, 37 Barb. (N. Y.) 610; *Ex p. Kellogg*, 64 Cal. 342.

A defendant, in proceedings supplementary to execution, was enjoined by an order of one of the justices of the court from disposing of or in any manner interfering with his property. By a series of adjournments and delays of the proceedings, he protracted the appointment of a receiver for a long period, and in the meantime confessed judgment in another court for a large amount to his father-in-law, upon which an execution was immediately returned, supplementary proceedings taken, a receiver appointed, and an assignment made by defendant to him under a justice's order before the receiver in the first suit was appointed, and the latter was thereby prevented from receiving the fund which the party in that suit was seeking to reach. It was held, on the facts, that the judgment was confessed for the purpose and with a view to enable the second judgment creditor to obtain a receiver and a transfer to him of the fund, and thereby to prevent the first creditor from reaching it, and that this was a plain and intentional violation of the injunction. Although simply confessing a judgment will not in itself be a violation of such an injunction order, yet it will be so deemed if accompanied by other acts which show an intent to change the disposition of the debtor's

property to the prejudice of the creditor who has obtained the injunction. *Ross v. Clusman*, 3 Sandf. (N. Y.) 676.

2. *Lansing v. Easton*, 7 Paige (N. Y.) 364. So a pending suit against a third party can be proceeded with by the judgment debtor without violating the injunction. *Parker v. Wakeman*, 10 Paige (N. Y.) 485.

So a sale of property previously made can be completed after the service of an injunction order. *Richardson v. Rust*, 9 Paige (N. Y.) 243; *Ireland v. Smith*, 1 Barb. (N. Y.) 419.

The execution by the judgment debtor of one mortgage of a lesser amount for another, has been held not to be such an interference with the property as to involve a contempt of an injunction order in supplementary proceedings. *Duffus v. Cole*, 39 N. Y. St. Rep. 838; (Supreme Ct.) 15 N. Y. Supp. 370; *citing* *Beard v. Snook*, 47 Hun (N. Y.) 158.

Bona fide Transferee.—A rule was issued in supplementary proceedings requiring the defendant and a judgment debtor of his to show cause why the indebtedness of the latter should not be applied to plaintiff's demand, and enjoining defendant meanwhile from assigning this judgment. This order was served on the next day one hour after defendant had assigned this judgment to another creditor, in pursuance of a previous promise, defendant having no knowledge of the order, nor of facts sufficient to have put him upon the inquiry. It was held that the assignment was valid. *Robertson v. Segler*, 24 S. Car. 387.

3. *Butler v. Niles*, 35 How. Pr. (N. Y.) 329.

ing the debt or other property, at a time and place specified in the order.¹

1. See *New York Code Civ. Proc.*, § 2441. In *Menage v. Lustfield*, 30 Minn. 487, the order directing the third person to appear and be examined was made on reading an affidavit and "examining the records and files of said court in said action." It was held that the affidavit alone was insufficient, but that the records and files were sufficient to authorize the order.

In *California*, it was held that allegations in a complaint against a garnishee in an action by a judgment creditor, authorized in proceedings supplementary to execution against the judgment debtor, that the assignor of the plaintiff "recovered a judgment" in the superior court, "which judgment was duly entered," etc., and that the order authorizing the suit was "duly made," were sufficient as against a general demurrer. *High v. Bank of Commerce*, 95 Cal. 386.

To authorize the order for the examination of third persons, the execution must have been properly issued, and on the proper judgment as hereinbefore set forth. See *supra*, this title, *Necessary Jurisdictional Facts*. See also *Merrill v. Allin*, 46 Hun (N. Y.) 623.

The order to examine a third party before execution returned need not contain allegations that the debtor has property in his possession which he unjustly refuses to apply to the judgment, such as are required to obtain an order to examine the judgment debtor under the same circumstances. *Potts v. Davidson*, 1 How. Pr. N. S. (N. Y.) 216.

Though the debt be not yet due to the judgment debtor, the third person so indebted to him may be examined. *Davis v. Herrig*, 65 How. Pr. (N. Y.) 290; *Davis v. Jones*, 8 Civ. Pro. Rep. (N. Y.) 43.

By bringing an action to have an assignment by the judgment debtor set aside, the creditor does not waive his right to examine the assignee in these proceedings. *Matter of Sickles*, 52 Hun (N. Y.) 527; 23 N. Y. St. Rep. 585.

Where, in *Indiana*, the complaint failed to designate the specific amount which a third person was alleged to owe to the judgment debtor, the affidavit was held defective and the proceedings void. *McKinney v. Snider*, 116 Ind. 160.

It is not necessary that the debtor

should be examined in this proceeding; *Graves v. Lake*, 12 How. Pr. (N. Y.) 33, nor that he should be present. *Foster v. Prince*, 8 Abb. Pr. (N. Y.) 407.

The proceedings against a third person may be instituted after the debtor has been examined and a receiver appointed. *Lockwood v. Worstell*, 15 Abb. Pr. (N. Y.) 430, note. So, though all the judgment debtor's property has been attached. *Hanson v. Tripler*, 3 Sandf. (N. Y.) 733.

Where an order staying the proceedings "upon an execution" was made, it was held that the creditor could still institute supplementary proceedings for the examination of a third person. *Lowber v. New York*, 5 Abb. Pr. (N. Y.) 268.

Where a third person attends, he is not entitled to witness fees. *Heckman v. Bach*, 20 Abb. N. Cas. (N. Y.) 401.

Upon the death of a sole judgment debtor, the proceedings for the examination of a third person abate. *Hazewell v. Penman*, 13 How. Pr. (N. Y.) 114.

Where proceedings on a third party order against one of several executors have been adjourned, a second order against a co-executor is not authorized, unless the debtor, since the adjournment, has acquired other property which should be applied to payment of the judgment. *Crane v. Beecher*, 26 N. Y. St. Rep. 233; 6 N. Y. Supp. 225.

In *Indiana*, in order to obtain the order for the examination of a third person, it must be alleged that the debtor has property which he unjustly refuses to apply to the satisfaction of the judgment. *Mitchell v. Bray*, 106 Ind. 266; *Earl v. Skiles*, 93 Ind. 178.

It is required that the affidavit should show that the property of the judgment debtor which is sought to be reached, together with that claimed to be exempt by law exceeds the amount actually exempt by law. *Abell v. Riddle*, 75 Ind. 345.

In a proceeding, under section 522 of the *Indiana Code* of 1852, by the heirs of a deceased judgment creditor, to subject a claim, alleged to have been assigned to the judgment debtor, to the payment of the judgment, it was not necessary, as against the assignor, that the complaint should aver that the judgment debtor had unjustly refused to apply the claim to the

The order itself is similar in its form and mode of service to that for the examination of the judgment debtor after execution returned.¹

2. Notice to Judgment Debtor.—Under the *New York* procedure, the judge, in his discretion, may require notice of the subsequent proceedings to be given to the judgment debtor in such a manner as the judge may deem just.²

payment of the judgment, or had claimed any part of his property as exempt from execution. *Fowler v. Hobbs*, 86 Ind. 131.

The Affidavit.—Where the affidavit, in setting forth the facts, used the words of the statute, this was held to be sufficient. *Seeley v. Garrison*, 10 Abb. Pr. (N. Y.) 460. See this case for a form of affidavit and order.

It is not sufficient to allege in the alternative that the third person "has property of the judgment debtor or is indebted to him." Such a statement alleges neither the one fact nor the other. *Davis v. Herrig*, 65 How. Pr. (N. Y.) 390; *Collins v. Beebe*, 27 N. Y. St. Rep. 4; (Supreme Ct.) 7 N. Y. Supp. 442; *Lee v. Heirberger*, 1 Code Rep. (N. Y.) 38; *Leonard v. Bowman*, 21 Civ. Pro. Rep. (N. Y.) 237; *Arnot v. Wright*, 55 Hun (N. Y.) 561.

The affidavit may be made by the attorney in the case, and the facts on which the order is to be based may be alleged on information and belief, without setting out the ground of belief. This is sufficient at least to confer jurisdiction to make the order and probably to sustain the order in a direct motion to set it aside. *Miller v. Adams*, 52 N. Y. 409. This case was an appeal from a judgment for the defendant, in an action for false imprisonment of the plaintiff on an attachment obtained for the contempt of the plaintiff in failing to appear and be examined as a third person in supplementary proceedings, in which the defendant in this case was the judgment creditor, on an order based on an affidavit containing an allegation on information and belief only. It was decided that such an affidavit so made on information and belief conferred jurisdiction on the judge to punish for contempt a third person for failure to appear and be examined as required by the order, and the court stated that its conclusion from the cases was that "an affidavit stating the possession of the property of or indebtedness to, the

debtor upon information and belief would be held sufficient upon direct application to set aside the order founded thereon." This decision was followed in the case of direct applications made to set aside the order, and an affidavit on information and belief was held sufficient. *Tefft v. Epstein*, 17 Civ. Pro. Rep. (N. Y.) 168; 7 N. Y. Supp. 897; *Grinnell v. Sherman*, 11 N. Y. Supp. 682; 33 N. Y. St. Rep. 27. The cases of *Day v. Lee*, 52 How. Pr. (N. Y.) 95, and *People v. Jones*, 1 Abb. N. Cas. (N. Y.) 172, to the contrary, were not followed. In *Fleming v. Tourgee*, 61 Hun (N. Y.) 623, which was an appeal from an order punishing for contempt a third person for not appearing for examination as directed, it was decided that an affidavit on information and belief was sufficient to give jurisdiction to make an order; but the court said that the affidavit would have been insufficient to support the order on a direct application to vacate it. Thus, it will be seen that the court of appeals, in *Miller v. Adams*, 52 N. Y. 409, and the general term, in *Fleming v. Tourgee*, 61 Hun (N. Y.) 623, have both decided that an affidavit on information and belief is sufficient to confer jurisdiction to make the order for examination and to punish for contempt on disobedience of that order. While they differ as to the effect of such an affidavit in a direct application to vacate the order based thereon, it is to be presumed that the *dictum* of the court of appeals will be followed in the latter case, as it has been in the inferior courts.

1. See *supra*, this title, *Order to Examine Judgment Debtor—After Execution Returned*.

2. *New York* Code Civ. Proc., § 2441. See *Foster v. Prince*, 8 Abb. Pr. (N. Y.) 407; *Gibson v. Haggerty*, 15 Abb. Pr. (N. Y.) 406; 37 N. Y. 555; 97 Am. Dec. 752; *Ward v. Beebe*, 15 Abb. Pr. (N. Y.) 372; *Lynch v. Johnson*, 48 N. Y. 27.

In 3 Rumsey's Pr. 414, it is said: "To allow the proceedings to be taken or

If the judgment debtor is not notified of the proceedings he has no right to appear by counsel in them,¹ and his right to move to vacate the order under such circumstances is questionable.²

X. MODE OF SERVICE OF ORDERS.—The *New York* code prescribes the mode of service of injunction and examination orders, and requires, first, that the original order, under the hand of the judge making it, must be exhibited, and, second, that a copy thereof and of the affidavit upon which the order was made must be delivered.³

continued without any notice to the judgment debtor would often open the door to injustice and fraud; and notice should in all cases be given, unless by giving notice there would be a failure of justice, as by giving a dishonest debtor an opportunity of removing his property from the jurisdiction of the courts of this state. But sometimes it is impossible to give such notice, as in cases where he has left the state or conceals himself. In all cases, however, the matter of giving notice is left to the discretion of the judge; and whether or not a notice shall be given to the judgment debtor should be determined by the circumstances of each case."

In *Gibson v. Haggerty*, 37 N. Y. 555, it was held that a payment by the debtor of the judgment debtor, in obedience to an order made under section 294 of the old code, was valid, although no notice of the proceeding was given to the judgment debtor, and that such payment afforded full protection as against an assignee of the debt who had not given notice of his assignment. The old code made the requirement of notice discretionary with the judge, as does section 2441 of the present code.

In *Indiana*, the judgment debtor must not only be given notice of the proceedings, but must be made a party thereto. *Hoadley v. Caywood*, 40 Ind. 239; *Cooke v. Ross*, 22 Ind. 157; *Chandler v. Caldwell*, 17 Ind. 256; *Wall v. Whisler*, 14 Ind. 228.

New Jersey.—If, under an order for discovery in aid of execution, an examination of witnesses be held without personal notice to the defendant, the proceedings will be set aside as irregular. *Shannon v. McMurtrie*, 48 N. J. L. 427.

1. *Corning v. Tooker*, 5 How. Pr. (N. Y.) 16; *DeComeau v. People*, 7 Robt. (N. Y.) 498.

2. *Lingsweiler v. Lingsweiler*, 57 N. Y. Super. Ct. 395; 18 Civ. Pro. Rep. (N. Y.) 81.

3. *New York Code Civ. Proc.*, § 2452. Unless served as above prescribed, the order is of no effect and the judge gains no jurisdiction. *People v. Warner*, 51 Hun (N. Y.) 53.

The omission of the judgment creditor to subscribe the copy of the affidavit and order in supplementary proceedings with his office and place of address, is a mere irregularity, not vitiating the service of the order, and not authorizing the judge who made the order to vacate the same upon an *ex parte* application. *Dorsey v. Cummings*, 48 Hun (N. Y.) 76.

Where the copy of the affidavit served failed to correspond with the original and was otherwise defective, the proceedings were dismissed. *National Printing Co. v. Patterson*, 4 N. Y. Month. Law Bull. 64.

Subpœnas to witnesses in supplementary proceedings, should be issued under the hand of the referee before whom they are to testify, and not in the name of the county judge and county clerk. *People v. Ball*, 37 Hun (N. Y.) 245.

A judgment debtor was properly served. His motion to have the order vacated was denied, and an order was made directing him to appear on a day named. It was held that the last mentioned order need not be personally served. *Johnson v. Tuttle*, 17 Abb. Pr. (N. Y.) 315.

It was formerly held that the affidavit need not be served with the order. *Barker v. Johnson*, 4 Abb. Pr. (N. Y.) 435; *Farquaharson v. Kimball*, 9 Abb. Pr. (N. Y.) 385, note; *Green v. Bullard*, 8 How. Pr. (N. Y.) 313.

In *New Jersey*, service of an order for discovery may be made beyond the jurisdiction of the court in which the judgment is, and even out of the state. *Seyfert v. Edison*, 47 N. J. L. 428.

An order made by a judge of the supreme court may be served in any part of the state. *Bingham v. Disbrow*, 37 Barb. (N. Y.) 24.

The order may be served by any one.¹ But its service after the return day is invalid.²

All irregularities in the mode of service of the order are waived by the appearance of the judgment debtor and his submitting to examination without objection.³

Proof of the service must be made by affidavit; a certificate of the sheriff is not sufficient.⁴

XI. ATTENDANCE FOR EXAMINATION.—It may be said generally that one cannot be required to attend for examination outside the county of his residence or place of business.⁵

The judgment debtor must not only appear at the place men-

in *North Carolina*, the leaving of a copy of the order with the judgment debtor's wife, was held to be sufficient service of the order on the judgment debtor. *Turner v. Holden*, 109 N. Car. 182.

1. *Utica City Bank v. Buel*, 9 Abb. Pr. (N. Y.) 385; 17 How. Pr. (N. Y.) 498.

2. *Henderson v. Stone*, 2 Sweeney (N. Y.) 468; 40 How. Pr. (N. Y.) 333.

3. *Newell v. Cutler*, 19 Hun (N. Y.) 74; *Billings v. Carver*, 54 Barb. (N. Y.) 40.

4. *Utica City Bank v. Buel*, 17 How. Pr. (N. Y.) 498; 9 Abb. Pr. (N. Y.) 385.

5. *New York Code Civ. Proc.*, § 2459; *Strybing v. Hicks*, 2 N. Y. Month. Law Bull. 6; *Merrill v. Allin*, 46 Hun (N. Y.) 623; *Wall v. Whisler*, 14 Ind. 228; *O'Brien v. Flanders*, 41 Ind. 486; *Folsom v. Clark*, 48 Ind. 414; *Hutchinson v. Symons*, 67 N. Car. 156; *Hasty v. Simpson*, 77 N. Car. 69; *Kennesaw Mills Co. v. Walker*, 19 S. Car. 104.

In *South Carolina*, the defendant in execution has a right to insist on being examined in the county where he resides or has an office. But this is a personal privilege which he may waive, and he does so if, without objection, he files a written statement which is accepted in lieu of his personal appearance required by the order of the court. *Banks v. Northrop*, 19 S. Car. 473.

Under the old *New York* code the place of the attendance of a third person was not specified, and it was left to the discretion of the judge to select a convenient county. *Courtois v. Harrison*, 1 Hilt. (N. Y.) 109; *Foster v. Prince*, 8 Abb. Pr. (N. Y.) 407.

After the return unsatisfied of an execution issued on a judgment of a court of New York county to the sheriff of an outside county where, prior to the judgment, the judgment debtor re-

sided, and after the said return, the debtor became a resident of New York county, it was held that the proceedings supplementary to the execution were properly begun in New York county. *Gould v. Moore*, 51 How. Pr. (N. Y.) 188.

The transaction of business here referred to must be personal and not through an agent. *Brown v. Gump*, 59 How. Pr. (N. Y.) 507. But it need not be his principal place of business. *McEwan v. Burgess*, 15 Abb. Pr. (N. Y.) 473; 25 How. Pr. (N. Y.) 92.

It was held that a weigher in the custom house in *New York* had not a place there for the personal transactions of business. *Belknap v. Hasbrouck*, 13 Abb. Pr. (N. Y.) 418 n.

The word "office," used in § 2459 of the *New York Code Civ. Proc.*, is not used in its technical sense, but designates the place where a party continually passes his time in the transaction of business. *Cass v. Crichton*, N. Y. Daily Reg., March 30th, 1881.

A non-resident judgment debtor who has a place for the transaction of business in person, in a certain county in the state, may be examined there; but if he has no such place of business, he must be examined in the county where the judgment roll or the transcript is filed. *Anyway v. David*, 9 Hun (N. Y.) 296.

A witness may be compelled to attend in a county outside that of his residence. *Foster v. Wilkinson*, 37 Hun (N. Y.) 242.

Before Whom—Judge or Referee.—In *New York*, an order requiring a person to attend and be examined must require him so to attend and be examined either before the judge to whom the order is returnable or before a referee designated therein. *New York Code Civ. Proc.*, § 2442; *Howe v. Welch*, 11 Civ. Pro. Rep. (N. Y.) 444.

tioned in the order, but must present himself to the judge or answer his name when called.¹

XII. THE REFEREE—1. **Appointment and Removal.**—In *New York*, the referee's appointment may be made *ex parte*, before the appearance of the judgment debtor in the supplementary proceedings.²

The appointing judge may modify or vacate his order, and, in his discretion, may remove the referee. The order of removal is not appealable.³

2. **Oath and Its Waiver.**—An oath is required of the referee, unless waived.⁴

3. **Powers and Duties.**—The referee may be empowered to issue

1. *Myers v. Janes*, 3 Abb. Pr. (N. Y.) 301. See *People v. Wilgus*, 5 Den. (N. Y.) 58. The debtor should wait at the designated place, in the absence of the examining officer, a reasonable time (usually half an hour), and though he does not so wait the proceedings are still binding on him. *Reynolds v. McElhone*, 20 How. Pr. (N. Y.) 454.

Reference—When Ordered.—In *New York*, at any stage of the proceedings, the judge to whom the order is returnable may, in his discretion, make an order directing that any other examination or testimony be taken by, or that a question arising be referred to, a referee designated in the order; where a question is so referred the referee may be directed to report either the evidence or the facts. *New York Code Civ. Proc.*, § 2443.

2. *Conway v. Hitchens*, 9 Barb. (N. Y.) 378; *Green v. Bullard*, 8 How. Pr. (N. Y.) 313, *overruling Hatch v. Weyburn*, 8 How. Pr. (N. Y.) 163; *Hulsaver v. Wiles*, 11 How. Pr. (N. Y.) 446.

The appointment is discretionary with the judge making the order. *Hollister v. Spafford*, 3 Sandf. (N. Y.) 742. See also *Howe v. Welch*, 11 Civ. Pro. Rep. (N. Y.) 444.

The referee need not reside in the county. *Wilson v. Andrews*, 9 How. Pr. (N. Y.) 39; *Bingham v. Disbrow*, 37 Barb. (N. Y.) 24.

It was held in *Bonner v. McPhail*, 31 Barb. (N. Y.) 107, that a judge could not appoint a referee to take evidence without the jurisdiction of his own court.

The order may direct an appearance before the referee and an appearance afterwards before the judge. *Sickles v. Hanley*, 4 Abb. N. Cas. (N. Y.) 231.

The nomination is made usually by the attorney for the moving party, but the attorney and the referee should not have offices in the same building. *Gilbert v. Frothingham*, 31 Civ. Pro. Rep. (N. Y.) 288.

The order appointing the referee need not necessarily be incorporated in the order directing the examination. The order is presumed, in the absence of evidence to the contrary, to have been served on the debtor. *Lewis v. Penfield*, 39 How. Pr. (N. Y.) 490.

In *California*, the clerk of the attaching creditor was appointed referee in supplementary proceedings. On appeal the appointment was allowed to stand, the reason being that the powers of a referee were so limited that the fact of his connection with the attaching creditor could not prejudice the rights of the judgment debtor. *Adams v. Hackett*, 7 Cal. 187.

3. *Pardee v. Tilton*, 83 N. Y. 623; 11 N. Y. Wkly. Dig. 455; *Carter v. Clarke*, 7 Robt. (N. Y.) 490; *Hulsaver v. Wiles*, 11 How. Pr. (N. Y.) 446. See *Allen v. Starring*, 26 How. Pr. (N. Y.) 57; *Tremain v. Richardson*, 68 N. Y. 619.

4. *New York Code Civ. Proc.*, § 2445; *Malcolm v. Foster*, 5 N. Y. Wkly. Dig. 310; *Browning v. Marvin*, 5 Abb. N. Cas. (N. Y.) 285.

Where all the parties are *sui juris*, and are represented, and the reference proceeds, it has been held that an omission to take the oath is an irregularity merely and is waived. *Katt v. Germania F. Ins. Co.*, 26 Hun (N. Y.) 429; *Nason v. Ludington*, 8 Daly (N. Y.) 149. But in *Flannery v. Sahagian*, 134 N. Y. 90, the contrary was held as to the oath of arbitrators; and see *Browning v. Marvin*, 5 Abb. N. Cas. (N. Y.) 285.

summons,¹ to administer an oath,² and to conduct the examination.³ He has no control over the proceedings before the judge.⁴ He may adjourn the proceedings from time to time.⁵

4. Report.—The referee must certify to the judge the evidence and other proceedings had before him.⁶ Where he is appointed to ascertain certain facts, his finding on these facts should be reported, and not the evidence at large.⁷ His report should be filed in court if subsequent proceedings are to be founded on it, otherwise it is unnecessary.⁸

XIII. PROCEEDINGS ON EXAMINATION—1. In General.—The object of the examination is to allow to the creditor an inexpensive, direct, and effective method of ascertaining by a searching examination the character and good faith of the transfers of the debtor's property, as well as of ascertaining what property is at the time owned by or is in possession of the debtor.⁹

1. *Redmond v. Goldsmith*, 2 N. Y. Month. Law Bull. 19. See also *People v. Ball*, 37 Hun (N. Y.) 245; 22 N. Y. Wkly. Dig. 275; *Knowles v. DeLazare*, 3 How. Pr. N. S. (N. Y.) 35.

A referee appointed by the court to examine a judgment debtor may issue the order for appearance of the debtor, and upon his failure to appear may issue a warrant for his arrest upon prescribed proofs being made. *Marriage v. Woodruff*, 77 Iowa 291.

2. *Woods v. Ross*, N. Y. Daily Reg. Feb. 4th, 1886 (N. Y. Gen. Sessions).

3. The referee is not an inquisitor to press questions himself, and if he attempts so to do in an officious manner and partisan spirit, he transcends his duty. *People v. Leipzig*, 52 How. Pr. (N. Y.) 410.

The powers of the referee are broader in *California* than in *New York*. *Adams v. Hackett*, 7 Cal. 187.

4. *Conway v. Hitchins*, 9 Barb. (N. Y.) 378; *Hulsaver v. Wiles*, 11 How. Pr. (N. Y.) 446; *Kennedy v. Norcott*, 54 How. Pr. (N. Y.) 87.

In *Iowa*, he may issue a warrant for the arrest of the debtor. And the fact that the debtor has been notified to appear for examination does not preclude the referee from afterwards issuing the warrant. *Marriage v. Woodruff*, 77 Iowa 291.

5. *New York Code Civ. Proc.*, § 2444. See *infra*, this title, *Proceedings on Examination*; *Allen v. Starring*, 26 How. Pr. (N. Y.) 57; *Mason v. Lee*, 23 How. Pr. (N. Y.) 466.

6. *New York Code Civ. Proc.*, § 2442; *Smith v. Johnson*, 7 How. Pr. (N. Y.) 39; *Ball v. Goodenough*, 37 How. Pr.

(N. Y.) 479; *Kennedy v. Norcott*, 54 How. Pr. (N. Y.) 87.

7. *Dorr v. Noxon*, 5 How. Pr. (N. Y.) 29.

When the judgment debtor or other person required to attend for examination fails to appear, the referee has no power to adjudge him guilty of contempt, but can only certify the default in his report for the action of the judge to whom the order was returnable. *La Fontaine v. Southern Underwriters' Assoc.*, 83 N. Car. 132.

The referee's certificate of default does not dispense with proof of the fact by affidavit. *Rineland v. Dunham*, 2 Civ. Pro. Rep. (N. Y.) 32.

8. *People v. Mead*, 29 How. Pr. (N. Y.) 360.

The parties are entitled to notice of a motion concerning the report or founded upon it. *Kennedy v. Norcott*, 54 How. Pr. (N. Y.) 87.

9. *Lathrop v. Clapp*, 40 N. Y. 328; 100 Am. Dec. 493; *Clapp v. Lathrop*, 23 How. Pr. (N. Y.) 427; *Sandford v. Carr*, 2 Abb. Pr. (N. Y.) 462; *Forbes v. Willard*, 37 How. Pr. (N. Y.) 193; *LeRoy v. Halsey*, 1 Code Rep. N. S. (N. Y.) 276; *Flint v. Webb*, 25 Minn. 264.

Various Questions of Indiana Procedure.—The following propositions tend to illustrate the procedure in this state:

The plaintiff may waive the answer; and, where this has been done, the debtor may be refused leave afterwards to file an answer. *Cooke v. Ross*, 22 Ind. 157.

The answer cannot be tested by demurrer; but, if it admits the plaintiff's claim, the court can move at once to the disposition of the property in ques-

2. Examination of Parties, Witnesses, and Documents.—Either party may be examined as a witness in his own behalf, and may produce and examine other witnesses, as upon the trial of an action.¹

tion. Or, if the answer is not full enough, a mere motion may be made to compel the party to answer more fully as to the matters specified. *Coffin v. McClure*, 23 Ind. 356.

On the facts discovered from the answer of the defendants, the judgment creditor may frame his complaint. *Banty v. Buckles*, 68 Ind. 49.

The plaintiff must disclose in his complaint or affidavit the nature of the claim which it is sought to enforce, and, if he relies upon a fraudulent transaction between the judgment debtor and a third party, the complaint must contain the proper allegations thereof. *Harris v. Howe*, 2 Ind. App. 419.

The complaint or affidavit may be tested by demurrer; and, after sustaining a demurrer, the court may overrule a motion for final judgment thereon and permit the affidavit to be amended. *Hutchinson v. Trauerman*, 112 Ind. 21.

Where a complaint is filed, issues of law or fact may be joined thereon and be tried as other issues are. *Toledo, etc., R. Co. v. Howes*, 68 Ind. 458, *overruling Burt v. Hoettinger*, 28 Ind. 214; *Eden v. Everson*, 65 Ind. 113.

The pleadings are not required to be formal. *Wallace v. Lawyer*, 91 Ind. 128; *Dillman v. Dillman*, 90 Ind. 585.

Where issues of fact are joined, a trial by jury is a constitutional right of the parties. *McMahan v. Works*, 72 Ind. 19; *American White Bronze Co. v. Clark*, 123 Ind. 230.

The proceeding is such a civil action that the venue may be changed. *Burkett v. Bowen*, 104 Ind. 184.

If third parties interested file answers denying the allegations in the affidavit or complaint of the judgment creditor, these allegations must be substantiated by him. *Chandler v. Caldwell*, 17 Ind. 256; *Bish v. Bradford*, 17 Ind. 490; *O'Brien v. Flanders*, 58 Ind. 22.

It seems that the plaintiff is not concluded by the judgment debtor's examination, but may examine other witnesses. *Pipus v. Deer*, 106 Ind. 135.

As to the evidence given on the trial, it is not necessary to show what is expected to be proved by the ques-

tions asked, as the very nature of the proceeding is an investigation of a subject of which the judgment creditor knows little or nothing. *Comstock v. Grindle*, 121 Ind. 459.

A variance between allegations and proof is fatal. *Harris v. Howe*, 2 Ind. App. 419.

The trial court is not required to make a special finding of facts and to state its conclusion of law thereon. *Hutchinson v. Trauerman*, 112 Ind. 21.

As the hearing is required by law to be summary, and the character of the judgment is expressly prescribed, special findings are not authorized, and, if made, will be treated as a general finding. *Balz v. Benninghof*, 5 Ind. App. 522.

Errors occurring in the trial must be saved and presented on the record as in other civil actions. *Kissell v. Anderson*, 73 Ind. 485.

A motion for a new trial must be made during the term of the trial, or, if the trial was on the last day of the term, then the motion must be made on the first day of the following term. *American White Bronze Co. v. Clark*, 123 Ind. 230.

A judgment rendered in supplementary proceedings, which settles the rights of the parties involved, is a defense in an action on an indebtedness existing from the third person to the debtor. *Bostwick v. Bryant*, 113 Ind. 448.

In *North Carolina*, under the code, if third persons claim an interest in property in their possession which is alleged to belong to the judgment debtor, the interest of all the parties may be litigated. *Farmers', etc., Nat. Bank v. Burns*, 109 N. Car. 105.

In *Missouri*, the execution on which the proceedings are based is admissible in evidence, or if by rule of court it is made part of the original process, the court may take judicial notice of it. *Spengler v. Kaufman*, 43 Mo. App. 5.

1. *New York Code Civ. Proc.*, § 2444. See *Sandford v. Carr*, 2 Abb. Pr. (N. Y.) 462.

Each of the parties may call and examine witnesses in respect to any contested fact which may be brought in

The witnesses are summoned by subpoena issued by or under the hands of the judge or referee, as the case may be,¹ and are entitled to fees as witnesses, as allowed by statute.² Where a person attends and is sworn as a witness, whether subpoenaed or not, he must answer relevant and material questions.³ But, until the service upon the judgment debtor of an order for his examination, a witness cannot be examined.⁴ The deposition of a witness without the state cannot be taken by commission to be used in supplementary proceedings.⁵

The production of books and papers may be compelled by a subpoena *duces tecum* signed by the judge or referee.⁶

issue in the course of the proceeding. *McCullough v. Clark*, 41 Cal. 302.

It is optional with the judgment creditor whether he will examine the judgment debtor or witnesses or both. *Graves v. Lake*, 12 How. Pr. (N. Y.) 33.

Wife of Debtor.—The wife of the judgment debtor may be subpoenaed and examined as a witness in the proceedings, subject to the usual rule regarding privileged communications. *Lockwood v. Worstell*, 15 Abb. Pr. (N. Y.) 430, note.

Formerly in *Wisconsin*, she could have been required to disclose whether she had property of her husband under her control, and could have been attached as for contempt in refusing to answer. *Petition of O'Brien*, 24 Wis. 547; *In re Milburn*, 59 Wis. 32.

But now under § 3030 Rev. Sts. of *Wisconsin*, a commissioner has no power to require any person other than the judgment debtor to appear before him to answer concerning property in his hands belonging to the debtor. *Blabon v. Gilchrist*, 67 Wis. 38.

1. *People v. Ball*, 22 N. Y. Wkly. Dig. 275; *People v. Dutcher*, 3 Abb. Pr. N. S. (N. Y.) 151; *Coates v. Wilkes*, 92 N. Car. 382.

In *Ohio*, the attendance of witnesses may be secured by procuring and serving an order granted by the officer before whom the examination is conducted. *Freeman on Ex.*, § 404.

Failure to Attend.—A judgment debtor who fails to attend after an order for examination has been served upon him, cannot object that he was not examined or that the examination was had in his absence. *Colton v. Bigelow*, 41 N. J. L. 268.

County of Examination.—The provisions of *New York Code Civ. Proc.*, § 2459, which requires the examination of the judgment debtor to be at a place within the county where his

residence or place of business is situated, do not apply to witnesses subpoenaed to appear and testify in such proceedings. A witness may be compelled to be examined in supplementary proceedings in a county other than the one of his residence. *Foster v. Wilkinson*, 37 Hun (N. Y.) 242.

2. *Davis v. Turner*, 4 How. Pr. (N. Y.) 190.

3. *People v. Marston*, 18 Abb. Pr. (N. Y.) 257.

4. *Benjamin v. Myers*, 3 N. Y. St. Rep. 284.

If, under an order for discovery in aid of execution, an examination of witnesses be held without personal notice to the defendant, the proceedings will be set aside as irregular. *Shannon v. McMurtrie*, 48 N. J. L. 427.

5. *Champlin v. Stodart*, 64 How. Pr. (N. Y.) 378; *Graham v. Colborn*, 14 How. Pr. (N. Y.) 52; 6 *Duer* (N. Y.) 678. The provisions of the *New York Code Civ. Proc.*, § 877 *et seq.*, in reference to taking depositions out of the state, relate to actions only, in their various stages, and cannot by their terms or any implication be extended to supplementary proceedings, which, by *New York Code Civ. Proc.*, § 2433, are declared to be special proceedings. *Matter of Attorney*, 83 N. Y. 164; *Morrell v. Hoey*, 24 How. Pr. (N. Y.) 48.

6. *Coates v. Wilkes*, 92 N. Car. 387; *Green v. Hicks*, 1 Barb. Ch. (N. Y.) 316.

"A witness may be required by subpoena *duces tecum* to produce papers on an examination in supplementary proceedings (*Champlin v. Stoddard*, 17 N. Y. Wkly. Dig. 76), and of course a party may be." *Pruden v. Tallman*, 6 Civ. Pro. Rep. (N. Y.) 360.

A corporation called as a witness in proceedings supplementary may be

3. Conduct of Examination.—Examinations of parties or witnesses are taken under oath.¹ Parties may have the advice and instruction of counsel in framing their answers, but witnesses, as a matter of right, cannot.² Cross-examination is permitted.³

Where the examination is taken down incorrectly, the witness is entitled to have it corrected in the original statement.⁴ But where the witness desires to correct his own statements, this should be done by a supplementary statement.⁵

4. Scope of the Examination.—It is impossible to lay down any particular rules on this subject, which shall be universally applicable, farther than this, that the whole examination must have for its single object to ascertain whether there is any property of the debtor which ought to be applied to the payment of the plaintiff's claim; and the extent of the inquiry in each particular case must be left to the good sense of the judge or referee under whose direction it takes place, having in view this general object.⁶

compelled to produce its books, either by order or by subpoena *duces tecum*. *Pendergast v. Dempsey*, 18 Civ. Pro. Rep. (N. Y.) 198; (Supreme Ct.) 10 N. Y. Supp. 938; *Holmes v. Stietz*, 6 Civ. Pro. Rep. (N. Y.) 362, note; *Semmes v. Noel*, N. Y. Daily Reg., March 30th, 1886. But in the latter case, an officer of the corporation who has control of the books, and not a mere employé who has immediate charge of them, should be served. *Wainwright v. Tiffany*, 13 Civ. Pro. Rep. (N. Y.) 222.

A physician cannot be compelled to deliver to his receiver in supplementary proceedings note-books containing private information as to his patients. *Kelly v. Levy* (N. Y. City Ct.), 29 N. Y. St. Rep. 659; 8 N. Y. Supp. 849.

Whether the books and papers are privileged from examination or not, is a question for the judge or referee to decide. *Champlin v. Stoddard*, 17 N. Y. Wkly. Dig. 76.

1. *New York Code Civ. Proc.*, § 2444; *Banty v. Buckles*, 68 Ind. 49. An answer not sworn to may be stricken out on motion. *Coffin v. McClure*, 23 Ind. 356; *Routh v. Spencer*, 30 Ind. 348.

If the debtor has been sworn once, an oath need not be administered again upon a further examination. *Hudson v. Plets*, 11 Paige (N. Y.) 180.

2. *Corning v. Tooker*, 5 How. Pr. (N. Y.) 16. But in *Sandford v. Carr*, 2 Abb. Pr. (N. Y.) 462, the court went further and held that a witness examined in supplementary proceedings was not entitled to have counsel assist on examination. In *Schwab v. Cohen*,

13 N. Y. St. Rep. 709, criticising this case, the court said: "Perhaps not, as a matter of strict right, but it might in some cases be an abuse of discretion to arbitrarily deny the privilege. The fact that a witness attends accompanied by counsel is neither offensive nor dangerous, nor does it necessarily import into the case a troublesome or intermeddling element. The court or referee may at all times limit and restrict the right of counsel and keep them within proper bounds. There can be no general rule upon the subject, as each case must stand on its own peculiarities, as every tub must stand on its own bottom."

3. *Coates v. Wilkes*, 92 N. Car. 386; *Le Roy v. Halsey*, 1 Duer (N. Y.) 589; although in *Corning v. Tooker*, 5 How. Pr. (N. Y.) 16, an earlier case, it was held otherwise under the old code.

An *ex parte* answer of the judgment debtor's debtor, although sworn to and filed in the cause, is not evidence against the judgment debtor, there having been no opportunity for cross-examination. *O'Brien v. Flanders*, 58 Ind. 22.

4. *Sherwood v. Dolen*, 14 Hun (N. Y.) 191.

5. The original statement should be left unaltered, but the party should be permitted to make the desired correction by a supplemental statement. *Corning v. Tooker*, 5 How. Pr. (N. Y.) 16.

6. **Scope of the Examination.**—*Le Roy v. Halsey*, 1 Duer (N. Y.) 590; *Heilbronner v. Levy*, 64 Wis. 636; *Cleveland v. Burnham*, 60 Wis. 16; *Forbes v. Willard*, 37 How. Pr. (N. Y.)

193; *Clapp v. Lathrop*, 23 How. Pr. (N. Y.) 423; 40 N. Y. 328; 100 Am. Dec. 493.

At one time the scope of the inquiry was limited. *Van Wyck v. Brady*, 3 Code Rep. (N. Y.) 157; *Town v. Safe-guard Ins. Co.*, 4 Bosw. (N. Y.) 683; but now it is much broader. *Mechanics*, etc., *Bank v. Healy*, 89 N. Y. 605; *Seligman v. Wallach*, 16 Abb. N. Cas. (N. Y.) 319.

The creditor may inquire into any recent transfer of the property, both by an examination of the defendant himself and any party to the transaction, or other witnesses. *Lathrop v. Clapp*, 40 N. Y. 328; 100 Am. Dec. 499.

But in the court of common pleas it was held that no examination will be allowed which seeks to set aside the assignment, and will only be permitted where it is in aid of it. The examination should not extend to an inquiry as to whether the preferences are fraudulent, or as to whether the assignors, either in making the assignment or any transactions anterior to the assignment or any act that was fraudulent in fact or fraudulent in contemplation of law. No inquiry as to what their assignors prior to the assignment did with borrowed money or with their own property should be permitted. *Matter of Everit*, 10 Daly (N. Y.) 99; *In re Rindskopf*, Dist. Ct. Jour., Jan. 9th, 1885. See also *Sp. T. 1882, Bacon v. Goldsmith*, 1 N. Y. City Ct. Rep. 462; *Schneider v. Altman*, 2 How. Pr. N. S. (N. Y.) 448.

Other courts of record, however, allow such an examination. *Seligman v. Wallach*, 6 Civ. Pro. Rep. (N. Y.) 232; *Mechanics' and Traders' Bank v. Healy*, 14 N. Y. Wkly. Dig. 120; *Schneider v. Altman*, 2 How. Pr. N. S. (N. Y.) 448.

In *Bannigan v. Piek* (Chambers Supreme Ct., May, 1884), unreported; cited by *Hawes, J.*, in *Schneider v. Altman*, 8 Civ. Pro. Rep. (N. Y.) 246, an objection taken in the course of an examination in supplementary proceedings, to questions concerning property owned by the judgment debtor, at and prior to the time he made a general assignment, was overruled orally by *Donohue, J.*

A witness will not be excused from answering on the ground that he claims to own the property. *Sandford v. Carr*, 2 Abb. Pr. (N. Y.) 463; and the examining party may inquire into the nature of his interest. *Barculows v. Protection Co.*, 2 Code Rep. (N. Y.)

72. See also *Green v. Hicks*, 1 Barb. Ch. (N. Y.) 317.

The name of a purchaser of the debtor's property was held to be immaterial where the consideration was for full value; but when it appeared that the last-named requisite was wanting, the purchaser's name was then held to be material. *Williams v. Carroll*, 2 Hilt. (N. Y.) 438.

In *Indiana*, great liberality is allowed in the examination; and if the questions propounded are at all pertinent, the court should require that they be answered. An inquiry as to what has become of the proceeds of the property disposed of by the judgment debtor is very pertinent. *Comstock v. Grindle*, 121 Ind. 459.

Where prior to the examination, the judgment debtor has sworn to a tax list showing property to belong to him, this list may properly be admitted as evidence in the examination. And an inquiry as to the disposition made by the judgment debtor of the property therein named, and if not disposed of, as to its whereabouts, may properly be made. *Towns v. Smith*, 115 Ind. 480; followed in *Comstock v. Grindle*, 121 Ind. 459.

In *Missouri*, the judgment debtor can be compelled to disclose all the property he possesses and not merely what he considers enough to satisfy the judgment. *State v. Barclay*, 86 Mo. 55.

Privileged Communications.—A physician will not be permitted to disclose professional information acquired in a relation of confidence. So he could not be compelled to deliver to a receiver of his property, appointed in proceedings supplementary to execution, his original books of account which contained privileged information concerning his patients. *Kelly v. Levy*, 29 N. Y. St. Rep. 659. See **PRIVILEGED COMMUNICATIONS**, vol. 19, p. 120.

Before Execution Returned.—In *Smith v. Weeks*, 60 Wis. 106, under § 3031 Rev. Sts. *Wisconsin*, ch. 131, it was held that an order in supplementary proceedings, when the execution had not been returned, must be specific as to the property which it is alleged the judgment defendant unjustly refuses to apply towards the satisfaction of the judgment; and under the order the defendant may be required to answer only concerning the property specified.

Against Third Parties.—In this proceeding the examination is not limited

It is not an excuse for a refusal to answer questions that the answers may tend to show that the party or witness has been guilty of fraudulent conduct.¹

Questions must be relevant.² The judgment debtor cannot be compelled to answer as to any property acquired by him subsequent to the service of the order of examination and the injunction.³

to the property alleged in the affidavit alone, but may cover all the property of the debtor, and any question claiming to show that the third party has property of the debtor, is relevant. *Hart v. Johnson*, 7 N. Y. St. Rep. 133; 43 Hun (N. Y.) 505. But see *Tompkins County Bank v. Trapp*, 21 How. Pr. (N. Y.) 17.

Taxes—Sufficiency of Personal Property.—The question as to the ownership of sufficient property to pay a tax, cannot be raised for the first time on the examination in supplementary proceedings. If the party wishes to raise that question, he should do so by motion to set aside the order. *Matter of Hartshorn*, 44 N. Y. St. Rep. 16.

1. *New York Code Civ. Proc.*, § 2460; *Lathrop v. Clapp*, 40 N. Y. 328; 100 Am. Dec. 493, *aff'g* 23 How. Pr. (N. Y.) 423. *Town v. Safeguard Ins. Co.*, 4 Bosw. (N. Y.) 683, and *Van Wyck v. Brady*, 3 Code Rep. (N. Y.) 157, lay down a rule contrary to the text. But *Bockes, J.*, in *Clapp v. Lathrop*, 23 How. Pr. (N. Y.) 443, says that this latter case "has not been generally accepted as an authority—indeed it has been almost universally disregarded in practice throughout the state."

The fraud referred to in the above is not simply a fraud in the disposition of the property, but any fraud whatever. *Forbes v. Willard*, 37 How. Pr. (N. Y.) 200.

But the witness should not be required to sign a deposition showing fraud on his part. *Marx v. Spaulding*, 43 Hun (N. Y.) 355.

His answer cannot be used against him in a criminal proceeding. *New York Code Civ. Proc.*, § 2460; *North Carolina Code*, § 2264; *La Fontaine v. Southern Underwriters' Assoc.*, 83 N. Car. 132. See *Steinehart v. Farrell*, 3 N. Y. St. Rep. 392; *Barber v. People*, 17 Hun (N. Y.) 368; *Loomis v. People*, 19 Hun (N. Y.) 601.

It has been held that proceedings instituted on a warrant of arrest under the non-imprisonment act are not criminal proceedings, and that the examination of the defendant in supple-

mentary proceedings may be used therein. *People v. Spier*, 12 Hun (N. Y.) 70. See also *Moak v. De Forrest*, 5 Hill (N. Y.) 605. But see *Keiley v. Dusenbury*, 2 Abb. N. Cas. (N. Y.) 360, where it was held that the examination in supplementary proceedings cannot be so used.

An *Ohio* statute which provides that the answer of a person under similar proceedings shall not be used as evidence against him in a prosecution for a fraud, is held not to apply to a civil action based on discoveries made in such proceedings and brought for the purpose of applying upon a judgment property subject to be so applied. *Goode v. Patterson*, 40 Ohio St. 345.

2. *Corning v. Tooker*, 5 How. Pr. (N. Y.) 19; *Hunt v. Enoch*, 6 Abb. Pr. (N. Y.) 212.

Evidence Against Assignee.—In *Bennett v. McGuire*, 58 Barb. (N. Y.) 625, which was an action against a judgment debtor and his assignee to set aside an assignment of security made by a debtor in fraud of his creditors, the testimony of the debtor, taken upon his examination in the proceedings supplementary to execution, was held inadmissible as against the assignee and the wife of the debtor who had taken a subsequent assignment from the assignee. See also *Gillespie v. Walker*, 56 Barb. (N. Y.) 185.

But evidence of the judgment debtor, taken in supplementary proceedings, is admissible in an action in which he testified for the defendant, not only against him as an admission, but as against all the defendants for the purpose of affecting his credibility by showing conflicting statements on his part. *Wright v. Nostrand*, 94 N. Y. 31.

3. These proceedings operate on property which the debtor has at the time the order is obtained. *Potter v. Low*, 16 How. Pr. (N. Y.) 549; and do not affect property acquired afterwards. *Merriam v. Hill*, 1 N. Y. Wkly. Dig. 260; *Columbian Institute v. Cregan*, 3 N. Y. St. Rep. 287; and see also *Gregory v. Valentine*, 4 Edw. Ch. (N. Y.) 282.

The examination is a record, which the debtor may compel the creditor to file in court.¹

5. **Adjournment.**²—The judge or referee may adjourn the proceedings from time to time as he thinks proper,³ even though the judgment debtor refuses to consent thereto, or is absent;⁴ but not indefinitely.⁵

XIV. REACHING AND APPLYING JUDGMENT DEBTOR'S PROPERTY—

1. **Property That can be Reached**—*a.* IN GENERAL.—As a general rule every species of property, not exempt by law, may be reached in proceedings supplementary to execution.⁶ But, as it is a condition precedent to the institution of such proceedings that an execution against both the real and personal property of the debtor shall be returned unsatisfied, in whole or in part, it is evident that property which can be found by the officer and taken on execution is not intended to be within the scope of supplementary proceedings.⁷

1. *Renner v. Meyer*, 22 Abb. N. Cas. (N. Y.) 438.

2. See *infra*, this title, *Discontinuance and Dismissal of Proceedings*.

3. *New York Code Civ. Proc.*, § 2444. See *supra*, this title, *Powers and Duties of the Referee*.

The adjournment may be made in the absence of the judgment debtor and even when he is not represented at the time. Ill health or extreme mental excitement is good ground for postponing the examination, and a judge or referee will never put a party in peril by compelling an examination under circumstances of danger to health or intellect. The question is, however, for the judge or referee before whom the examination is to be conducted. *Mason v. Lee*, 23 How. Pr. (N. Y.) 468.

In *People v. Oliver*, 66 Barb. (N. Y.) 575, it is said: "The day on which the debtor should appear a second time before the referee, was agreed upon between the creditor's counsel, the debtor, and referee. Such an arrangement by parol is valid."

4. *Kaufman v. Thrasher*, 10 Hun (N. Y.) 438, *overruling* *People v. Hulburt*, 5 How. Pr. (N. Y.) 446.

The failure of a party to appear on an adjourned day may be punished as a contempt, although the adjournment was made in the absence of the party upon the consent of his attorney. *Parker v. Hunt*, 15 Abb. Pr. (N. Y.) 410 n.

5. If the reference is not adjourned to some specified time, or the right reserved to the complainants to have a further examination within some reasonable time to be prescribed by the

master upon a further summons, examination of the defendant will be considered as closed and the master's power on the order of reference as spent. *Hudson v. Plets*, 11 Paige (N. Y.) 180.

When the examination has been once closed by the referee, he has no power to again open it. This can be done only by an order of a judge. *Orr's Case*, 2 Abb. Pr. (N. Y.) 457.

6. *Adams v. Hackett*, 7 Cal. 201; *Drought v. Curtiss*, 8 How. Pr. (N. Y. Supreme Ct.) 56; *Lynch v. Johnson*, 48 N. Y. 33; *In re Milburn*, 59 Wis. 34; *Flint v. Webb*, 25 Minn. 263; *Towne v. Campbell*, 35 Minn. 231.

In *Staples v. May*, 87 Cal. 178, in regard to the question whether choses in action, arising from torts committed on the property of the judgment debtor, can be reached by supplementary proceedings, the court said: "We know of no reason to hold any narrower construction of our statutory provisions on this subject than obtains in *New York*, where it is said that these proceedings can reach everything which could formerly have been made to contribute to the payment of judgments by the aid of creditors' bills, and where it was held that creditors' bills would reach choses in action arising from torts committed on the property of the judgment debtor, to which his creditor would have a right to resort."

7. *Bunn v. Daly*, 24 Hun (N. Y.) 626; *Tinke v. Langdon* (Supreme Ct.), 3 N. Y. Wkly. Dig. 384.

In *Albany City Nat. Bank v. Gaynor*, 67 How. Pr. (N. Y. Supreme Ct.) 421, the judge refused to order the

b. INTERESTS IN REAL PROPERTY.—It has been held that the following interests in real property¹ can be reached: a dower right;² rents due to a tenant by the curtesy;³ the interest of a tenant by the curtesy initiate when the wife's property has been sold in partition;⁴ an annuity charged by devise on real estate for the judgment debtor's benefit;⁵ an interest in a contract for the purchase of real estate;⁶ the surplus from a sale in partition;⁷ the income of the judgment debtor's real estate, during the period allowed by statute for redemption after a sale on execution.⁸

c. PERSONAL PROPERTY.—The following varieties of personal property have been held to be subject to these proceedings: a watch of the judgment debtor, unless necessary to be used in his business;⁹ a seat in the board of trade¹⁰ or a stock

delivery to a receiver of the possession of the judgment debtor's real estate on which the judgment was a lien and which could have been sold under execution before the appointment of the receiver. See also *Williams v. Sexton*, 19 Wis. 42.

In *Iowa*, the court has no authority to make an order for the delivery of property which is visible and can be levied on by execution. *Reardon v. Henry*, 82 Iowa 134.

In *Balz v. Benninghof*, 5 Ind. App. 522, the court said: "To justify a resort to the extraordinary proceeding invoked in this case, the defendant must have been destitute of other leviable property than that sought to be reached." *Cit- ing Earl v. Skiles*, 93 Ind. 178; *Cushman v. Gephart*, 97 Ind. 46; *Taylor v. Johnson*, 113 Ind. 164.

1. The words "lands and tenements," in section 433 of the *Kansas* Civil Code, include those in which the debtor has an equitable interest. *Kiser v. Sawyer*, 4 Kan. 433.

In *New Jersey*, a receiver appointed in supplementary proceedings is not vested with any interest in the real estate of the judgment debtor. *Higgins v. Gillesheiner*, 26 N. J. Eq. 308; *Skin- ner v. Terhune*, 45 N. J. Eq. 571; *Bold v. Dean*, 48 N. J. Eq. 193.

2. *Sayles v. Naylor* (Buff. Super. Ct.), 5 N. Y. St. Rep. 816; *Tompkins v. Fonda*, 4 Paige (N. Y.) 448; *Stewart v. McMartin*, 5 Barb. (N. Y.) 438; *Moak v. Coats*, 33 Barb. (N. Y.) 498, *affirmed*, 33 How. Pr. (N. Y.) 618.

In *Payne v. Becker*, 87 N. Y. 153, *rev'd* 22 Hun (N. Y.) 28, it was held that the dower interest of a widow in lands of which her deceased husband had been seised, although unmeasured, was assignable as a right in action; and,

therefore, passed to the receiver in supplementary proceedings; and that he might bring an action in his own name for partition.

3. *Beamish v. Hoyt*, 2 Robt. (N. Y.) 307.

4. *Ellsworth v. Cook*, 8 Paige (N. Y.) 643.

5. *Ten Brock v. Sloo*, 2 Abb. Pr. (N. Y. Supreme Ct.) 234; 13 How. Pr. (N. Y. Supreme Ct.) 28. The same might formerly have been reached by a creditor's bill in equity. *Degraw v. Clason*, 11 Paige (N. Y.) 136.

6. *Ellsworth v. Cuyler*, 9 Paige (N. Y.) 418; *Figg v. Snook*, 9 Ind. 202.

7. *Sherman v. Carvill*, 73 Ind. 126.

8. *Farnham v. Campbell*, 10 Paige (N. Y.) 598; *Albany City Bank v. Schermerhorn*, 9 Paige (N. Y.) 372; 38 Am. Dec. 551.

9. *Deposit Nat. Bank v. Wickham*, 44 How. Pr. (N. Y. Supreme Ct.) 421. If it is necessary in carrying on his business, it cannot be reached. *Mer- riam v. Hill* (Marine Ct.), 1 N. Y. Wkly. Dig. 260; *Matter of Edlunds*, 35 Hun (N. Y.) 367.

But where it is worn merely as an ornament, and that only on special occasions, it will not be exempt, although a present from the debtor's mother. *Peck v. Mulvihill*, 2 City Ct. Rep. (N. Y.) 424. See also *Bitting v. Vandenburg*, 17 How. Pr. (N. Y. Super. Ct.) 82; *Bumpus v. Maynard*, 38 Barb. (N. Y.) 626.

10. *Powell v. Waldron*, 89 N. Y. 328; 42 Am. Rep. 301. Upon the sale of a seat by the receiver to a purchaser who is a member, the judgment debtor can be compelled to transfer it to him. *Rit- terband v. Baggett*, 42 N. Y. Super. Ct. 556; 4 Abb. N. Cas (N. Y. Super. Ct.) 67.

exchange;¹ an interest in a patent;² an interest in a partnership in dissolution;³ money due to a judgment debtor,⁴ or fraudulently

Where a seat in the New York Cotton Exchange under the by-laws of that association is transferable by assignment of the certificate to members under certain prescribed rules and restrictions, and pursuant thereto the seat has been pledged by the judgment debtor as collateral for a loan, a receiver appointed in these proceedings has the right to redeem the seat. *Powell v. Waldron*, 89 N. Y. 328; 42 Am. Rep. 301.

1. *Habenicht v. Lissak*, 78 Cal. 351. See also STOCK EXCHANGE, vol. 23, p. 755; *Grocers' Bank v. Murphy*, 10 Daly (N. Y.) 168; *Londheim v. White*, 67 How. Pr. (N. Y. City Ct.) 467; *Sewell v. Ives*, 61 How. Pr. (N. Y. Super. Ct.) 54.

On the sale of a debtor's title to a seat in the Stock Exchange by a receiver in supplementary proceedings, the debtor will, upon motion, be required to sign a consent that the purchaser be vested with all the rights, privileges, and benefits which belong to such a membership. The court has no power to compel the debtor to formally resign his membership in the Exchange, nor to direct him to nominate or recommend as his successor a person unknown to him. The consent, however, is equivalent to such resignation and nomination, and on the refusal of the Exchange to accept the nomination or perform its duties in the premises, proper action may be taken by the receiver. *Roome v. Swan*, 15 Civ. Pro. Rep. (N. Y. City Ct.) 344.

2. *Pacific Bank v. Robinson*, 57 Cal. 520; 40 Am. Rep. 120. *Citing Barnes v. Morgan*, 3 Hun (N. Y.) 703; and *distinguishing Stephens v. Cady*, 14 How. (U. S.) 528. See also *Thorne v. Thomas* (Supreme Ct.), 1 N. Y. Month. Law Bull. 53; *Maxon v. Gray*, 15 R. I. 475.

A patent right may be reached by a creditor's bill. *Stephens v. Cady*, 14 How. (U. S.) 528. And in such case, the want of utility or novelty of the patented article is no defense to the patentee or his fraudulent assignee. *Gillett v. Bate*, 86 N. Y. 87; 10 Abb. N. Cas. (N. Y. Ct. of App.) 88.

3. *Webb v. Overmann*, 6 Abb. Pr. (N. Y. Supreme Ct.) 92. It may also be reached by a creditor's bill. *Eager v. Price*, 2 Paige (N. Y.) 333.

4. See *New York Code Civ. Proc.*, § 2447; *Bolt v. Keyhoe*, 30 Hun (N. Y.)

619; *affirmed*, 96 N. Y. 646; *Whalen v. Tennyson* (Super. Ct.), 1 N. Y. Month. Law Bull. 22.

Money due the judgment debtor for wages or salary can be reached. *Telles v. Lynde*, 47 Fed. Rep. 912; *Woodman v. Goodenough*, 18 Abb. Pr. (N. Y. Supreme Ct.) 265; *Gerregani v. Wheelwright*, 3 Abb. Pr. N. S. (N. Y. C. Pl.) 264; *Potter v. Low*, 16 How. Pr. (N. Y. Supreme Ct.) 549; *Tripp v. Childs*, 14 Barb. (N. Y.) 85; *Bishop v. Hornsberg*, (Marine Ct.) N. Y. Daily Reg. Aug. 2d, 1881; *Osborne v. Wilkes*, 108 N. Car. 651.

The rule that a debt due from a municipal corporation cannot be reached by process of garnishment, has no application to the examination of a judgment debtor in supplementary proceedings. *Knight v. Nash*, 22 Minn. 452.

A debt due to the defendant in a judgment, and payable in the bonds of a municipal corporation, is liable to be seized on an attachment execution, and the bonds are a proper subject of sale under such a process. *King v. Hyatt*, 41 Pa. St. 229.

In *Indiana*, a promissory note not yet due can be reached. *Pursell v. Pappenheimer*, 11 Ind. 328; *Dunning v. Rogers*, 69 Ind. 272.

Where a person disclosed that he did not owe the judgment debtor anything, but that he had signed a note for him as trustee for other persons, it was held that there was nothing on which to base a judgment against him. *Timm v. Stegman* (Wash. 1893), 32 Pac. Rep. 1004.

Money in Court.—Where money belonging to the judgment debtor is in the hands of a court, it may be reached in supplementary proceedings instituted in that court, and the court may order it paid to the judgment creditor in satisfaction of his judgment. *McDaniel v. Stokes*, 19 S. Car. 60; *Union Bank v. Northrop*, 19 S. Car. 473; *Bank of Minn. v. Hayes*, 11 Mont. 533.

Where a third person, in accordance with an order of the court, paid to the sheriff money due the judgment debtor for building a house, and on the same day a number of mechanics' liens were filed against the premises, the court refused to make an order requiring the sheriff to pay the money to the judgment creditor until the lien suits should be determined. *Clark v. Gallagher*

withheld by him;¹ alimony directed to be paid to a woman;² money on a life insurance policy received and deposited;³ an annuity given to a judgment debtor and wife, but belonging solely to the judgment debtor during their joint lives;⁴ an equity of redemption in chattels which are mortgaged;⁵ an interest in a personal estate as next of kin;⁶ a chose in action on a contract or arising from a tort, which diminishes the debtor's estate;⁷ prop-

(Supreme Ct.), 21 N. Y. St. Rep. 314; (Supreme Ct.) 3 N. Y. Supp. 312.

The proceeds of land taken in condemnation proceedings may be reached in an equitable action in aid of execution, while in the hands of the clerk of the court to be paid to the judgment debtor. *Ahlhauser v. Doud*, 74 Wis. 400.

In *Terry v. Deitz*, 49 Ind. 293, it was held that money deposited with the clerk of the court for the purpose of redeeming real estate which had been sold under a decree of foreclosure, could not be reached in supplementary proceedings until it was determined what right the judgment debtor had to redeem such real estate.

One bound by contract to support and maintain the judgment debtor, is not liable to the creditor in money in supplementary proceedings against the debtor. *Mahony v. Hunter*, 30 Ind. 246.

1. *Baker v. State*, 109 Ind. 47, *criticizing* *Wallace v. Lawyer*, 54 Ind. 501; 23 Am. Rep. 661.

Money or other personal property belonging to the debtor and in his possession or under his control, may by order of the court be turned over to the sheriff for the benefit of the creditor. *Dickinson v. Onderdonk*, 18 Hun (N. Y.) 479; *Serven v. Lowerre* (Rockland Co. Ct.), 23 N. Y. Supp. 1052; 3 Misc. (N. Y. Rockland Co. Ct.) 113. See also *Duffy v. Dawson* (C. Pl.), 21 N. Y. Supp. 978. But the court will not order the property to be delivered to the creditor himself. *Dickinson v. Onderdonk*, 18 Hun (N. Y.) 479.

2. *Stevenson v. Stevenson*, 34 Hun (N. Y.) 157.

3. This is so whether the money is in the actual control of the debtor or not. *Millington v. Fox* (Oneida Co. Ct.), 13 N. Y. Supp. 334. See also *Crosby v. Stephan*, 32 Hun (N. Y.) 478; *Millington v. Fox*, 13 N. Y. Supp. 334.

A judgment debtor, examined in supplementary proceedings before a referee, testified that he became entitled to the sum of \$713, upon an insurance policy upon the life of his brother, who died on the third of May, 1887; that he re-

ceived a check for the insurance in September of the same year, and used the money obtained upon the check in payment of other debts than that owing to the plaintiff. The order instituting the proceedings was served on the judgment debtor in June, 1887, after the judgment debtor became the owner of the said insurance money. It was held that the insurance money was applicable to the judgment on which the proceedings were based. *Walter v. Pecare*, 57 Hun (N. Y.) 587; 11 N. Y. Supp. 146.

4. *Gifford v. Rising*, 55 Hun (N. Y.) 61; (Supreme Ct.) 28 N. Y. St. Rep. 310.

5. *Hull v. Carnley*, 17 N. Y. 202; *Manning v. Monaghan*, 23 N. Y. 539; *Campbell v. Fish*, 8 Daly (N. Y.) 162.

The receiver in supplementary proceedings may bring an action to set aside a chattel mortgage executed in fraud of creditors. *Mandeville v. Avery*, 124 N. Y. 376; *Miller v. Mackenzie*, 29 N. J. Eq. 291; *Hamlin v. Wright*, 23 Wis. 491.

6. *Rand v. Rand*, 78 N. Car. 12. The same may be reached by a creditor's bill, where supplementary proceedings are not substituted therefor. *McArthur v. Hoysradt*, 11 Paige (N. Y.) 495. But under the code, a creditor's bill may not be filed for this purpose. *Rand v. Rand*, 78 N. Car. 12.

7. *Staples v. May*, 87 Cal. 178; *Figg v. Snook*, 9 Ind. 202; *Butler v. Jaffray*, 12 Ind. 504; *Graydon v. Barlow*, 15 Ind. 197; *Keightley v. Walls*, 27 Ind. 384; *Devan v. Ellis*, 29 Ind. 72; *Folsom v. Clark*, 48 Ind. 414; *O'Brien v. Flanders*, 58 Ind. 22; *Eden v. Everson*, 65 Ind. 113; *Dunning v. Rogers*, 69 Ind. 272; *Sherman v. Carvill*, 73 Ind. 126; *Fowler v. Griffin*, 83 Ind. 297; *Earl v. Skiles*, 93 Ind. 178; *McKee v. Judd*, 12 N. Y. 622; 64 Am. Dec. 513; *Zabriskie v. Smith*, 13 N. Y. 332; 64 Am. Dec. 551; *Robinson v. Weeks*, 6 How. Pr. (N. Y. Supreme Ct.) 161; *Ten Broeck v. Sloo*, 13 How. Pr. (N. Y. Supreme Ct.) 28; *Drought v. Curtiss*, 8 How. Pr. (N. Y. Supreme Ct.) 56; *Drouwer v. Hill*, 1 Sandf. (N. Y.) 649; *Gillet v. Fair-*

erty held in trust for the judgment debtor's benefit, where the trust proceeded from the judgment debtor himself,¹ or where the trust proceeds from another and the money is held only to be paid to the judgment debtor;² money lost by the judgment

child, 4 Den. (N. Y.) 80; Hudson v. Pleta, 11 Paige (N. Y.) 180; People v. Tioga C. P., 19 Wend. (N. Y.) 73; Butler v. New York, etc., R. Co., 22 Barb. (N. Y.) 110; Gould v. Gould, 36 Barb. (N. Y.) 275.

A cause of action for a personal tort, such as slander, deceit, etc., not being assignable either by voluntary act or operation of law, cannot be so reached. Zabriskie v. Smith, 13 N. Y. 322; Cotterell v. Slosson (N. Y. City Ct.), Daily Reg., Jan. 6th, 1884. But a judgment on a personal tort may be reached. Crouch v. Gridley, 6 Hill (N. Y.) 250; Davenport v. Ludlow, 3 Code Rep. (N. Y. Supreme Ct.) 66.

In Muller v. Hall, 49 How. Pr. (N. Y. Super. Ct.) 374, it appeared that a mortgage held by an executrix as security for money due and coming due under her husband's will, was assigned by her personally, without consideration, to her daughter, the judgment debtor; and it was held that in supplementary proceedings to reach such mortgage, it could not be shown, by oral proof, that the mortgage was held by the executrix in trust for her husband's estate.

1. See 3 N. Y. Rev. St. (7th ed.), p. 2327, § 1; Eden v. Everson, 65 Ind. 113.

Money admittedly transferred by the debtor under an agreement for his future support, can be reached. Davis v. Briggs (Supreme Ct.), 24 N. Y. St. Rep. 896.

Where an assignee, under a general assignment, has not claimed the property of the judgment debtor, the latter remaining in possession and exercising control apparently with the assent and acquiescence of the assignee, the creditor can reach the property under supplementary proceedings begun subsequently to the making of the assignment. Eastern Nat. Bank v. Hulshizer (Supreme Ct.), 2 N. Y. St. Rep. 115.

Where a judgment debtor keeps a bank account under his own name, adding the words "in trust" without any other designation of the trust, the beneficiary not being mentioned, it has been held that the claim against the bank is a *chose in action* in favor of the debtor personally, which the plaintiff is entitled to appropriate. Green v. Gris-

wold (Super. Ct.), 23 N. Y. St. Rep. 218, affirming 17 N. Y. St. Rep. 755.

2. Bacon v. Bonham, 27 N. J. Eq. 209; Hallett v. Thompson, 5 Paige (N. Y.) 583.

The New York Code of Civil Procedure, section 2463, declares that there shall be no seizure of, or interference with, property held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor.

Where the trust fund has become payable to the *cestui que trust*, it may be reached in supplementary proceedings. Lawrence v. Pease (Supreme Ct.), 21 N. Y. Supp. 223.

Surplus Income Arising from a Trust.

—Where a judgment debtor is entitled to the income of an estate held in trust for his benefit during life, a judgment creditor may, by supplementary proceedings, reach and anticipate the surplus income beyond what is necessary to support the judgment debtor and those dependent upon him for support. Williams v. Thorn, 70 N. Y. 270. See also Kirk v. Worthington (City Ct.), N. Y. Daily Reg. April 29th, 1885. Compare Stewart v. Foster, 1 Hilt. (N. Y.) 505.

The court may fix the amount of such surplus income and direct that plaintiff's debt be paid out of the same. Williams v. Thorn, 81 N. Y. 381.

The judgment creditor may maintain an equitable action to reach and appropriate such surplus incomes to the payment of his judgment. Tolles v. Wood, 99 N. Y. 616. But the receiver of the property of the judgment debtor appointed in supplementary proceedings may not maintain such action. Levey v. Bull, 47 Hun (N. Y.) 350.

Where a judgment debtor has an interest in a trust fund by which he is entitled to a certain portion of the annual profits arising from the principal sum invested, his creditors are entitled to nothing under an order issued in proceedings supplementary to execution, not actually payable to the debtor at the time the order is issued. Campbell v. Foster, 16 How. Pr. (N. Y. Supreme Ct.) 275, affirmed 35 N. Y. 361.

When property was left in trust,

debtor at gambling:¹ funds of a private corporation in the hands of its stockholders, when such funds have not been declared a dividend.²

2. Property That Cannot Be Reached—*a. IN GENERAL.*—Only money actually due the judgment debtor, or property to which he was entitled at the time the order for examination was served, can be reached.³ Moneys or earnings not due at the time

the income to be paid to the son of the donor for his support, the trust was held to extend to the support of his wife and child also, and so increasing the amount of the exemption. *Thompson v. Thompson*, 52 Hun (N. Y.) 456. See *Campbell v. Foster*, 16 How. Pr. (N. Y. Supreme Ct.) 275, *affirmed* 35 N. Y. 361; *DeCamp v. Dempsey*, 10 Civ. Pro. Rep. (N. Y.) 210.

But a debtor will not be allowed to get the benefit of this exemption by a fraudulent arrangement to receive the proceeds of his own business in the shape of salary. *Tripp v. Childs*, 14 Barb. (N. Y.) 85. In this case a physician hired himself out on a salary to his son, who was not a physician, to carry on his own business of practicing medicine, and the agreement was held to be fraudulent. But see *Albright v. Kempton*, 4 Civ. Pro. Rep. (N. Y. City Ct.) 16.

Vested Legacy Held in Trust.—In *Spencer v. Greene*, 17 R. I. 727, the court, construing the *New York* statute, held that a legacy which had become vested in the judgment debtor at the death of the testator, but was held in trust for him pending a life estate, at the termination of which it would be payable to him, passed to the receiver under an assignment made in compliance with an order in supplementary proceedings.

1. In *Meech v. Stoner*, 19 N. Y. 26, it was held that the right of action to recover money lost in gaming given by the statute was assignable and was not a mere personal privilege.

And in *Steinhart v. Farrell* (City Ct.), 3 N. Y. St. Rep. 292, it was held by the city court of New York that the judgment debtor's right of action to recover such money passed to the receiver appointed in supplementary proceedings, and that he might sue for recovery of the same.

2. *Hughes v. Oregonian R. Co.*, 11 Oregon 158.

3. *Campbell v. Genet*, 2 Hilt. (N. Y.) 290; *Potter v. Low*, 16 How. Pr. (N. Y. Supreme Ct.) 549; *First Nat. Bank*

v. Beardsley (Supreme Ct.), 8 N. Y. Wkly. Dig. 7.

Property received after the granting, but before the service of the order for examination, cannot, it is said, be reached. *Atkinson v. Sewine*, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 384.

A month's salary of a custom-house officer, for which a draft on the disbursing officer was deposited with the latter, it being arranged that the official should indorse the draft, when it became due, in payment of a loan, could not be reached, as it had been equitably appropriated to the payee of the draft with the disbursing officer's consent. *Ireland v. Smith*, 1 Barb. (N. Y.) 419.

A being summoned, in a proceeding supplementary to execution, to answer as to an alleged indebtedness to the execution defendant, it appeared that he had executed certain promissory notes to the latter, payable at a bank in this state, which had been assigned to other parties before the commencement of the proceedings, in payment of pre-existing debts. The court directed that the money due upon the notes should be paid into court, and that the assignees should be made parties to try the question whether they were holders of the paper in good faith. It was held, that where commercial paper is received in payment and extinguishment of a pre-existing debt, the holder is entitled to protection, and that the order of the court directing the assignees of the notes to be made parties, was not authorized by the statute. *McKnight v. Kniseley*, 25 Ind. 336; 87 Am. Dec. 364.

Where the salary sought to be reached thus was not due until the end of the day on which the order was served, it was held that the money could not be reached. *First Nat. Bank v. Beardsley* (Supreme Ct.), 8 N. Y. Wkly. Dig. 7; *Merriam v. Hill* (Marine Ct.), 1 N. Y. Wkly. Dig. 260.

To sustain an application for an attachment to punish a judgment debtor for disposing of moneys received by him after the service of an injunction order in supplementary proceedings,

of the service of the order for examination,¹ or property subsequently acquired, or debts subsequently accruing to him,² as well as moneys to become due on a contingency, or for work to be thereafter performed, cannot be taken from the judgment debtor.³

If it is doubtful whether the debtor's interest accrued before or after service of the order, he is given the benefit of the doubt.⁴

b. PROPERTY OUTSIDE THE JURISDICTION.—The judge cannot compel the judgment debtor to produce and deliver to the receiver personal property out of the state.⁵ Land in another state does not vest in a receiver appointed;⁶ but the general

the creditor must show affirmatively that the money was already earned by or due to the debtor when the order was served. *Gerregani v. Wheelwright*, 3 Abb. Pr. N. S. (N. Y. C. Pl.) 264.

Promissory Note Not Yet Due.—In *Indiana*, it has been held that a promissory note not yet due may be reached. *Pursell v. Pappenheimer*, 11 Ind. 328.

1. *First Nat. Bank v. Beardsley* (Supreme Ct.), 8 N. Y. Wkly. Dig. 7; *Woodman v. Goodenough*, 18 Abb. Pr. (N. Y. Supreme Ct.) 265; *Gerregani v. Wheelwright*, 3 Abb. Pr. N. S. (N. Y. C. Pl.) 264; *Ireland v. Smith*, 1 Barb. (N. Y.) 419; *Browning v. Bettis*, 8 Paige (N. Y.) 568; *Columbian Inst. v. Cregan* (City Ct.), 3 N. Y. St. Rep. 287; *Albright v. Kempton*, 4 Civ. Pro. Rep. (N. Y. City Ct.) 16; *Caton v. Southwell*, 13 Barb. (N. Y.) 335; *Ireland v. Smith*, 1 Barb. (N. Y.) 419; *Potter v. Low*, 16 How. Pr. (N. Y. Supreme Ct.) 549.

In *Albright v. Kempton*, 4 Civ. Pro. Rep. (N. Y. City Ct.) 16, it was held that where an order for examination of a judgment debtor was served upon him before his salary and certain commissions which he had earned were due, they could not be reached in these proceedings; the court relying upon *Merriam v. Hill* (Marine Ct.), 1 N. Y. Wkly. Dig. 260 and *McMillan v. Vanderlip*, 12 Johns. (N. Y.) 165.

Money or earnings not due cannot be reached even though previously contracted for. *Woodman v. Goodenough*, 18 Abb. Pr. (N. Y. Supreme Ct.), 265. But in *Tellis v. Lynde*, 47 Fed. Rep. 912, it was held that wages not due but absolutely payable at a certain time, may be reached in proceedings supplementary to execution.

2. *Campbell v. Genet*, 2 Hilt. (N. Y.) 290; *Sands v. Roberts*, 8 Abb. Pr. (N. Y. C. Pl.) 343; *Caton v. Southwell*, 13 Barb. (N. Y.) 335; *Dubois v. Cassidy*, 75 N. Y. 298; *Campbell*

v. Foster, 16 How. Pr. (N. Y. Supreme Ct.) 275, *affirmed* 35 N. Y. 361; *Woodman v. Goodenough*, 18 Abb. Pr. (N. Y. Supreme Ct.) 265; *Master v. Ammerman*, 51 Hun (N. Y.) 244; *Gerregani v. Wheelwright*, 3 Abb. Pr. N. S. (N. Y. C. Pl.) 264; *Potter v. Low*, 16 How. Pr. (N. Y. Supreme Ct.) 549; *Ireland v. Smith*, 1 Barb. (N. Y.) 419; 3 How. Pr. (N. Y. Supreme Ct.) 244.

3. *McCormick v. Kehoe*, 7 N. Y. Leg. Obs. 184; *Woodman v. Goodenough*, 18 Abb. Pr. (N. Y. Supreme Ct.) 265.

Payments on a building loan cannot be enforced where the building has not progressed far enough to cause them to be due. *McCormick v. Kehoe*, 7 N. Y. Leg. Obs. 184; *Willison v. Salmon*, 45 N. J. Eq. 257.

Sureties.—In *Cheatham v. Seawright*, 30 S. Car. 101, it was held that sureties could not be required, in supplementary proceedings against their principal, to turn over to a receiver personal property, put into their hands by their principal as an indemnity, until they had been relieved of their liability for him. So money deposited by a third person in lieu of bail for a defendant, cannot be reached in proceedings against the latter. *McShane v. Pinkham* (City Ct.), 19 N. Y. Supp. 969.

4. *Potter v. Low*, 16 How. Pr. (N. Y. Supreme Ct.) 549.

5. *Buchanan v. Hunt*, 98 N. Y. 560, *rev'd* 33 Hun (N. Y.) 329. In this case it is said that the most the court can do is to require the defendant to transfer his title to such property to a receiver in order that he may pursue it in the foreign jurisdiction. See also *Bunn v. Fonda*, 2 Code Rep. (N. Y. Supreme Ct.) 70.

6. *Smith v. Tozer*, 42 Hun (N. Y.) 22; *First Nat. Bank v. Martin*, 49 Hun (N. Y.) 574. See *infra*, this title, *The Receiver*.

rule is that the court may compel the judgment debtor to convey such land to the receiver.¹

c. EXEMPT PROPERTY.—Property expressly exempt by law from levy and sale by virtue of an execution, cannot be seized or interfered with on proceedings supplementary thereto.² So of property belonging to a householder and exempted by statute, as

1. *Towne v. Campbell*, 35 Minn. 231; *Spang v. Robinson*, 24 W. Va. 327.

In *New York*, it was held under the old code that the court might, by an order in supplementary proceedings, compel the judgment debtor to transfer his real estate situated in another state to the receiver. *Bailey v. Ryder*, 10 N. Y. 363; *Bunn v. Fonda*, 2 Code Rep. (N. Y. Supreme Ct.) 70; *Fenner v. Sanborn*, 37 Barb. (N. Y.) 610.

But under the *New York* Code of Civil Procedure, section 2468, which provides that the title to the real property of the debtor shall vest in the receiver only from the time when the order appointing him, or a certified copy thereof, is filed with the clerk of the county wherein such property is situated, it has been held by the supreme court that a court is not authorized to order a judgment debtor to convey real estate situated in another state to the receiver, on the ground that the receiver's control of the real estate must be confined to the *situs* where he can file the order necessary to give him title to the same. *Smith v. Tozer*, 42 Hun (N. Y.) 22. See also *First Nat. Bank v. Martin*, 49 Hun (N. Y.) 571.

Mr. Freeman remarks that the reasoning of the court does not seem irresistible, as the section of the code in question was apparently designed to prescribe rules for the government of cases wherein no conveyance is necessary, and not to impose limitations on the power of the court to compel assignments. 2 *Freeman, Ex.*, § 420.

In *Smith v. Tozer*, 42 Hun (N. Y.) 22, it is said that the proper remedy in such cases is a judgment creditor's action, under art. 1, tit. 4, of ch. 15, of the Code of Civ. Proc., in which the court may, by judgment, appoint a receiver and direct a judgment debtor to convey such property to him. See also *infra*, this title, *The Receiver*.

2. *New York* Code Civ. Proc., § 2463. Generally as to what is exempt see *New York* Code Civ. Proc., §§ 1389-1404.

Right of Action, Judgment for Ex-

empt Property.—In *Andrews v. Rowan*, 28 How. Pr. (N. Y. Supreme Ct.) 126, it was held, where a receiver of the judgment debtor's property was appointed in proceedings supplementary to execution pending an action brought by the judgment debtor for the conversion of exempt property, that the right of action did not vest in the receiver, nor did the judgment thereafter recovered vest in him. The court said: "The statute exempting certain property of the debtor from execution, should be fairly construed, to enable the debtor to enjoy such property. If when such property is wrongfully taken from the debtor, against his will, the law does not afford him an adequate remedy for the injury, and protect him in its enforcement, the statute is to the extent of the failure rendered nugatory. If the judgment rendered for the injury may be acquired by a judgment creditor, by proceedings supplemental to execution, there would be nothing to prevent seizing exempt property, selling it upon execution, and when the debtor had sued and recovered a judgment therefor, compelling the application of such judgment to the payment of the debt for which the property was seized, thus entirely depriving the debtor of the exemption, and enabling the creditor in this way to collect his debt from property that the law has declared not liable for its payment; such construction, if the language will permit, should be adopted as will secure the debtor in the enjoyment of the exempt property, and afford him an adequate and complete remedy for a violation of his rights." In *Tillotson v. Wolcott*, 48 N. Y. 188, it was held that a judgment recovered by a debtor for an unlawful seizure of exempt property could not be reached by these proceedings. *Leonard, Com.*, said: "The observations of Justice Grover in the case of *Andrews v. Rowan*, 28 How. Pr. (N. Y. Supreme Ct.) 126, are exceedingly forcible, and justly commend themselves to our acceptance." *Overruling Mallory v. Norton*, 21 Barb. (N. Y.) 424. See

well as necessary tools with which the judgment debtor earns a living.¹ The following have been held to be exempt: a share in the *New York Law Institute* owned by a lawyer in actual practice;² necessary wearing apparel;³ pension money granted by the *United States*.⁴ Money from the police pension or insurance fund paid or to be paid to the widow of a policeman cannot be reached.⁵ So a fund raised by the officials of a social club for a fellow member was held exempt.⁶

d. EARNINGS AND OFFICIAL SALARIES.—The earnings of the judgment debtor for his personal services,⁷ rendered within the

also *Yates Nat. Bank v. Carpenter*, 119 N. Y. 553.

Proceeds of Exempt Property.—But in *Andrews v. Rowan*, 28 How. Pr. (N. Y. Supreme Ct.) 126, the court, citing *Hudson v. Pletz*, 11 Paige (N. Y.) 180, said that where the debtor voluntarily disposes of exempt property, the proceeds may be reached by his creditors by means of a creditor's bill. And see *Harrier v. Fassett*, 56 Iowa 264; *Smith v. Gore*, 23 Kan. 488; 33 Am. Rep. 188.

Insurance on Exempt Property.—So insurance money received on exempt property is exempt. *Cooney v. Cooney*, 65 Barb. (N. Y.) 524. And see *Andrews v. Rowan*, 28 How. Pr. (N. Y. Supreme Ct.) 126; *Sands v. Roberts*, 8 Abb. Pr. (N. Y. C. Pl.) 343.

1. *New York Code Civ. Proc.*, §§ 1389-1404. See *Bunn v. Fonda*, 2 Code Rep. (N. Y. Supreme Ct.) 70; *Finnin v. Malloy*, 33 N. Y. Super. Ct. 382; *Houghton v. Lee*, 50 Cal. 101.

As to who is a householder, see *HOUSEHOLDER*, vol. 9, p. 783; *Van Doran v. Marden*, 48 Iowa 186; *Lowry v. McAlister*, 86 Ind. 543.

Though a wife is by statute authorized to assign a policy of insurance with the consent of her husband, that right does not affect her right to an exemption thereof from the claims of her creditors. *Baron v. Brummer*, 100 N. Y. 372.

What Law Governs.—In *Buchanan v. Hunt*, 33 Hun (N. Y.) 329, *overruled* upon another point in *Buchanan v. Hunt*, 98 N. Y. 560, it was held that a *lex fori* must govern the exemption. The court, by Pratt, J., said: "The remedies to which parties are entitled, and the operation of which they must abide, depend upon the law of the forum. To what extent their operation shall be restrained or limited by exemption laws must also depend upon the *lex fori*." And to the same

effect, see *Bunn v. Fonda*, 2 Code Rep. (N. Y. Supreme Ct.) 70.

2. The lawyer had a family, and the exemption was allowed on the ground that the privileges of the institute constituted a necessary working tool. *Keiher v. Shipherd*, 4 Civ. Pro. Rep. (N. Y. City Ct.) 274; citing *Robinson's Case*, 3 Abb. Pr. (N. Y. C. Pl.) 466.

3. *Bumpus v. Maynard*, 38 Barb. (N. Y.) 626; *Frazier v. Barnum*, 19 N. J. Eq. 316; 97 Am. Dec. 666.

The question is whether he holds it in good faith as wearing apparel. Rings and jewelry are not wearing apparel and must be given up. *Bumpus v. Maynard*, 38 Barb. (N. Y.) 626; *Frazier v. Barnum*, 19 N. J. Eq. 316; 97 Am. Dec. 666.

4. *New York Code Civ. Proc.*, § 1393; *Burgett v. Fancher*, 35 Hun (N. Y.) 647; *Yates Nat. Bank v. Carpenter*, 119 N. Y. 553; *First Nat. Bank v. Martin*, 49 Hun (N. Y.) 41; *Wildrick v. De Vinney* (Supreme Ct.), 18 N. Y. Wkly. Dig. 355. In *Stockwell v. National Bank*, 36 Hun (N. Y.) 583, it was held that such pension could not be reached even after it had been received by the pensioner and deposited in a savings bank on interest.

5. *Sargent v. Bennett*, 3 How. Pr. N. S. (N. Y. City Ct.) 515.

In *Nagle v. Stagg*, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 348, it was held that pension money due from the police commissioners to the judgment debtor, who was a retired policeman, could not be reached in supplementary proceedings.

6. *Wilder v. Clark* (City Ct.), 33 N. Y. St. Rep. 143; (City Ct.) 11 N. Y. Supp. 683.

7. As to what have been held to be earnings for personal services within statutes exempting such earnings from execution, attachment, or proceedings supplementary, see *Jason v. Antone*, 131 Mass. 534; *Kane v. Clough*, 36 Mich. 436; *Aschemoor v. Emmvert*

period provided by statute next before the institution of these proceedings, where it appears that those earnings are necessary for the use of a family wholly or partly supported by his labor,¹ cannot be seized or interfered with.² Other earnings, the judgment creditor is entitled to.³

The exemption is construed liberally for the benefit of the judgment debtor,⁴ and, though restrained from disposing of his property not exempt from execution, he may apply his earnings to the support of his family, without first calling the attention of the court to the exemption.⁵

The judgment creditor gets no lien on the judgment debtor's skill or attainments, and where the latter in good faith renders gratuitous service to a third person, remuneration therefor cannot be recovered by the judgment creditor.⁶

(C. Pl.), 5 N. Y. Month. Law Bull. 80; *Miller v. Hooper*, 19 Hun (N. Y.) 493; *Whalen v. Tennison* (Super. Ct.), 1 N. Y. Month. Law Bull. 22; *Sanford v. Goodwin* (Marine Ct.), N. Y. Daily Reg., March 11th, 1881; *McCoy v. Cornell*, 40 Iowa 457; *Banks v. Rodenbach*, 54 Iowa 695; *Brown v. Hebard*, 20 Wis. 326; 91 Am. Dec. 408; *Arnold v. Waltz*, 53 Iowa 706; 36 Am. Rep. 248; *Tyson v. Reynolds*, 52 Iowa 431.

1. In *Van Vechten v. Hall*, 14 How. Pr. (N. Y. Saratoga Co. Ct.) 436, it was held, where it appeared that the judgment debtor kept house and took in boarders, but that his family only consisted of his housekeeper and her children, that he was not exempt. In *Cummings v. Timberman*, 49 How. Pr. (N. Y. C. Pl.) 236, where the family supported by the judgment debtor consisted of his father, mother, and sister, this was held to be a family, within the provision of the code. In *Linton v. Crosby*, 56 Iowa 386, it was held that where husband and wife lived separate, having no children, and the husband in no way contributed to the support of his wife, the husband was not the head of a family. In *Tyson v. Reynolds*, 52 Iowa 431, a widower, with whom lived his son and son's wife, and who employed a household servant, was held entitled to the exemption. In *Martin v. Sheridan*, 2 Hill (N. Y.) 586, it was held that where the wife supported the family by keeping boarders, the husband's earnings for services were not exempt.

2. *New York Code Civ. Proc.*, § 2463.

A debtor having a family may always have 60 days back earnings exempt. *McCullough v. Carragan*, 24 Hun (N. Y.) 157.

If the earnings of the preceding 60 days are not sufficient to support the family, the proceedings will be discharged. *Cummings v. Timberman*, 49 How. Pr. (N. Y. C. Pl.) 236.

In *New Jersey*, wages cannot be reached in supplementary proceedings. *Howell v. McDowell*, 47 N. J. L. 359.

Formerly, the 60 days were reckoned up to the time of the order of disposition of the property. See *Bush v. White*, 12 Abb. Pr. (N. Y. Super. Ct.), 21. See also *Union Bank v. Northrup*, 19 S. Car. 473.

3. *Bush v. White*, 12 Abb. Pr. (N. Y. Super. Ct.) 21; *Tripp v. Childs*, 14 Barb. (N. Y.) 85; *Potter v. Low*, 16 How. Pr. (N. Y. Supreme Ct.) 549; *Woodman v. Goodenough*, 18 Abb. Pr. (N. Y. Supreme Ct.) 265; *Gerregani v. Wheelwright*, 3 Abb. Pr. N. S. (N. Y. C. Pl.) 265.

A physician who has furnished a list of accounts to a receiver, cannot be compelled to deliver up his original books of account containing confidential communications from his patients. *Kelly v. Levy* (City Ct.), 8 N. Y. Supp. 849.

4. *Miller v. Hooper*, 19 Hun (N. Y.) 394.

5. *Hancock v. Sears*, 93 N. Y. 79; *rev'g* 29 Hun (N. Y.) 96.

But in *Gillett v. Hilton*, 11 Civ. Pro. Rep. (N. Y. City Ct.) 108, the city court of New York held, at special term, that a judgment debtor who paid a debt, contracted for the support of his family, out of such exempt earnings, had violated the restraining order and was guilty of contempt.

6. *Osborne v. Wilkes*, 108 N. Car. 651. In this case it was held that the judgment debtor could not be compelled

Salaries of public officers, while in the hands of the disbursing officers cannot, on grounds of public policy, be reached by supplementary proceedings.¹

3. Order Permitting Payment of Debts to Sheriff.—The *New York* code authorizes the judge to permit one indebted to the judgment debtor to make payment to the sheriff after the commencement of the proceeding and before the appointment of the receiver.²

4. Order Directing Payment or Delivery.—So the *New York* code provides that the judge may order the judgment debtor to pay money or deliver property to the sheriff, in the absence of a

to exact compensation for managing his wife's property.

1. Roeller v. Ames, 33 Minn. 132; Swepson v. Turner, 76 N. Car. 115; Waldman v. O'Donnell, 57 How. Pr. (N. Y. C. Pl.) 215; Remmy v. Gedney, 57 How. Pr. (N. Y. C. Pl.) 217; Green v. New York, 5 Abb. Pr. (N. Y. C. Pl.) 504; Lowber v. New York, 7 Abb. Pr. (N. Y. Supreme Ct.) 252; Cornell v. Funk, 1 City Ct. Rep. N. Y. 25; Columbian Inst. v. Cregan, 11 Civ. Pro. Rep. (N. Y. City Ct.) 87.

In Swepson v. Turner, 76 N. Car. 115, it was attempted to reach by supplementary proceedings money due to the judgment debtor from the state for services rendered as public printer, and it was held, on the ground of public policy, that such money could not be reached.

In Roeller v. Ames, 33 Minn. 132, it was held that salaries of officers of municipal corporations could not be reached in supplementary proceedings. The court distinguished this case from Knight v. Nash, 22 Minn. 452, where it was held that money due a contractor for labor performed for the city might be reached in such proceedings.

But in Newark v. Funk, 15 Ohio St. 462, it was held that salaries of officers of incorporated cities, due and unpaid, might be subjected by judgment creditors of such officers to the payment of their judgments. See also GARNISHMENT, vol. 8, p. 1132.

2. *New York* Code Civ. Proc., § 2446.

It was held in *North Carolina*, that such a provision, being in derogation of the common right of every creditor of having his debt paid to himself, must be strictly construed. Howey v. Miller, 67 N. Car. 459. See also Judd v. Littlejohn, 11 Wis. 176; Kibbee v. Howard, 7 Wis. 150.

Under similar provisions in the former *New York* code, it was held

that a sheriff who had collected money upon an execution in favor of a party, had no power to apply it to the payment of another execution in his hands against the same party. Baker v. Kenworthy, 41 N. Y. 215. See also Smith v. McMillan, 84 N. Car. 593.

The amount of a verdict rendered in an action of assault and battery cannot be paid to a sheriff on an execution against the party who recovered the verdict, under section 293 of the old *New York* code. A verdict in tort must be consummated by judgment before it can be treated as an indebtedness under that section. Davenport v. Ludlow, 3 Code Rep. (N. Y. Supreme Ct.) 66. See also Mallory v. Norton, 21 Barb. (N. Y.) 424.

In Hallanan v. Crow, 15 Ohio St. 176, it was held that the provisions of the *Ohio* Code Civ. Proc., section 463, which provide that "after the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt," etc., were applicable to the jurisdiction and proceedings before justices of the peace; and that the receipt of a constable for an amount so paid on a judgment recovered before a justice of the peace would be a valid discharge of the debt.

The payment in obedience to an order is a valid payment, although no notice of the proceedings is given to the judgment debtor; Gibson v. Haggerty, 37 N. Y. 555; 97 Am. Dec. 752; Bishop v. Garcia, 14 Abb. Pr. N. S. (N. Y. Super. Ct.) 69; and is a defense to an action on the debt, Bishop v. Garcia, 14 Abb. Pr. N. S. (N. Y.) 69, which it seems under the old code must have been set up affirmatively as a counterclaim and proved by a certified copy of the judgment and by the sheriff's receipt. Calkin v. Packer, 21 Barb. (N. Y.) 275; Handly v. Greene, 15 Barb. (N. Y.) 601;

receiver; or that a third person may be so ordered, in the case of property capable of delivery, to which the judgment debtor has the substantially undisputed right of possession.¹ But the order

Beebe v. Kenyon, 3 Hun (N. Y.) 73. See *Kibbee v. Howard*, 7 Wis. 150.

By the terms of the present *New York* code such a payment is a discharge of the indebtedness.

1. *New York* Code Civ. Proc., § 2447. That the judgment debtor has the personal property in his possession or under his control must clearly appear. *Sandford v. Moshier*, 13 How. Pr. (N. Y. Supreme Ct.) 137; *Hall v. McMahon*, 10 Abb. Pr. (N. Y. C. Pl.) 103; *Stewart v. Foster*, 1 Hilt. (N. Y.) 505; *Boelger v. Swivel*, 1 How. Pr. N. S. (N. Y. City Ct.) 372; *Christensen v. Foster* (Minn. 1892), 53 N. W. Rep. 461. Thus in *Winters v. McCarthy*, 2 Abb. N. Cas. (N. Y. C. Pl.) 357, where the judgment debtor, upon an examination in supplementary proceedings, disclosed that at some time previous to the proceeding he had collected a sum of money on a bond and mortgage which he owned in his own right, the disposition of which he did not clearly account for in full, it was held that this fact alone would not give the judgment creditor any right to a peremptory order from the court requiring the payment of the debt out of such fund, but that he must show by reliable evidence that at the time the injunction was served the debtor had in his possession property applicable to the judgment.

The order will not be warranted by the fact that the answer of the judgment debtor is unsatisfactory to his creditor, and gives rise to a suspicion that he may be concealing his property. The creditor must establish that the debtor has the money or means before the order can be made. *Peters v. Kerr*, 22 Hun (N. Y.) 3.

The defendant in an action had the complaint dismissed for costs. A second action was brought for the same cause in the same court by the plaintiff, who, being a non-resident, was required to file security for costs. His attorneys, therefore, deposited a sum of money belonging to them as such security with the proper clerk. The attorney for the defendant in supplementary proceedings, based on the judgment in the first action, obtained an order requiring said clerk to pay over the sum so deposited to satisfy the judgment for costs; but the order

was vacated on the ground that the title to the money deposited as security remained in the attorneys for the plaintiff, who deposited it subject to the contingency of the loss of the suit by the plaintiff, but the plaintiff having won the suit, the money belonged to the attorneys for the plaintiff. *Frazier v. Ward*, 13 Daly (N. Y.) 431.

A determined to break his contract, and proceeded at once to convert all his property into money, in anticipation of a judgment against him for damages. Judgment having been recovered and execution returned unsatisfied, he was examined in supplementary proceedings, and his explanation as to the disposition of the money was contradictory and incredible. It was held that he must be presumed to be in possession and control of sufficient moneys to pay the judgment and should be ordered to pay the same and the costs of the proceedings out of such moneys. *Logan v. O'Leary*, 43 N. J. Eq. 320.

In *Hathaway v. Brady*, 26 Cal. 581, it was held that there was nothing in the provisions of the *California* Practice Act relating to supplementary proceedings, that authorizes a court to make an order for the application of property of the judgment debtor, alleged to be in the hands of a third party, to the satisfaction of the judgment, without first ascertaining by an examination of the party alleged to have the property in his possession, the truth of the allegation.

Nature of Property.—It has been held by the *New York* supreme court that only personal property is contemplated. *First Nat. Bank v. Martin*, 49 Hun (N. Y.) 571; *Smith v. Tozer*, 42 Hun (N. Y.) 22.

The statute applies to specific or tangible property. *Earl v. Quinn*, N. Y. Daily Reg., Dec. 11th, 1880; *Serven v. Lowerre*, 23 N. Y. Supp. 1052. And so under the old code. *West Side Bank v. Pugsley*, 47 N. Y. 368; *Heroy v. Gibson*, 10 Bosw. (N. Y.) 591.

In *Montana*, the judge may order the money paid into court. *Minnesota Bank v. Hayes*, 11 Mont. 533.

Notice.—As to notice in *New York*, see *Ward v. Beebe*, 17 Abb. Pr. (N. Y. Supreme Ct.) 1; *Kemp v. Harding*, 4 How. Pr. (N. Y. Supreme Ct.) 178; *Seeley v. Garrison*, 10 Abb. Pr. (N. Y.

may not be made if the title to the property or the right of possession thereof is substantially disputed,¹ or if the property is

C. Pl.) 460; *Foster v. Prince*, 8 Abb. Pr. (N. Y. Supreme Ct.) 407; *Gibson v. Haggerty*, 37 N. Y. 555; 97 Am. Dec. 752; *Sherwood v. Buffalo, etc.*, R. Co., 12 How. Pr. (N. Y. Supreme Ct.) 138; *Lynch v. Johnson*, 48 N. Y. 27; *Waldheim v. Bender*, 36 How. Pr. (N. Y.) 181; *Serven v. Lowerre* (Rockland Co. Ct.), 23 N. Y. Supp. 1052; *Corning v. Glenville Woollen Co.*, 14 Abb. Pr. (N. Y. Supreme Ct.) 339.

It was held in *Smith v. McQuade*, 59 Hun (N. Y.) 374, that the court could not compel the debtor to transport the property from one part of the state to another to be delivered to the receiver. See also *Serven v. Lowerre*, 23 N. Y. Supp. 1052.

The property should be definitely specified. *Smith v. McQuade*, 59 Hun (N. Y.) 374.

An order to deliver cigars was construed to include the boxes. *Richie v. Bedell*, 22 N. Y. Wkly. Dig. 563.

An order requiring third persons to pay over the money in their hands belonging to the judgment debtor to the sheriff, is irregular, where it appears that there was a concealment of the fact that there had been a receiver appointed in the proceeding. *Columbia Bank v. Ingersoll*, 21 Abb. N. Cas. (N. Y. Supreme Ct.) 241.

In *Boelger v. Swivel*, 1 How. Pr. N. S. (N. Y. City Ct.) 372, it was held that the statute does not confer upon a judge the power to order the payment of money or delivery of property directly to the judgment creditor, or in any other manner than to the sheriff designated in the order, unless a receiver has been appointed, and in that case to the receiver. See also *Birnbaum v. Thompson* (Supreme Ct.), 5 N. Y. Month. Law Bull. 30; *In re Daves*, 81 N. Car. 72. See *supra*, this title, *Property That Cannot Be Reached*.

1. Indisputable Right of Possession.—*Gasper v. Bennett*, 12 How. Pr. (N. Y. Supreme Ct.) 307; *Crouse v. Whipple*, 34 How. Pr. (N. Y. Supreme Ct.) 333; *Bauer v. Betz* (Supreme Ct.), 4 N. Y. St. Rep. 92; *Hayes v. McClelland* (Supreme Ct.), 20 N. Y. Wkly. Dig. 393; *Rodman v. Henry*, 17 N. Y. 482; *Barnard v. Kobbe*, 54 N. Y. 516; *Hall v. McMahon*, 10 Abb. Pr. (N. Y. C. Pl.) 103; *Ex p. Hollie*, 59 Cal. 414; *Gallagher v. O'Neil* (City Ct.), 3 N. Y. Supp.

126; *Schrauth v. Dry Dock Sav. Bank*, 86 N. Y. 390; *Robson v. Ford*, 3 Edw. Ch. (N. Y.) 441.

If the property is in the possession of another, claiming title by transfer from the debtor, no matter how fraudulent the transfer, no order may be made to compel him to deliver the property. *Town v. Safeguard Ins. Co.*, 4 Bosw. (N. Y.) 683; *Teller v. Randall*, 40 Barb. (N. Y.) 242; *Roy v. Baucus*, 43 Barb. (N. Y.) 310.

Where it was sought to require a judgment debtor to deliver to a receiver appointed in supplementary proceedings a policy of insurance on the debtor's life, which he alleged he had assigned as security for an indebtedness due from him to an estate of which he was executor, the policy then being in the hands of the substituted trustee for the estate and claimed by him as such security, it was held that the judgment debtor's right to possession was "substantially disputed," within the statute, and that the order of the court should require only that the judgment debtor assign to the receiver the policy and all his right, title, and interest therein, so that the receiver might take proceedings to recover it from the substituted trustee. *Frost v. Craig*, 16 Daly (N. Y.) 107.

So where the claim to a surplus was disputed, it was held that the statute was inapplicable. *Moller v. Wells*, 29 Hun (N. Y.) 587.

In those states where the court is allowed to order the amount of indebtedness of a third person to the judgment debtor to be applied in satisfaction of the judgment, it may not order such application if the debt is in good faith denied. *Hagerman v. Lee*, 12 Nev. 331; *Hartman v. Olvera*, 51 Cal. 501; *Hibernia Sav., etc., Soc. v. Inyo County Ct.*, 56 Cal. 265.

The power claimed by the court under section 297 of the former code of *New York* to order a third person indebted to a judgment debtor to pay the judgment creditor so much of such indebtedness as might be sufficient to satisfy the judgment creditor's claim, was never exercised where the amount of the indebtedness due from the third person was either disputed or uncertain, or where there was any doubt as to the pecuniary ability of the third person to

incapable of delivery, or if there is an adverse claim against it,¹ or if there is a doubt of the ability of the debtor or third person to comply with the order;² and in all cases in which the right of

make payment. In such a case the proper course was to have a receiver appointed. *Alexander v. Richardson*, 7 Robt. (N. Y.) 63; *West Side Bank v. Pugsley*, 47 N. Y. 368; *People v. Hulburt*, 5 How. Pr. (N. Y. Supreme Ct.) 446; *Corning v. Tooker*, 5 How. Pr. (N. Y. Supreme Ct.), 16; *Grassmuck v. Richards*, 2 Abb. N. Cas. (N. Y. Supreme Ct.) 359.

In *Hall v. McMahon*, 10 Abb. Pr. (N. Y. C. Pl.) 103, the court said: "In supplementary proceedings, where a judge is asked to make an order requiring property alleged to belong to the defendant but in the possession of and claimed by another, to be delivered over to a receiver, the testimony should show beyond a reasonable doubt that the claim is without any foundation in fact, and used merely as a cover to protect defendant's property from the just demands of his creditors."

Where it appeared on examination of the third person in supplementary proceedings, that he had in his possession \$1,000 paid by the judgment debtor under an agreement for two years' board for himself and wife in advance, it was held that the agreement was void as to creditors, except so far as it provided for the payment of an existing debt, and no other claim being made to the money by the third party except under this void contract, no suit was necessary to determine the rights of the parties, and . . . an order by the judge directing payment to the receiver of an amount sufficient to discharge the debt under section 2447 of the *New York Code Civ. Proc.* was proper. *Davis v. Briggs* (Supreme Ct.), 24 N. Y. St. Rep. 896.

Under *Minnesota Gen. Sts.*, ch. 66, § 306, where a person or corporation alleged to have property of the judgment debtor or to be indebted to him, claims an interest in the property adverse to him or denies the debt, such interest or debt is recoverable only in an action against such person or corporation by the receiver. *Knight v. Nash*, 22 Minn. 452.

The provisions of *Wisconsin Rev. Sts.*, § 3035, do not authorize a court or judge, in proceedings supplementary to execution, to order any property of the judgment debtor in the hands of

himself or any other person, to be applied towards the satisfaction of the judgment, except where there is no dispute about the title of the property or of the amount due. *Blabon v. Gilchrist*, 67 Wis. 38.

When Order Directing Payment of Money Due to the Judgment Debtor Will Be Vacated.—Where a person owing money to a judgment debtor has been ordered to apply the same to the satisfaction of the judgment, and subsequently it appears that the judgment debtor had, prior to the making of the order, assigned all his interest in the claim against the third person, the order directing him to pay over the money should be vacated. *Beebe v. Kenyon*, 3 Hun (N. Y.) 73.

1. *Brown v. Moore*, 61 Cal. 432; *Clapp v. Lathrop*, 23 How. Pr. (N. Y. Supreme Ct.) 423.

The court may not order a judgment debtor to deliver to a receiver appointed in supplementary proceedings, personal property in possession of the judgment debtor and belonging to him, subject to a chattel mortgage payable on demand. *Griswold v. Tompkins*, 7 Daly (N. Y.) 214.

Claim of Exemption.—When property, possibly exempt by law, is claimed by the judgment debtor to be exempt, it would seem doubtful whether the question of exemption could be tried under these supplementary proceedings. Such a question is proper for a jury trial. *Dickinson v. Onderdonk*, 18 Hun (N. Y.) 479.

Concealment of Adverse Claim.—Where, under the former code, an order was obtained in proceedings supplementary to execution, directing a third person to pay over money to the judgment creditor, and it appeared that the attorney for the judgment creditor knew at the time the order was obtained that there was another claim for the same money and a suit pending thereon, but failed to disclose the same to the justice who granted the order, it was held that the suppression of this fact was an imposition on the justice, and the court was empowered by appropriate means to compel the restitution of the money. *Fowler v. Lowenstein*, 7 Lans. (N. Y.) 167.

2. *Sandford v. Moshier*, 13 How.

title or the right of possession of the property is brought into question, such right may be determined only in an action brought by the receiver or the judgment creditor, according to the local practice.¹

The denial of the debt, or the adverse claim to the property, must be made in good faith, and not resorted to in order to drive the judgment creditor to an action for the mere purpose of delay or fraud.²

After a payment or delivery, the third person making it is fully protected, provided he had no notice, actual or constructive, of the claim of another.³ If the third person had notice of the conflicting claim at the time of the payment or delivery, he is not protected, but may be compelled to respond twice.⁴

Pr. (N. Y. Supreme Ct.) 137; *Peters v. Kerr*, 22 How. Pr. (N. Y. Supreme Ct.) 3; *Locke v. Mabbett*, 3 Abb. App. Dec. (N. Y.) 68.

The right of plaintiff in supplementary proceedings to exact a peremptory order of the court for payment of his debt from any fund or property of the defendant that he has discovered, does not ensue from the fact that the defendant against whom he proceeds had been possessed of money or property, the disposition of which he is unable to account for, but solely upon facts disclosing that when the injunction was served the defendant, having in his possession or under his control property applicable to the judgment, was in a position to comply with the order. *Winters v. McCarthy*, 2 Abb. N. Cas. (N. Y. C. Pl.) 357.

Where it appears that the judgment debtor acquired a specific sum of money after the service of the order of disclosure, and paid it out again before the disclosure, the court may not order the debtor to pay that sum of money towards the satisfaction of the judgment. *Christensen v. Fostevin* (Minn. 1892), 53 N. W. Rep. 461.

1. How. Stat. (Mich.), § 8112; *Barnard v. Kobbe*, 3 Daly (N. Y.) 373; *affirmed*, 54 N. Y. 516; *Nathans v. Satterlee*, 18 Abb. N. Cas. (N. Y. C. Pl.) 310; *Parker v. Page*, 38 Cal. 522; *McDowell v. Bell*, 86 Cal. 615; *Stewart v. Foster*, 1 Hilt. (N. Y.) 505; *Joyce v. Holbrook*, 2 Hilt. (N. Y.) 95; *McCrea v. Cook*, 1 City Ct. Rep. (N. Y.) 385; *Hagerman v. Lee*, 12 Nev. 331; *Sherwood v. Buffalo*, etc., R. Co., 12 How. Pr. (N. Y. Supreme Ct.) 136; *Rodman v. Henry*, 17 N. Y. 482; *People v. Connor*, 15 Abb. Pr. N. S. (N. Y. Supreme Ct.) 430; *Teller v. Randall*, 26 How.

Pr. (N. Y. Supreme Ct.) 155; *Patten v. Connah*, 13 Abb. Pr. (N. Y. C. Pl.) 418.

If, pending a litigation to recover a money judgment, gold coin of the defendant, which is in the custody of the defendant, is by consent of the parties loaned out, and a note of the borrower is taken therefor, payable in gold coin, the court may not, after plaintiff recovers judgment, while the note is outstanding in the hands of a third party and not under the control of the court, make an order in proceedings supplemental to execution that the borrower pay over the money in gold coin. The mode of enforcing a contract in coin is, under the statute, by an action or proceeding upon the contract itself. *Hathaway v. Brady*, 26 Cal. 581.

2. *Parker v. Page*, 38 Cal. 522.

3. *Gibson v. Haggerty*, 37 N. Y. 555; 97 Am. Dec. 752; *Lynch v. Johnson*, 48 N. Y. 27.

4. *Schrauth v. Dry Dock Sav. Bank*, 86 N. Y. 390; *Roy v. Baucus*, 43 Barb. (N. Y.) 310. See *Lee v. Delehanty*, 25 Hun (N. Y.) 197.

A recovered judgment against B, and instituted proceedings supplementary to execution. C was examined in these proceedings and admitted having in his hands a balance from the proceeds of the sale of certain goods placed in his hands as a broker by A, who concealed the fact that he had been notified that the goods were claimed by W, to whom they belonged, and in that way suffered an order to be made that the amount be paid over to the sheriff, and thereby paid it accordingly. It was held that by stating the facts of the case, C had it in his power to prevent the order from being made. It was his duty to have done so, and omit-

5. Liens; Priority, etc.—The creditor, by instituting supplementary proceedings, acquires a lien upon the equitable assets of the debtor, which takes effect from the time of service of the order.¹ But, to perfect his lien, and secure the full benefit of the supplementary proceedings, the judgment creditor must obtain an order directing the property of the debtor to be applied

ting it without reason or excuse, his after-payment to the sheriff was voluntary and not compulsory, and no defense to an action by W for the proceeds of the sale. He cannot take it upon himself to decide who was really entitled to the money and must bear the consequences of his mistake. *Wright v. Cabot*, 89 N. Y. 570.

1. *McCorkle v. Herrman*, 117 N. Y. 297; *Duffy v. Dawson*, 2 Misc. (N. Y. C. Pl.) 401; (C. Pl.) 50 N. Y. St. Rep. 584; *Edmonston v. McLoud*, 16 N. Y. 543; *aff'g* 19 Barb. (N. Y.) 356; *Field v. Sands*, 8 Bosw. (N. Y.) 685; *Jeffres v. Cochrane*, 47 Barb. (N. Y.) 557; *aff'd* 48 N. Y. 671; *Union Bank v. Union Bank*, 6 Ohio St. 254.

In *Lynch v. Johnson*, 48 N. Y. 33, Earl, J., said: "These proceedings furnish a simple substitute for the creditor's bill, as formerly used in chancery. The commencement of the creditor's suit in chancery gave the creditor at once a lien upon the equitable assets of the judgment debtor. *Storm v. Waddell*, 2 Sandf. Ch. (N. Y.) 494; *Brown v. Nicho's*, 42 N. Y. 26. He was rewarded as a vigilant creditor, the commencement of his suit being regarded as an actual levy upon the equitable assets of the debtor. Under sections 292 and 294 (of the old code, which are similar in all respects to sections 2441, 2446, 2447 of the present code), the service of the order takes the place of the commencement of the suit under the old system and should give the judgment creditor the priority of a vigilant creditor, and a lien upon the equitable assets of his debtor. *Edmonston v. McLoud*, 16 N. Y. 544." See also *Knower v. Central Nat. Bank*, 124 N. Y. 552.

In *Deposit Nat. Bank v. Wickham*, 44 How. Pr. (N. Y. Supreme Ct.) 421, the lien of the judgment debtor, so acquired, was held to be prior to that of the attorney for services rendered.

But the commencement of the proceedings does not create a lien upon assets which the debtor has previously assigned. *Field v. Sands*, 8 Bosw. (N. Y.) 685.

Personal Property.—But as to personal property, under the former practice in *New York*, no lien was created in favor of the creditor until the appointment of a receiver; and other creditors could levy on such property and acquire a valid lien thereon in preference. *Van Alstyne v. Cook*, 25 N. Y. 489; *Brown v. Nichols*, 42 N. Y. 26; *Davenport v. Kelly*, 42 N. Y. 193; *Voorhees v. Seymour*, 26 Barb. (N. Y.) 569; *Becker v. Torrance*, 31 N. Y. 631. See also *Sherman v. Fowler* (Marine Ct.), N. Y. Daily Reg., May 15th, 1881.

Now, however, under section 2469 *New York Code Civ. Proc.*, when the receiver's title to personal property becomes vested, it extends back, for the benefit of the judgment debtor, to the time of service of the order. See *McCorkle v. Herrman*, 117 N. Y. 301; *Clark v. Gilbert*, 10 Daly (N. Y.) 316. Under that section "personal property" includes money, chattels, things in action, and evidences of debt. *McCorkle v. Herrman*, 117 N. Y. 301.

In *Indiana*.—By the institution of supplementary proceedings the creditor acquires a lien upon the claims intended to be reached. *Graydon v. Barlow*, 15 Ind. 197; *Butler v. Jaffray*, 12 Ind. 504. In these two cases the superior court of *Indiana* did not decide at what precise stage of the proceedings the lien will attach. But in *Cook v. Ross*, 22 Ind. 157, this court held that the lien is acquired from the time of service of process on the defendant.

In *Hoadley v. Caywood*, 40 Ind. 243, it was held that a judgment creditor waived his lien, so acquired, by proving his claim in a bankrupt court.

In *Wisconsin*.—A similar rule prevails here. The supplementary proceedings are deemed a substitute for the creditor's bill, and upon service of process and commencing such proceedings, the creditor acquires a lien upon the assets of the debtor. *Kellogg v. Coller*, 47 Wis. 649. See also *Clark v. Bergenthal*, 52 Wis. 109.

In *Kentucky*.—In an auxiliary action in the nature of a discovery in aid of a judgment which has been recovered in

to the judgment, or the appointment of a receiver.¹ The rights of the judgment creditor, so acquired, will not be affected by an assignment of the property, or subsequent bankruptcy of the debtor.² Nor will they be divested by the death of the judgment debtor.³

The creditor who first institutes his proceedings has preference over others subsequently commencing similar proceedings;⁴ and a *bona fide* attempt to serve the process is equivalent to actual service, in respect to the priority of right, if the creditor has

an action, and shown not to be satisfied, by a return of *nulla bona*, if the property discovered is specifically described in the action, a lien is created upon it for the satisfaction of the judgment. *Trabue v. Conners*, 84 Ky. 283.

In Ohio.—Upon service of an order upon a third person, to appear and answer as to property and effects held by him belonging to the judgment debtor, all the incidents of *lis pendens* must be enforced against him from the time of such service. *Union Bank v. Union Bank*, 6 Ohio St. 254. But in *Gregory v. Hewson*, 1 Bond (U. S.) 277, it was held that this principle did not apply to the case of a judgment debtor, as to whom there had been a mere order for his examination, without an order restraining him from disposing of his property.

1. *Lynch v. Johnson*, 48 N. Y. 33; *Edmonston v. McLoud*, 16 N. Y. 543. In *Becker v. Torrance*, 31 N. Y. 631, it was declared that no right was acquired as against other creditors pursuing different remedies until the appointment of the receiver.

Until the appointment of a receiver, or the entry of an order directing the application of the property involved for the benefit of the party instituting proceedings, there is nothing corresponding to "actual levy." *Billings v. Stewart*, 4 Dem. (N. Y.) 269.

Filing of Security.—In *Banks v. Potter*, 21 How. Pr. (N. Y. C. Pl.) 471, *Daly, J.*, said: "It is essential that the creditor should go on and perfect his lien, by taking all the necessary steps to consummate the appointment of a receiver, or creditors who are more vigilant will obtain priority over him. The appointment of a receiver is not perfected until he has filed the requisite security; and when that is done, his appointment operates by relation, from the time that an order was made for the appointment of a receiver."

2. *Cooke v. Ross*, 22 Ind. 157. See

also *Storm v. Waddell*, 2 Sandf. Ch. (N. Y.) 494; *Eameston v. Lyde*, 1 Paige (N. Y.) 637; *Corning v. White*, 2 Paige (N. Y.) 567; 22 Am. Dec. 659; *Pool v. Ragland*, 57 Ala. 414.

In *Coleman v. Roff*, 45 N. J. L. 7, it was held that an assignment of choses in action by a judgment debtor, after proceedings for discovery, is void as against a receiver subsequently appointed.

3. The lien acquired is not divested by the death of the judgment debtor. *Hazewell v. Penman*, 13 How. Pr. (N. Y. Supreme Ct.) 114. See also *Brown v. Nichols*, 42 N. Y. 26, where the lien was created in the analogous proceeding by creditor's bill. In this case *Earl, J.*, said that the lien that a judgment creditor obtains by commencing an action in the nature of a creditor's bill, to collect a judgment, is not divested by the death of the debtor, and that the debtor's property passes to his personal representative, subject to such lien.

Although the lien is not divested, it cannot be enforced in a surrogate's court against the assets of the estate of the decedent, unless perfected during the lifetime of the latter by the appointment of a receiver, or an order directing the application of the debtor's property to the satisfaction of the judgment. *Billings v. Stewart*, 4 Dem. (N. Y.) 265.

4. *Fessenden v. Woods*, 3 Bosw. (N. Y.) 550; *Field v. Sands*, 8 Bosw. (N. Y.) 686; *Myrick v. Selden*, 36 Barb. (N. Y.) 15; *Guggenheimer v. Stephens*, 17 Civ. Pro. Rep. (N. Y. City Ct.) 383; *Phillips v. O'Connor*, 1 City Ct. Rep. (N. Y.) 372. See also *Bevans v. Pierce*, 1 City Ct. Rep. (N. Y.) 259.

By the commencement of the supplementary proceedings, the creditor acquires the same lien which he acquired, under the former practice, by the commencement of a creditor's suit. *Porter v. Williams*, 5 How. Pr. (N. Y. Supreme Ct.) 441; *Myer's Case*, 2 Abb. Pr. (N. Y. Supreme Ct.) 476; *Lillien-*

proceeded with due diligence.¹ This priority will not be divested in favor of another who obtains an order for an injunction, or the appointment of a receiver in proceedings subsequently instituted.² But if the creditor fails to exercise due diligence in prosecuting his proceeding, another may obtain preference by superior vigilance.³ A lien existing before the institution of proceedings cannot be affected.⁴

The fund collected by a receiver is not to be considered the property of the person at whose instance the receiver was appointed, but as being held in trust for those who shall establish a right to it according to their respective priorities.⁵

dahl v. Fellerman, 11 How. Pr. (N. Y. Supreme Ct.) 528. In *Sale v. Lawson*, 4 Sandf. (N. Y.) 718, it was held that this lien is not superseded by the issuing of a new execution, unless it clearly appears that the property levied upon is the undisputed property of the debtor, and is sufficient to satisfy the debt.

Successive Proceedings in Different Courts.—It seems that the rule of the chancery court, giving priority in case of successive suits to the one first instituted before whatever chancellor it may have been instituted, is to be applied in successive supplementary proceedings in the same or different courts. In *Ross v. Clusman*, 3 Sandf. (N. Y.) 676, court said: "We do not perceive how the courts are to avoid incessant confusion and clashing of jurisdiction in respect to the proceedings supplementary to execution, unless the just and equitable rule of the court of chancery, in relation to successive creditor's suits, be adopted and applied to them."

1. *Kellogg v. Collier*, 47 Wis. 649. An order may properly be served on the wife of a debtor, if she is of suitable age and discretion. *Turner v. Holden*, 109 N. Car. 182.

2. *Bevans v. Pierce*, 1 City Ct. Rep. (N. Y.) 359; *Sherman v. Fowler* (Marine Ct.), N. Y. Daily Reg., May 15th, 1881; *Youngs v. Klunder* (City Ct.), 27 N. Y. St. Rep. 32.

A judgment creditor who has duly commenced supplementary proceedings, terminating in the appointment of a receiver, acquires an equitable lien on a debt owing to his debtor, and has priority over a mechanic's lien, which is filed subsequently to the commencement of the supplementary proceedings, but before the appointment of the receiver. The title of the receiver antedates the mechanic's lien and he has

the prior right to the debt. *McCorkle v. Herrman*, 117 N. Y. 267.

3. *Banks v. Potter*, 21 How. Pr. (N. Y. C. Pl.) 471.

If the creditor abandons pursuit, or lingers on the way, before he has obtained a specific lien, another may obtain preference by superior vigilance. *Eameston v. Lyde*, 1 Paige (N. Y.) 637. So a delay of eight years in prosecuting a creditor's suit should be deemed an abandonment or waiver of his prior rights. *Myrick v. Selden*, 36 Barb. (N. Y.) 15.

Failure to reinstate the hearing, or to apply for a receiver within three and a half years after the examination is closed, must be deemed an abandonment of the proceedings. *Meyers v. Herbert* (Supreme Ct.), 19 N. Y. Supp. 132.

4. *Corning v. Glenville Woollen Co.*, 14 Abb. Pr. (N. Y. Supreme Ct.) 339.

An assignee in bankruptcy proceedings has priority over the receiver in supplementary proceedings, where the debtor filed their petition in bankruptcy before the creditor recovered judgment, although the assignee was appointed after the receiver. *Morris v. First Nat. Bank*, 68 N. Y. 362.

But where an assignee under a general assignment has not claimed the property of the judgment debtor, the latter remaining in possession and exercising control apparently with the assent and acquiescence of the assignee, the creditor can reach the property under supplementary proceedings begun subsequently to the making of the assignment. *Eastern Nat. Bank v. Hulshizer* (Supreme Ct.), 2 N. Y. St. Rep. 115.

5. *Guggenheimer v. Stephens*, 17 Civ. Pro. Rep. (N. Y. City Ct.) 383; *Banks v. Potter*, 21 How. Pr. (N. Y. C. Pl.) 469; *Stewart's Estate*, 8 Civ. Pro. Rep. (N. Y. Supreme Ct.) 354. His dis-

XV. CONTEMPT—(See also CONTEMPT, vol. 3, p. 777)—1. **In General.**—The statutes provide in substance that any person who refuses, or, without sufficient cause, neglects to obey an order of a judge or referee duly served upon him in these proceedings, or an oral direction given directly to him by a judge or referee in the course of the proceedings, or to attend before a judge or referee according to a command of a subpoena duly served upon him, may be punished as for a contempt.¹ It has been said that the remedy thus provided is, at best, a violent one, and the provisions governing the proceedings leading up to it should be strictly construed, and, if there is any disregard of them, there is no authority to punish.² The party may purge himself of the

tribution of the fund must be governed by the maxim, *Qui prior est tempore, portior est jure*. Phillips v. O'Connor, 1 City Ct. Rep. (N. Y.) 372.

Proceeds of the sale of land are regarded as the land itself for the purpose of determining priorities. Gugenheimer v. Stephens, 17 Civ. Pro. Rep. (N. Y. City Ct.) 383.

1. *In re Milburn*, 59 Wis. 24; *State v. Becht*, 23 Minn. 411. See also the succeeding subdivisions of this section.

A receiver duly ordered to pay money to another person cannot excuse himself for failure to comply with the order on the ground that that person was indebted to him. McGarry v. Smith, 2 N. Y. Month. Law Bull. 7.

In *Bond v. Bond*, 69 N. Car. 97, it was held that if an order be made in supplementary proceedings appointing a receiver and ordering a person to deliver a bond, alleged to be the property of the execution debtor, to the receiver, he is *prima facie* guilty of contempt of court if he hands the bond to an attorney for collection instead of handing it over to the receiver; though he may be discharged upon swearing that he only intended for a certain purpose to obtain a judgment, and not to collect the money, and that thereby he did not intend any contempt of the court, and his discharge should be granted on his paying the costs.

Refusal to pay a sum of money when ordered to do so is not punishable as for a contempt if the money could have been reached on execution against property. *Randall v. Dusenbury*, 41 N. Y. Super. Ct. 456. See also *In re Remington*, 7 Wis. 643; *First Nat. Bank v. Martin*, 49 Hun (N. Y.) 571.

2. In *Smith v. Weeks*, 60 Wis. 94, it was said: "The construction of the statute ought to be strict. It is at

best a violent remedy, and the question was reserved in a *quære* in *In re Remington*, 7 Wis. 643, whether it was not unconstitutional, as authorizing imprisonment for debt in actions on contract. In *Holstein v. Rice*, 24 How. Pr. (N. Y.) 139, this proceeding is called 'special, extraordinary and peculiar.' By all rules of construction, not only the statute should be construed strictly, but the proceedings under it must follow the statute strictly or no authority is conferred by it. It is a proceeding in which a defendant in a judgment on a contract may be imprisoned, and, in favor of liberty, it should strictly comply with the law." See also *First Nat. Bank v. Martin*, 49 Hun (N. Y.) 571.

Where the order appointing a receiver in proceedings supplementary to execution has not been filed with the clerk of the county in which the judgment roll is filed, as required by *New York Code Civ. Proc.*, §§ 2467, 2468, the judgment debtor is not punishable as for a contempt for not complying with the directions contained in such order. *Bareither v. Brosche*, 13 N. Y. Supp. 551.

In *Kennedy v. Weed*, 10 Abb. Pr. (N. Y.) 62, on the return of an order requiring the defendants to show cause why they should not be punished as for a contempt in disobeying the order directing them to appear and be examined concerning their property, it appeared that there was no such judgment docketed against them as that described in the affidavit on which supplementary proceedings were instituted—the affidavit showing a judgment in favor of the plaintiff against "Ira Weed and Mary Weed," while the transcript docketed was of a judgment against "Ira Weed and Mrs.

apparent contempt by showing that he was actually unable to comply with the order;¹ but it is otherwise if his inability is the result of design on his part; in which case the creation of the inability is itself a contempt.² And where the violation of the order is trivial, and due to accident and not design, and it is made

Weed." It was held that the defendants were not punishable as for contempt for disobeying an order based upon such an erroneous affidavit—the affidavit should truly describe the judgment.

In *Muldoon v. Pierz*, 1 Abb. N. Cas. (N. Y.) 309, judgment was obtained against August Pierz, and the order for the examination in the proceedings was served on Anthony Pierz. The order required the debtor to appear before a referee to be examined in Queens County, and Anthony Pierz having failed to appear, a motion was made to punish him for contempt. But it was held that a defendant sued by a wrong name, does not, by failing to appear in the action, waive his right to object to the misnomer even after judgment and execution, and will not be deemed in contempt for non-compliance with an order for examination as judgment debtor in proceedings supplementary to execution in which his name is erroneously stated, notwithstanding he is the real person intended.

In *Lehmaier v. Griswold*, 46 N. Y. Super. Ct. 11, it was held that after the defendant appears and submits to examination in supplementary proceedings without objection, he is not in a position to justify himself, when proceeded against for contempt in violating an order restraining him from disposing of his property, by allegations of informalities in the affidavit upon which the proceedings were grounded; nor to claim that the jurisdiction to which he has submitted is avoided by such informalities. And especially is this the case when the defendant is an officer of the court. See also *Matter of Johns*, 1 N. Y. Month. Law Bull. 75.

In *People v. Jones*, 1 Abb. N. Cas. (N. Y.) 172, it was held that proceedings to punish a third party for contempt, for not complying with an order to appear for examination, should be dismissed if the allegation in the original affidavit that he has money or property of the judgment debtor, etc., was only on information and belief,

without stating the sources of information. Compare *Miller v. Adams*, 52 N. Y. 409.

Where the proceedings are abandoned, a witness, although regularly cited, is not punishable as for a contempt for failing to attend thereafter; no notice of the time and place of the second examination having been given to the judgment debtor. *Thomas v. Kircher*, 15 Abb. Pr. N. S. (N. Y.) 342.

In *Sloan v. Higgins*, 1 N. Y. Month. Law Bull. 59, it was held, in third party proceedings, that when it does not appear that execution has been returned unsatisfied, the third party cannot be punished for disobedience of an order to appear.

1. *Myers v. Trimble*, 3 E. D. Smith (N. Y.) 607.

In *McCartan v. Van Syckel*, 10 Bosw. (N. Y.) 694, it was held that a party should not be adjudged guilty of contempt for non-compliance with an order of the court, where he is incapacitated from complying by an act of the adverse party, although that act be lawful.

2. In *Ex p. Kellogg*, 64 Cal. 343, an execution against the petitioner had been returned unsatisfied and he was summoned to appear before a referee to answer in respect of his property, pursuant to *California Code Civ. Proc.*, § 714 *et seq.* On the examination he testified that he owned and possessed certain personal property, whereupon the creditor moved for an order directing the delivery of the property to the sheriff, who had in his hands an *alias* execution. The referee took the motion under advisement, and continued the hearing to a certain day, at which time, upon the request of the petitioner, there was a further continuance. During the last continuance the petitioner, in anticipation of, and for the purpose of, defeating the order prayed for, disposed of the property. The superior court adjudged him guilty of a contempt, and he asked for a discharge from custody. It was held that the judgment was proper, and that the prisoner should be remanded.

to appear that the party intended to comply with the order, it seems that he will not be punished as for contempt.¹

It has been held that where the debtor refuses to obey an order in supplementary proceedings, and a second order for his examination is obtained, which supersedes the first, he may not be punished for his contempt of the first order; such order must be treated as having been abandoned.²

The constitutionality of these statutes has been assailed upon various grounds, but chiefly upon the ground that the authority given to commit the debtor, as for a contempt, in case of disobedience to an order, is violative of the constitutional prohibition against imprisonment for debt. But their constitutionality has been almost uniformly sustained, it being held that the punishment is for the contempt and not for non-payment.³

1. Hazard v. Caswell, 8 N. Y. Wkly. Dig. 492.

2. Gaylord v. Jones, 7 Hun (N.Y.) 480.

3. **Constitutionality of Provisions Making Disobedience Punishable as for a Contempt.**—*Minnesota* Gen. Sta., ch. 66, § 307, and ch. 87, authorizing commitment as for a contempt for refusal to deliver over property, are not obnoxious to §§ 12, 7, 6, and 4, of art. 1 of the constitution of that state, which declare respectively that "no person shall be imprisoned for debt in this state;" that "no person shall be deprived of liberty without due process of law; nor be held to answer for a criminal offense, unless upon the action of grand jury;" that "in all criminal prosecutions the accused shall enjoy the right to a jury trial;" and that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law," etc. *State v. Becht*, 23 Minn. 411. In this case Berry, J., said: "In the case at bar, the imprisonment is for contempt in refusing to obey an order of the court. It is true that the order relates to the debt evidenced by the judgment against the relator, but this in no way alters the fact that the imprisonment is for the contempt, not for the debt; and the contempt does not consist in the relator's neglect or refusal to pay the debt, but in his disobedience of the order directing him to hand over certain property to the receiver. The fact that the property in question is to be handed over for the purpose of being applied to the payment of the judgment, is in no way important. The contempt is nevertheless in no proper sense imprisonment for debt."

Wisconsin Rev. Sta., § 3037, authorizing imprisonment as for a contempt

of a judgment debtor who disobeys an order for the delivery or payment of property or money made in supplementary proceedings, does not violate § 16, art. 1, of the constitution of that state, providing that "no person shall be imprisoned for debt arising out of or founded on a contract express or implied," . . . even though the judgment was for a debt founded on a contract. *In re Milburn*, 59 Wis. 24. In this case the court quotes approvingly the observation of Berry, J., in *State v. Becht*, 23 Minn. 411, set out above.

The *Kansas* statutes authorizing imprisonment as for a contempt in case of disobedience of an order requiring delivery, etc., are not violative of §§ 5, 10, 16, of the bill of rights of that state, which provide respectively that "the right of trial by jury shall be inviolate;" "no person shall be a witness against himself;" "no person shall be imprisoned for debt, except in cases of fraud;" nor of the 5th amendment to the Federal Constitution that "no person shall be deprived of life, liberty, or property without due process of law." *Matter of Burrows*, 33 Kan. 675.

South Carolina.—An order in supplementary proceedings for the delivery of a sum of money ascertained to be in the defendant's possession and under his control, and for imprisonment in the event of refusal to do so, is not a "punishment without trial by jury" nor "imprisonment for debt" within the meaning of those terms as used in the *South Carolina* constitution. *Kennesaw Mills Co. v. Walker*, 19 S. Car. 104.

Missouri.—Committing the debtor for failure or refusal to answer proper questions in supplementary proceed-

2. Failure to Attend For Examination.—To refuse to appear for examination may subject one to punishment as for a contempt.¹ But it should appear that the order is such as the judge or referee is authorized to make,² and that it has been duly served.³

ings is not in violation of the *Missouri* constitution forbidding imprisonment for debt. *State v. Barclay*, 86 Mo. 55.

Iowa Code, ch. 3, tit. 18, providing for proceedings supplementary to execution for discovering property of the defendant in the execution, is not violative of the constitution in that it provides for the imprisonment for contempt of persons disobeying the order of the court, judge, or referee without trial by jury. *Eikenberry v. Edwards*, 67 Iowa 619; 56 Am. Rep. 360; *distinguishing Ex p. Grace*, 12 Iowa 208; 79 Am. Dec. 529; *Marriage v. Woodruff*, 77 Iowa 291; *Osborne v. Reardon*, 79 Iowa 175; *McDonnell v. Henderson*, 74 Iowa 619.

1. A judgment debtor is guilty of contempt in failing to obey an order requiring him to appear, although the order may be afterwards set aside for irregularity. *Shultz v. Andrews*, 54 How. Pr. (N. Y. Supreme Ct.) 378.

Where the person is sued by the wrong name and judgment entered against him in that name, he cannot be punished for failing to appear in proceedings supplementary thereto brought against him in the false name. *Muldoon v. Pierz*, 1 Abb. N. Cas. (N. Y. Supreme Ct.) 309; *McGill v. Weil* (Erie Co. Ct.), 10 N. Y. Supp. 246.

If he appears, however, and does not object to the proceedings being continued, he waives his right to do so. *Matter of Johns* (N. Y. C. Pl.), 1 Month. Law Bull. 76.

Proceedings to punish a third person for contempt in not complying with an order to appear and be examined, should be dismissed if the allegation in the original affidavit was only on information and belief, without stating sources of information. *People v. Jones*, 1 Abb. N. Cas. (N. Y. C. Pl.) 172.

Although the judgment debtor has been discharged under the Insolvent Act, nevertheless when served with an order to appear for examination, a failure to do so will constitute a contempt. *Coursen v. Dearborn*, 7 Robt. (N. Y.) 143. See *Spaid v. Hage* (C. Pl.), 1 N. Y. Wkly. Dig. 24.

Where the debtor returned the order to attend and be examined because

not properly folioed, on the motion to punish for contempt, he stating this as an excuse, an attachment was not issued against him, but he was compelled to appear and be examined. *Sparford v. Hogan*, 22 N. Y. Wkly. Dig. 519.

When the order appointing a referee to take the examination of the judgment debtor, directs the latter to appear before the referee at such times and places as he might direct, the judgment debtor is bound to appear when and where ordered by the referee or be in contempt. *Redmond v. Goldsmith* (C. Pl.), 2 N. Y. Month. Law Bull. 29.

A failure of a party to appear on an adjourned day in supplementary proceedings may be punished as a contempt, although the adjournment was made in the absence of the party upon the consent of his attorney. *Parker v. Hunt*, 15 Abb. Pr. (N. Y. Supreme Ct.) 410, note. See generally, *Myers v. Trimble*, 3 E. D. Smith (N. Y.) 607.

Where a defendant failed to appear and submit to examination before a referee, in accordance with an order granted in supplementary proceedings, and, being proceeded against for contempt, offered in excuse affidavits tending to show that on the return day of the order she was too ill to leave her house, the court held that this, together with the fact that her attorney advised her, in good faith, not to appear, as the proceedings were irregular and void, constituted a sufficient excuse for non-attendance. *Walters v. Kenyon* (Supreme Ct.), 4 N. Y. St. Rep. 398.

2. *Brockway v. Brien*, 37 How. Pr. (N. Y. C. Pl.) 270; *Gaylord v. Jones*, 7 Hun (N. Y.) 480; *State v. Burrows*, 33 Kan. 15; *McDonnell v. Henderson*, 74 Iowa 619.

If at any stage of the proceeding it appears that the alleged facts upon which jurisdiction is based do not exist, it is the duty of the judge to dismiss the parties, and a defendant will not be punished for disobeying an order for examination founded on an affidavit specifying a judgment which has no existence. *Kennedy v. Weed*, 10 Abb. Pr. (N. Y.) 62.

3. *DeWitt v. Dennis*, 30 How. Pr. (N. Y. Supreme Ct.) 131.

3. Refusal to Answer.—Refusal on the part of a judgment debtor or a witness to answer any proper and pertinent question is punishable as a contempt.¹

It is a contempt for a party to refuse to obey the referee's order that he permit a witness, while testifying, to examine books and documents which such party has been required to produce to enable the adverse party to question such witness in relation thereto; but a refusal to leave the books and documents with the referee is not a contempt, if the order under

The service of an order for the defendant to appear and submit to examination, made without exhibiting to him the original order of the judge, is irregular, and may be set aside upon defendant's objection, but he may not disregard it, and his failure to appear and make the objection is a waiver of it. *Billings v. Carver*, 54 Barb. (N. Y.) 40.

The improper service of an order for the examination of a judgment debtor in supplementary proceedings while attending court as a witness, does not vitiate the order, but merely affects the service of it, *Fletcher v. Francko*, 21 Civ. Pro. Rep. (N. Y.) 34; and it would seem to follow that a disobedience of the order under such circumstances would render the judgment debtor liable for contempt.

1. *People v. Marston*, 18 Abb. Pr. (N. Y.) 257. In this case the judgment debtor was shown to have been a member of a firm, and his co-partner being examined as a witness refused to state the amount received by the debtor out of the business, between the dates specified, and whether the books of the firm were within the control of the witness; it was held that an order committing him for contempt was proper, and on an appeal therefrom should be affirmed with costs.

In *Page v. Randall*, 6 Cal. 32, the court, in affirming the judgment of the trial court, committing the judgment debtor to jail for refusing to answer questions as to his property, in supplementary proceedings, said: "The refusal to answer interrogatories was highly improper and contumacious, deserving the rebuke and punishment inflicted by the court below."

Under *Missouri Rev. Sts.*, § 2410 *et seq.*, on an examination of the debtor to discover his property, he may be required to disclose, not only that he has property, but where and in whose possession it is, and upon what terms it is

held. And he may not discontinue such examination by disclosing only so much property as he considers sufficient to satisfy the judgment. And the referee appointed to conduct the examination may commit the debtor upon his refusal to answer competent questions; and the fact that the debtor was a grand juror at the time of the examination does not take him out of the operation of the statute, he having appeared and submitted to the examination, and not having made any such suggestion until after he refused to answer the questions on other grounds. *State v. Barclay*, 86 Mo. 55.

An order under *Wisconsin Rev. Sts.*, § 3031, must require the debtor to answer concerning the specific property which he unjustly refuses to apply, etc., and cannot require a general discovery. *Smith v. Weeks*, 60 Wis. 94.

Questions Looking to Discovery of Incumbrances on Property—What Answer Is Not a Contempt.—Where the judgment debtor was interrogated as to the amount and nature of incumbrances on his property some six months prior to the examination, and he replied in substance, that he was unable to give the information sought, it was held that the question was not necessarily within his power to answer, and that the answer given was not necessarily evasive or a refusal to comply with the order; that the question did not look to a discovery of property, but to a discovery of incumbrances thereon, and he may not, in this proceeding, be bound to discover those incumbrances—that would depend upon the form of the original order. *Wicker v. Dresser*, 14 How. Pr. (N. Y.) 465. See also *Foley v. Rathbone*, 4 N. Y. Wkly. Dig. 71.

As to the effect of a refusal to answer questions relating to the fraudulent conduct of the witness, see *supra*, this title, *Proceedings on Examination—Scope of Examination*.

which the referee acts simply requires their production.¹

When a witness appears before a referee in supplementary proceedings and is sworn, he must answer all proper and pertinent questions; whether he has been subpoenaed or not after he appears and is sworn is immaterial.²

4. Violating Injunction—(See also INJUNCTIONS, vol. 10, p. 777).—A person who disobeys an injunction order issued in these proceedings and duly served upon him,³ or who permits any act of

1. *Sudlow v. Knox*, 7 Abb. Pr. N. S. (N. Y.) 411.

Examination of Parties—Privilege of Attorney.—In *New York* the refusal of a witness to produce papers, admitted to be in his possession, on the ground that it would be a breach of his privilege as attorney, is assuming the right of determining for himself the question of privilege, which is the court's province and not his, and his refusal to produce the papers constitutes a contempt. Since by the Code of Civil Procedure of *New York* a party is compellable to testify just as any other witness, the privilege of an attorney founded on the former rule that a party could not be compelled to testify, is gone. *Mitchell's Case*, 12 Abb. Pr. (N. Y.) 249.

2. *People v. Marston*, 18 Abb. Pr. (N. Y.) 257.

3. *Meyer v. Dreyspring* (City Ct.), 23 N. Y. Supp. 315; *Deposit Nat. Bank v. Wickham*, 44 How. Pr. (N. Y. Supreme Ct.) 421; *Millington v. Fox* (Oneida Co. Ct.), 13 N. Y. Supp. 334.

When not Excused by Informalities.—Where one has been imprisoned upon an attachment for a contempt in disobeying an injunction order, he may not, on application for discharge by *habeas corpus*, avail himself of mere irregularities in the proceedings upon which the order was based, but must show lack of jurisdiction to make the order. *In re Perry*, 30 Wis. 268. And if he has appeared and been examined in the proceedings, without objection, he may not claim that the jurisdiction to which he has submitted is avoided by informalities in the affidavit upon which the proceedings were based. *Lehmaier v. Griswold*, 46 N. Y. Super. Ct. 11.

Confessing Judgment.—If one restrained by injunction from transferring or interfering with his property, creates a lien upon his real estate situate in another state, by confessing judgment to another for a fictitious

debt, this is a violation of the injunction, and may be punished as for a contempt. *Fenner v. Sanborn*, 37 Barb. (N. Y.) 610. Ordinarily, however, simply confessing a judgment will not be a violation of such an injunction order. *M'Credie v. Senior*, 4 Paige (N. Y.) 378; but it will be so deemed if accompanied by other acts which show an intent to change the disposition of the debtor's property to the prejudice of the creditor who has obtained the injunction. *Ross v. Clussman*, 3 Sandf. (N. Y.) 676; and if there is a special clause therein to that effect, the injunction will prevent the defendant from confessing a judgment in favor of another *bona fide* creditor. *Lansing v. Easton*, 7 Paige (N. Y.) 364.

After the lapse of more than three years, a judgment debtor will not be guilty of contempt in disposing of his property contrary to the terms of a restraining clause in the order for examination, where the examination has been indefinitely postponed, as, after the lapse of such a time the proceeding is deemed to have been abandoned. *Meyers v. Herbert*, 64 Hun (N. Y.) 200.

A defendant, who does an act in disobedience of an injunction, may not protect himself against punishment by showing that he acted under the authority, by the direction, and for the benefit, of a third person—not a party to the suit, who, since the service of the injunction, has become entitled to do the act complained of. *Krom v. Hogan*, 4 How. Pr. (N. Y. Supreme Ct.) 225.

A corporation may be restrained by injunction and punished for violating it by fine or by the sequestration of property. *New York v. New York, etc., Ferry Co.*, 64 N. Y. 622; *People v. Albany, etc., R. Co.*, 12 Abb. Pr. (N. Y. Supreme Ct.) 136; 20 How. Pr. (N. Y.) 358; *Atlantic, etc., Tel. Co. v. Baltimore, etc., R. Co.*, 46 N. Y. Super. Ct. 377.

Where the debtor commenced an action as administrator of his son to

violation by another for his benefit,¹ is guilty of contempt; and there are cases in which a party will be considered in contempt for disobedience of an injunction which has not been regularly served on him; as where he was present in court at the time it was ordered, or had any other certain knowledge that the same had been ordered.²

To punish one for the disposition of property, when restrained by an injunction, it must appear affirmatively that the title to the property was in the judgment debtor,³ and that it was

recover damages, and assigned his interest therein after service of an injunction restraining the disposition of his property, the assignment was held to constitute a contempt of the injunction. *Wynkoop v. Miers*, 17 Civ. Pro. Rep. (N. Y. City Ct.) 443.

Payment of rent of a place of business, though the debtor's family reside on the same premises, violates an injunction against the judgment debtor's interfering with his property. *Aschemoor v. Emmvert* (C. Pl.), 2 N. Y. Month. Law Bull. 81. See *Taggard v. Talcott*, 2 Edw. Ch. (N. Y.) 628.

The disposition of property which could have been reached on execution is a contempt of a restraining clause of an order, though the property was transferred for the purpose of employing an attorney. *Deposit Nat. Bank v. Wickham*, 44 How. Pr. (N. Y. Supreme Ct.) 421. Compare *Bond v. Bond*, 69 N. Car. 97.

Failure to stop payment of checks drawn before the service of the injunction order is not a contempt. *Fitzgibbon v. Smith*, 61 Hun (N. Y.) 627.

An execution and exchange by a judgment debtor of a mortgage of a small amount, in return for one of a larger amount already existing, is not a contempt of an injunction order against transferring property obtained in these proceedings. *Duffus v. Cole*, 61 Hun (N. Y.) 619. Nor is carrying into effect a previous assignment, a contempt. *Richardson v. Rust*, 9 Paige (N. Y.) 243. See *Ireland v. Smith*, 1 Barb. (N. Y.) 419. Nor is proceeding to judgment in a suit against a third party pending at the time of the service of injunction. *Parker v. Wakeman*, 10 Paige (N. Y.) 485.

Where the claim of a third party to property of the judgment debtor is not such as to raise a substantial dispute, a disposition of the property by such party contrary to the injunction may be punished as a contempt. But if the

amount involved is large, the court is loath to decide the question on motion to punish for contempt, and, on security being given to abide the result of an action, will deny the motion. *Lillienthal v. Wallach*, 37 Fed. Rep. 241.

1. *Neale v. Osborne*, 15 How. Pr. (N. Y. Supreme Ct.) 81; *Poertner v. Russell*, 33 Wis. 193.

2. *Livingston v. Swift*, 23 How. Pr. (N. Y. Supreme Ct.) 1; *Hull v. Thomas*, 3 Edw. Ch. (N. Y.) 236; *Haring v. Kauffman*, 13 N. J. Eq. 397; *Endicott v. Mathis*, 9 N. J. Eq. 110.

In *People v. Brower*, 4 Paige (N. Y.) 405, a party was held in contempt for not obeying an order served on his solicitor, where the knowledge of such service was brought home to him.

A person who is not a party to the action or named in the injunction order, may be held liable for disobeying such injunction on the ground that he is an agent or servant. But, in order that such liability may be incurred, the person should bear such a relation to the defendant as will enable the latter to control his action in regard to the subject-matter as to which the injunction issues. *Batterman v. Finn*, 32 How. Pr. (N. Y. Supreme Ct.) 501.

Members of a Corporate Body Bound Without Personal Service.—An injunction issued against a corporation binds all its officers and agents, and they are just as much liable for disobedience as if personally named in the order. *Davis v. New York*, 1 Duer (N. Y.) 451. The service upon the mayor of an injunction against a municipality is sufficient, and binds all the individuals of the municipality to whose knowledge the injunction comes. *People v. Sturtevant*, 9 N. Y. 263; 59 Am. Dec. 536.

3. *Dean v. Hyatt* (Supreme Ct.), 5 N. Y. Wkly. Dig. 67; *Beard v. Snook*, 47 Hun (N. Y.) 158; *Joline v. Connolly*, 24 N. Y. Wkly. Dig. 111.

An order in supplementary proceedings declaring the judgment debtor

acquired prior to the service of the injunction order;¹ for the disposition of after-acquired property is not a contempt.²

An injunction order in supplementary proceedings continues in force until vacated or modified by further order of the judge or court, and any violation of it prior to that time is a contempt.³

5. Failure to Turn Over Property.—To bring one into contempt for failing or refusing to pay over money, or deliver up property to another, in supplementary proceedings, an order requiring such payment or delivery is a necessary pre-requisite.⁴ And it is

guilty of contempt in disposing of certain money, but allowing him to produce for examination a certain witness to prove that the money was not his, and that if he fails to so produce the witness an order to punish him for contempt will be granted, is not a declaration of his contempt on suspicion, but is within the sound discretion of the court. *Haas v. Matheson* (City Ct.), 20 N. Y. Supp. 660.

The drawing of money deposited in the name of the judgment debtor is a contempt, though he held it in trust for his wife. *People v. Kingsland*, 3 Abb. App. Dec. (N. Y.) 526.

1. *Potter v. Low*, 16 How. Pr. (N. Y. Supreme Ct.) 549.

2. *Rainsford v. Temple*, 3 Misc. (N. Y. C. Pl.) 294; *Sanford v. Goodwin* (N. Y. Marine Ct.), 20 Civ. Pro. Rep. 276, note; *Gerregani v. Wheelwright*, 3 Abb. Pr. N. S. (N. Y. C. Pl.) 264; *McGivney v. Childs*, 41 Hun (N. Y.) 607.

But wages, not within a statutory exemption, earned before the service of an order restraining one from disposing of any of his property, may not be drawn and disposed of subsequently, without incurring liability for contempt. *Newell v. Cutler*, 19 Hun (N. Y.) 74; *Hancock v. Sears*, 29 Hun (N. Y.) 96; *Gillett v. Hilton* (N. Y. City Ct.), 11 Civ. Pro. Rep. 108.

It is not, however, a contempt of such an order to apply wages within the exemption to the support of one's family, though without procuring permission of the court or judge before making the application. *Hancock v. Sears*, 93 N. Y. 79, *overruling* *Newell v. Cutler*, 19 Hun (N. Y.) 74, upon this point.

3. See *infra*, this title, *Beginning and Termination of the Injunction*. *People v. Sturtevant*, 9 N. Y. 263; 59 Am. Dec. 536; *Krom v. Hogan*, 4 How. Pr. (N. Y. Supreme Ct.) 225.

Woolf v. Jacobs, 36 N. Y. Super. Ct. 408. In this case the proceedings were stayed by an order of the court pending a motion to vacate the judgment, which motion was subsequently granted and the decision thereof appealed from. Pending the appeal, the injunction was violated, and when the appellate court reinstated the original judgment the violation of the injunction was punished as a contempt, though the proceedings had not been continued by formal adjournments.

In *Koehler v. Farmers', etc., Nat. Bank* (Supreme Ct.), 6 N. Y. Supp. 470, *affirmed* 117 N. Y. 661, *Van Brunt, P. J.*, said: "The point that the justice had no jurisdiction to grant the injunction, because the papers on which it was based neither made nor tended to make a case conferring jurisdiction, seems to be founded upon the claim that the injunction may be violated with impunity by the defendant, provided he is able to show upon a subsequent application that it has been improvidently granted. No such rule exists, for the reason that the books are full of cases where a party will not be heard to attack an injunction of the court because it was improvidently granted, where he has willfully violated the injunction, until he has purged himself of his contempt. The case of *People v. Bergen*, 53 N. Y. 404, is a sufficient authority to the contrary, if any were needed. It is there laid down that if the order is improvident the remedy is by application to vacate it, or by appeal. So long as it remains in force, it is the duty of all parties to obey it and the merits are not reviewable. The same rule is laid down in *Clark v. Bininger*, 75 N. Y. 344; and also in *People v. Dwyer*, 90 N. Y. 402. But it is needless to multiply authorities upon this point, as the rule is elementary."

4. **Order to Deliver Necessary.**—The

not enough that he has been served with the order and made acquainted with its effect, but in addition, a compliance therewith must be explicitly demanded of him personally, by the party authorized to make it, and there must be a refusal.¹ A demand of the debtor's solicitor will not suffice;² nor will a demand by the attorney of the receiver, or by the referee appointed to see

debtor is not punishable as for a contempt for refusing to deliver his property to the receiver, when the order appointing the receiver does not so direct, and no subsequent order to that effect has been made. *McKelsey v. Lewis*, 3 Abb. N. Cas. (N. Y.) 61. Under such circumstances, a refusal of the debtor to deliver the property to the receiver is not a disobedience of any order of court, for none has been made requiring such a delivery. It is true that the debtor refuses to do that which it is his duty to do, but such duty results from a change of title to the property produced by the appointment of a receiver and not from an order which he refuses to obey. To punish as for a contempt for refusing to deliver property to the receiver, an order requiring such delivery is a necessary pre-requisite. *Watson v. Fitzsimmons*, 5 Duer (N. Y.) 629.

1. *Gray v. Cook*, 24 How. Pr. (N. Y.) 432; *McComb v. Weaver*, 11 Hun (N. Y.) 271. See this latter case for a conversation between the receiver and defendant which was held not to amount to a demand to deliver over the property.

In *Maier v. Huette*, 10 Ill. App. 56, it was held that merely asking the debtor to satisfy the judgment is not enough, but a specific demand must be made in a way that the debtor will understand that unless he complies therewith he will be punished for contempt.

In supplementary proceedings the court made a general finding that the debtor had money and property in his possession and under his control, which he unjustly refused to apply to the payment of his debts, and ordered his imprisonment until he should pay in full the judgment. It was held, on *habeas corpus*, that it was necessary for the order to state the amount of money, and describe the property, under his control; for otherwise it would not appear that he was able to satisfy the judgment; and also that the order should first direct payment, and only after refusal to comply therewith

should the commitment be made. *Matter of O'Connell*, 49 Kan. 415. See also *State v. Burrows*, 33 Kan. 10; *Matter of Burrows*, 33 Kan. 675.

In proceedings supplementary to an execution, the creditor was adjudged to be entitled to have his judgment satisfied out of certain named personal property, which the debtor was directed to deliver up on demand to the sheriff as receiver. Upon service of the order and demand for the delivery, the debtor told the sheriff that he might take the property if he desired to, but he would not turn it over to him as it belonged to his wife. It was held that the action of the debtor was not such a disobedience of the order as to render him liable for contempt under *Iowa Code*, § 3145. *Reardon v. Henry*, 82 Iowa 134.

When Compliance Impossible.—How Shown.—In answer to a citation to show cause why he should not be punished for contempt in refusing to comply with an order of court to deliver up property, it is competent for the party to show that compliance with the order was impossible, although no appeal was taken from the order, and he did not, in any manner, attempt to impeach its correctness. *Hogue v. Hayes*, 53 Iowa 377.

Presumption of Due Service.—It has been held that where the defendant, after being duly notified, fails to show cause why he should not be punished for disobeying an order of the court to pay and deliver over, it will be presumed that such order was duly served upon him and that he had the ability to obey. *In re Milburn*, 59 Wis. 25.

When Personal Service Not Necessary.—In *McDonnell v. Henderson*, 74 Iowa 619, it was held that when the defendant is present in court during all the stages of the supplementary proceedings, for the discovery of property, an order made will be binding on him, without its being reduced to writing and signed by the judge, and personally served.

2. *Lorton v. Seaman*, 9 Paige (N. Y.) 610.

that the delivery is made, when the order directs that the delivery be made to the receiver.¹

Where the order appointing the receiver directs the debtor to assign and convey his lands, but contains no direction to surrender possession, it seems that he may not be held in contempt for refusing to surrender possession.²

When the order directs the debtor to pay a sum of money "in satisfaction of the judgment," he is not in contempt for refusing to pay it to the receiver; such an order is not to pay the money into court or to the receiver, but, in effect, to pay it to the plaintiff directly in satisfaction of his judgment.³

If it does not appear that the specific property or money ordered to be delivered up was at the time of the service of the order for examination in the possession or under the control of the party, he is not liable to punishment for contempt in failing or refusing to turn over the same.⁴

Where a party was ordered to pay to the judgment creditor the amount of a debt, which he admitted, on examination in supplementary proceedings, owing to the judgment debtor, and it subsequently appeared that, prior to the proceedings, the judgment debtor had assigned absolutely all interest in the claim against him, the court declined to punish him as for contempt for non-compliance, he having disclaimed any

1. *Panton v. Zebbley*, 19 How. Pr. (N. Y.) 394.

2. *Tinkey v. Langdon*, 60 How. Pr. (N. Y.) 180; appeal taken, and dismissed in 22 Hun (N. Y.) 315.

3. *People v. King*, 9 How. Pr. (N. Y.) 97.

Under the present code of *New York* (section 2447), there is no authority to make such an order—the order must now direct payment or delivery to be made to the sheriff or receiver.

4. *Tinker v. Crooks*, 22 Hun (N. Y.) 579. Compare *Brush v. Lee*, 6 Abb. Pr. N. S. (N. Y.) 51.

Property of Defendant in Hands of Non-resident for the Use and Benefit of the Former.—Promissory notes belonging to the defendant, in the hands of a resident of a distant state, but held for the use and benefit of the defendant, are under the latter's control, and he is guilty of contempt in disobeying an order to deliver up the same. *Eikenberry v. Edwards*, 67 Iowa 619; 56 Am. Rep. 360; *Farmer v. Hoffman*, 67 Iowa 678.

When Title to Property is in Dispute.—In *New York*, when the title to the property is in dispute, an order may not be made for its delivery to the receiver. *Gallagher v. O'Neil*, 3 N. Y. Supp. 126; *West Side Bank v. Pugsley*, 47 N.

Y. 368; *People v. Conner*, 15 Abb. Pr. N. S. (N. Y.) 430; *Town v. Safeguard Ins. Co.*, 4 Bosw. (N. Y.) 683; *Rodman v. Henry*, 17 N. Y. 482.

Property Subject to Chattel Mortgage

—Property Levied Upon.—In *Griswold v. Tompkins*, 7 Daly (N. Y.) 214, it was held that where it appears in the proceedings that personal property in the possession of the debtor and belonging to him, is subject to a chattel mortgage payable on demand, a judge before whom the proceedings are had, may not order the debtor to deliver the property over to the receiver appointed by him, and the refusal by the debtor to deliver upon the demand of the receiver, is not punishable as a contempt. And further if, before the demand is made for the delivery of the property by the receiver, it is levied upon by an execution issued upon a judgment recovered against the debtor by another creditor, and the levy is in full force at the time the demand is made, the property is not in the defendant's custody, but in the custody of the officer under the execution, and the judgment debtor's refusal to deliver the property to the receiver is not punishable as a contempt. See also *Chappell v. Winters*, 16 N. Y. Wkly. Dig. 89.

intentional disrespect to the court or disobedience to its order.¹

6. Punishment—*a.* BY WHOM ADMINISTERED.—It may be said generally that the punishment for contempt in violating an order may be imposed by the judge who made it, or by the court from whence the execution issued.² Statutes sometimes confer the power to punish thus for contempt on the referee who has been charged with hearing the proceedings.³

1. Debtor of the Judgment Debtor.—*Beebe v. Kenyon*, 5 Thomp. & C. (N. Y.) 271; 3 Hun (N. Y.) 73. The present code of *New York* (section 2447) does not authorize the court to order a debtor of the judgment debtor to pay directly to the judgment creditor. And even under the former code the authority to do so was not free from doubt and was sometimes denied. *West Side Bank v. Pugsley*, 47 N. Y. 368.

In *Estey v. Fuller Implement Co.*, 82 Iowa 678, it was said that the authority given by section 3140 of the *Iowa* code, in proceedings supplementary to execution, to order third persons to turn over property in their possession to the judgment creditor, is for the protection of such third parties, but not being parties to the proceedings they are not bound by such orders, and will not be in contempt by refusing to comply with them. If the creditor would subject the property to the payment of his debt in such a case, he must resort to the remedies provided by law for that purpose; as execution, garnishment, or equitable proceedings. See also *Rear-don v. Henry*, 82 Iowa 134.

2. *New York* Code Civ. Proc., § 2457, provides that the judge or court out of which the execution was issued may punish as for contempt. See *Peck v. Baldwin*, 58 Hun (N. Y.) 308; *Browning v. Hayes*, 41 Hun (N. Y.) 282; *Blanchard v. Reilly*, 11 Civ. Pro. Rep. (N. Y. Supreme Ct.) 281; *Lathrop v. Clapp*, 40 N. Y. 328; 100 Am. Dec. 493; *Dresser v. Van Pelt*, 15 How. Pr. (N. Y. Super. Ct.) 19.

A special surrogate who issues an order in supplementary proceedings has power to punish for contempt. *Aldrich v. Davis* (Supreme Ct.), 19 N. Y. Supp. 765.

Under the former code of *New York*, where the power to punish for contempt was given to the judge, it was frequently declared that the power could be exercised by him only and not by the court. *Shepherd v. Dean*, 13 How. Pr. (N. Y. C. Pl.) 173; *Wicker v. Dresser*, 14 How. Pr. (N.

Y. Supreme Ct.) 465; *Cowdrey v. Carpenter*, 17 Abb. Pr. (N. Y. Super. Ct.) 107; and, therefore, an attachment should have been returnable before the judge and not before the court. *Matter of Smethurst*, 2 Sandf. (N. Y.) 724; *Matter of Pester*, 2 Code Rep. (N. Y. Supreme Ct.) 98. In such cases an attachment issued by the judge might properly be made returnable before him at his office. *Matter of Smethurst*, 2 Sandf. (N. Y.) 724. But it has been held that the court had the inherent power, in a general sense, of punishing, as a contempt, disobedience to orders made by judges out of court; and that the power was not taken away from the court by any provisions of the code relating to supplementary proceedings. *Hilton v. Patterson*, 18 Abb. Pr. (N. Y. Supreme Ct.) 248, citing *Wickes v. Dresser*, 4 Abb. Pr. (N. Y. Supreme Ct.) 93; *Dresser v. Van Pelt*, 15 How. Pr. (N. Y. Super. Ct.) 19; *Kearney's Case*, 13 Abb. Pr. (N. Y. Supreme Ct.) 459.

Where the term of the county judge before whom an order to show cause why one should not be committed for contempt is made returnable, expires before the return day, the hearing may be had before his successor. *Gemman v. Berry*, 34 Hun (N. Y.) 138. See also *Holstein v. Rice*, 15 Abb. Pr. (N. Y. Supreme Ct.) 307, which declares the same practice under the former code. See also *Kelly v. McCormick*, 2 E. D. Smith (N. Y.) 504.

Discharge.—When a commitment for contempt is issued under section 2457 *New York* Code Civ. Proc., although it seems that the judge who made the commitment, or the court out of which the execution was issued may grant a discharge of the defendant from imprisonment, it is the better practice to apply to the court therefor. *Mitchell v. Hull*, 3 N. Y. Month. Law Bull. 22.

3. In *Missouri*, under the statute. *State v. Barclay*, 86 Mo. 55. In *California*, under the statute, disobedience

b. PROCEDURE.—The procedure must conform to the statute.¹ Usually an attachment or order to show cause issues. But it is sometimes provided that where the defense is disobedience to an order of the court requiring the payment of money, upon proof by affidavit that a personal demand therefor has been made and payment refused or neglected, a warrant may be issued without notice to the offender.²

In whatever way the defendant may be brought before the court or judge, a clear case must be made out.³

to the order of a referee is punishable as contempt by the court or judge ordering the reference.

A justice of the peace may adjudge a party guilty of contempt who refuses to obey an order in supplementary proceedings had before him. *Ex p. Latimer*, 47 Cal. 131.

Under the *Wisconsin* statute, it is held that a court has jurisdiction to punish as for contempt the disobedience of a lawful order of a court commissioner, even though the commissioner has power to punish such contempt. *Nieuwankamp v. Ullman*, 47 Wis. 169.

Prior to the enactment of *Wisconsin* Laws of 1860, ch. 44, a court commissioner was not authorized to commit to jail one who disobeyed his orders in supplementary proceedings. *In re Remington*, 7 Wis. 643.

1. *Matter of Smethurst*, 2 Sandf. (N. Y.) 724.

It was said in *Smith v. Weeks*, 60 Wis. 107, that the statute authorizing punishment should be construed strictly. See also *In re Remington*, 7 Wis. 643.

In *Re Milburn*, 59 Wis. 24, it was held that the statute providing for admission to jail liberties of persons in attachment for contempt, applied to those in contempt in supplementary proceedings.

By giving bail in cases of arrest for contempt in supplementary proceedings, the defendant waives all irregularities in the process upon which the arrest was made. *Kelly v. McCormick*, 28 N. Y. 318.

As to the procedure in *New York*, see *Pitt v. Davison*, 37 N. Y. 235; *Staford v. Brown*, 4 Paige (N. Y.) 360; *People v. Craft*, 7 Paige (N. Y.) 325; *Holstein v. Rice*, 15 Abb. Pr. (N. Y. Supreme Ct.) 307; *Lathrop v. Clapp*, 40 N. Y. 328; 100 Am. Dec. 493; *Watson v. Fitzsimmons*, 5 Duer (N. Y.) 629; *Brush v. Lee*, 6 Abb. Pr. N. S. (N. Y. Ct. of App.) 50; *Matter of Smethurst*, 2 Sandf. (N. Y.) 724; *Ward*

v. Arenson, 10 Bosw. (N. Y.) 589; *Wicker v. Dresser*, 14 How. Pr. (N. Y. Supreme Ct.) 465; *Kearney's Case*, 13 Abb. Pr. (N. Y. Supreme Ct.) 459; *Reynolds v. McElhone*, 20 How. Pr. (N. Y. Supreme Ct.) 454.

2. **Disobedience of Order to Pay Costs or Specified Sum of Money.**—*New York* Code Civ. Proc., § 2268; *Brush v. Lee*, 6 Abb. Pr. N. S. (N. Y. Ct. of App.) 50; *Matter of Pester*, 2 Code Rep. (N. Y. Supreme Ct.) 98.

In the common pleas, a bailable attachment is issued in the first instance *Fisher v. Doyle*, 2 N. Y. Month. Law Bull. 43. So, under the former *New York* code, it was held that the process to appear and answer was for contempts other than those for non-payment of a sum of money. *People v. King*, 9 How. Pr. (N. Y. Supreme Ct.) 99. But in *Tinker v. Crooks*, 22 Hun (N. Y.) 579, a case which is said to be not well considered, it was held that this summary process ought not to have been allowed. See also *West Side Bank v. Pugsley*, 47 N. Y. 368.

The plaintiff must establish that the defendant has the money or means, before an order for contempt can be made. The defendant cannot be committed to jail on suspicion, nor can an order be made that will have that result, unless it be admitted or proven that the defendant can comply with the order asked for. *Peters v. Kerr*, 22 How. Pr. (N. Y. Supreme Ct.) 3.

In *South Carolina*, it is held that it is an error to incorporate in an order for the delivery of money, a provision for punishment in case of refusal; and that the proper course is for the application for attachment to be made after the time fixed for the execution of the order, and on rule to show cause. *Kennesaw Mills Co. v. Walker*, 19 S. Car. 104.

3. *Peters v. Kerr*, 22 How. Pr. (N. Y. Supreme Ct.) 3. The plaintiff must establish that the defendant has the

c. EXTENT OF PUNISHMENT.—The extent of punishment is regulated by the statutes, which, in some instances, have made provision that a fine shall be imposed upon the offender sufficient to indemnify the complainant for loss or injury sustained by reason of contempt;¹ the amount of the indemnity to be assessed must be ascertained, upon proof of the damage sustained, by the

money or means, before an order can be issued for him to pay the judgment or be committed to jail.

Before attachment issues to bring the defendant before the judge for disobedience of an order requiring him to appear before a referee and submit to an examination as to his property, it must be made to appear that the order is lawful; that it is such an order as the judge is authorized to make, and that it has been duly served. The manner of service should be stated, so that the judge can see whether it is duly served. The affidavit of the attorney that an order was personally served by the sheriff is not evidence of due service so as to authorize the judge to grant an attachment against the judgment debtor for disobedience of it. The particular misconduct must be designated. *De Witt v. Dennis*, 30 How. Pr. (N. Y. Supreme Ct.) 131.

In *Tinkey v. Langdon*, 60 How. Pr. (N. Y. Supreme Ct.) 183, where the debtor was held in contempt for refusing to surrender possession of his lands and real estate, or any part thereof, to a receiver, it was held that it was necessary for the papers to show that there had been an order directing the debtor to assign and convey his lands, and in the absence thereof he could not be held in contempt.

To sustain an application for an attachment to punish a judgment debtor for disposing of money received by him after the service of an injunction order in supplementary proceedings, the creditor must show affirmatively that the money was already earned by or due to the debtor when the order was served. *Gerregani v. Wheelwright*, 3 Abb. Pr. N. S. (N. Y. C. Pl.) 264; *Potter v. Low*, 16 How. Pr. (N. Y. Supreme Ct.) 549.

Where the alleged contempt is the failure to pay over money or transfer property to a receiver or sheriff, not only the order and its service must be proved, but also a personal demand by the receiver or sheriff for the money or property. *Tinkey v. Langdon*, 60 How. Pr. (N. Y. Supreme Ct.) 180;

Panton v. Zebbley, 19 How. Pr. (N. Y. Super. Ct.) 394.

Where the offense is failure to appear, no proof of the omission is necessary, because the judge has judicial knowledge of that fact. *Miller v. Adams*, 52 N. Y. 409. But see *Ward v. Arenson*, 10 Bosw. (N. Y.) 589, which holds that proof of failure to appear is necessary, as well as proof of service of order.

Where an attorney makes the affidavit for an attachment, he need not prove his authority. *Miller v. Adams*, 52 N. Y. 409.

1. In *New York*.—"If an actual loss or injury has been produced to the complainant by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law that an action may be maintained to recover damages for the loss or injury, a fine sufficient for indemnification must be imposed upon the offender, and collected and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such fine constitute a bar to an action by the aggrieved party to recover damages for the loss or injury." *New York Code Civ. Proc.*, § 2284.

It is the duty of the court to impose such a fine. *Livingston v. Swift*, 23 How. Pr. (N. Y. Supreme Ct.) 1; *Lansing v. Easton*, 7 Paige (N. Y.) 364; *Fenner v. Sanborn*, 37 Barb. (N. Y.) 610.

Where the acts of the defendants did not of themselves cause the loss complained of to the plaintiff, they should not be fined the full amount of the judgment. *Lehmaier v. Griswold*, 46 N. Y. Super. Ct. 11.

Erroneous Advice of Counsel No Excuse.—The fact that the defendants acted under erroneous advice of counsel to whom they applied for information, cannot protect them from a fine sufficient to compensate the adverse parties for the injuries they have sustained by the wrongful acts complained of, though it may furnish a ground to justify the court in refusing to inflict a further punishment upon the offenders

same rules of law which would apply in an action for such damage.¹ But when no actual loss or injury has been produced, the limit of the fine to be imposed, with costs and actual expenses, is usually fixed by the statute.²

for a violation of its orders. *Lansing v. Easton*, 7 Paige (N. Y.) 367.

1. **Proof of Damages.**—*Gallagher v. O'Neil* (City Ct.), 21 N. Y. St. Rep. 163; *Sudlow v. Knox*, 7 Abb. Pr. N. S. (N. Y. Ct. of App.) 412; *Leudeke v. Coursen*, 3 Misc. (N. Y. City Ct.) 559; *King v. Flynn*, 37 Hun (N. Y.) 329.

A fine cannot be imposed arbitrarily and capriciously, but must be based on proof of damage or injury. *Tinkey v. Langdon*, 60 How. Pr. (N. Y. Supreme Ct.) 184; *citing Simmonds v. Simmonds* (Supreme Ct.), 6 N. Y. Wkly. Dig. 263; *Sudlow v. Knox*, 7 Abb. Pr. N. S. (N. Y. Ct. of App.) 412; *Clark v. Binninger*, 75 N. Y. 344.

A witness who refuses to answer questions propounded on his examination in a special proceeding, while guilty of a contempt, is not guilty of a criminal contempt. The fine imposed should be limited to the amount necessary to indemnify. *King v. Flynn*, 37 Hun (N. Y.) 329.

The court may summarily fine a delinquent \$250 for disobedience to an order, in addition to costs; but, where the fine goes beyond this and is for the indemnity of the party, the loss or injury must be legally ascertained and assessed, that the court may know what indemnity is necessary. *Gallagher v. O'Neil* (City Ct.), 21 N. Y. St. Rep. 163.

Amount of Indemnity.—The value of property disposed of in violation of an injunction should regulate the amount of the fine. *Feely v. Glennen* (C. Pl.), 2 N. Y. Month. Law Bull. 19.

So where \$356.25 was drawn out of a bank, contrary to the provision of an injunction, a fine of \$400 was held to be reasonable. *People v. Kingsland*, 3 Keyes (N. Y.) 325.

In *Meyer v. Dreysspring*, 3 Misc. (N. Y.) 560, the defendant having departed with \$60 in violation of an injunction order, was subjected to a fine for that amount.

In *Fenner v. Sanborn*, 37 Barb. (N. Y.) 610, the fine imposed by a county judge, being no greater than the injury sustained and less than the amount due the plaintiffs, was held to have been properly imposed.

2. In *New York*, "a fine must be im-

posed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid in like manner as where there has been an actual loss." *New York Code Civ. Proc.*, § 2284. See *Lehmaier v. Griswold*, 46 N. Y. Super. Ct. 11; *Luedeke v. Coursen*, 3 Misc. (N. Y. City Ct.) 559; *Van Valkenburgh v. Doolittle*, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 75; *Sudlow v. Knox*, 7 Abb. Pr. N. S. (N. Y. Ct. of App.) 411; *Matter of Morris*, 45 Hun (N. Y.) 173; *Tinkey v. Langdon*, 60 How. Pr. (N. Y. Supreme Ct.) 180; *Moffat v. Herman*, 116 N. Y. 135.

So where a debtor failed to attend and be examined, a fine imposed equal to the amount of the judgment was held excessive; it should have been an amount sufficient to pay the prosecuting attorney for his costs and expenses. *Reynolds v. Gilchrist*, 9 Hun (N. Y.) 203. The same amount of fine was imposed where a debtor refused to answer a question, but was afterwards vacated as excessive. *Foley v. Rathborne*, 12 Hun (N. Y.) 589.

In a case where the debtor failed to appear in proceedings on a judgment for \$2,606, he was fined \$500 and committed to jail without bail, though it does not appear whether or not there was actual loss. *Waters v. Miller* (C. Pl.), 3 N. Y. Month. Law Bull. 101.

Where the debtor failed to appear, an order terminating the contempt proceedings, and allowing the debtor to appear and be examined on condition that he pay the referee's fees already incurred, was held proper. *Putnam v. Anthony* (Supreme Ct.), 7 N. Y. St. Rep. 580.

The court cannot punish a judgment debtor for contempt in failing to obey an order in supplementary proceedings requiring him to appear and submit to an examination by fining him the full amount of the judgment as indemnity to the judgment creditor, unless it is made to appear that the said creditor has sustained loss or injury to that amount by the failure of the debtor to obey such order. *Fall Brook Coal Co. v. Hecksher*, 42 Hun (N. Y.) 534.

The costs allowed must be proved, and are alike in amount to those allowed for similar services in other actions in the same court; the court may not arbitrarily fix a gross sum.¹ They include the costs of the supplementary proceedings.² A counsel fee is not allowed.³

In *New York*, where the misconduct proved consists of an omission to perform an act or duty, which is yet in the power of the offender to perform, he may be imprisoned until he has performed it and paid the fine imposed. In such a case the order and the warrant of commitment, if one is issued, must specify the act or duty to be performed and the sum to be paid.⁴

Where there is no proof of loss to creditors, an order committing defendant for refusal to deliver property to the receiver until he pays a fine of \$500, is erroneous, since, under *New York Code Civ. Proc.*, § 2284, a court can summarily fine a party for misconduct only to the amount of \$250 and costs. *Gallagher v. O'Neil* (City Ct.), 21 N. Y. St. Rep. 163.

Where a judgment debtor, upon being arrested under an attachment, at once submits himself to an examination, the court will ordinarily accept his excuse and discharge him from arrest; but this will not be done where the debtor puts the pursuing creditor to expense in prosecuting the attachment, and raises all objections possible. *Hilton v. Patterson*, 18 Abb. Pr. (N. Y. Supreme Ct.) 245.

In *Knowles v. De Lazare*, 8 Civ. Pro. Rep. (N. Y. C. Pl.) 386, upon the willingness of the judgment debtor to appear for further examination, the court declined to award costs to the plaintiff, on the ground that there was an honest misunderstanding as to the necessity of attendance, and the debtor denied an intent to defy the process of the court.

Prior to the adoption of *New York Code Civ. Proc.*, § 2284, where there was no actual damage sustained, the fine imposed was limited to the costs and expenses incurred by the relative in the contempt proceedings. *People v. Oliver*, 66 Barb. (N. Y.) 570; *Reynolds v. Gilchrist*, 9 Hun (N. Y.) 203.

1. *New York Code Civ. Proc.*, § 3240. See *Sudlow v. Knox*, 7 Abb. Pr. N. S. (N. Y.) 411.

In *Seeley v. Black*, 35 How. Pr. (N. Y. Supreme Ct.) 369, it was held that costs were to be estimated at the same rate as those in the original action, and not as those in special proceedings.

2. *Ross v. Clusman*, 3 Sandf. (N. Y.) 676.

To entitle the plaintiff to compensation for the referee's time in making up his report in contempt proceedings, there should be a detailed specification thereof from the referee. *Van Valkenburgh v. Doolittle*, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 75.

3. *Matter of Morris*, 45 Hun (N. Y.) 173; *Sudlow v. Knox*, 4 Abb. N. Cas. (N. Y.) 72; *People v. Jacobs*, 5 Hun (N. Y.) 428, affirmed 66 N. Y. 8; *Power v. Village*, 19 Hun (N. Y.) 117. Compare *Van Valkenburg v. Doolittle*, 4 Abb. N. Cas. (N. Y.) 72.

4. *New York Code Civ. Proc.*, § 2285. See also *Matter of Pester*, 2 Code Rep. (N. Y. Supreme Ct.) 98.

Similar provisions exist in other states. *California Code Civ. Proc.*, § 1219; *Iowa Rev. Code*, § 3494. *Ex p. Latimer*, 47 Cal. 131; *Ex p. Rowe*, 7 Cal. 177.

In *Albany City Bank v. Schermerhorn*, 9 Paige (N. Y.) 372; 38 Am. Dec. 551, decided under the former practice, it was held that the order should specify particularly what the offender is to do, and the manner in which it is to be done. See also *De Witt v. Dennis*, 30 How. Pr. (N. Y. Supreme Ct.) 131; *Matter of Clark*, 2 N. Y. Month. Law Bull. 22, which holds that the particular misconduct of which the accused is convicted must be set forth in the order; and when not set forth, the order of commitment is void.

In *Rugg v. Spencer*, 59 Barb. (N. Y.) 385, it was held that if all the necessary facts to constitute a regular and valid order appear on its face, it will be deemed to be such, until the contrary is made to appear; and that an order which expressly declared the fine imposed was to indemnify the plaintiff for damage and loss sustained by the contempt, was sufficient in form, though

XVI. DEFECTS, OMISSIONS, AND IRREGULARITIES; WAIVER.—Defects or irregularities in proceedings supplementary, which do not render them null and void, should be taken advantage of by motion made in due time to set the proceedings aside.¹ In many cases such irregularities may be remedied by amendment.² So

the recital was somewhat defective in not stating expressly that actual loss or injury had been sustained.

In Kansas.—Under proceedings for contempt against a judgment debtor for failure to comply with an order requiring him to deliver property for the satisfaction of a judgment, the judge may enforce the same by committing him to jail until the judgment and the costs of the proceedings for contempt are satisfied. *Matter of Burrows*, 33 Kan. 675; and the order for commitment must state the amount of money and describe the property under his control. *Matter of O'Connell*, 49 Kan. 415.

In Wisconsin, the order disobeyed must be recited in the writ, for the statute is strictly construed. *Smith v. Weeks*, 60 Wis. 94.

Discharge from Imprisonment.—One cannot be discharged from imprisonment without the consent of the prosecutor, until the fine is actually paid. *Lansing v. Easton*, 7 Paige (N. Y.) 364.

Duration of Punishment.—The limitation as to the duration of imprisonment does not apply where a party has the power to perform the act required. *Gallagher v. O'Neil (City Ct.)*, 21 N. Y. St. Rep. 163, *citing In re Haigh* (Supreme Ct.), N. Y. Daily Reg., Jan. 20th, 1887.

1. *Hilton v. Patterson*, 18 Abb. Pr. (N. Y. Supreme Ct.) 245.

Proceedings supplementary to execution are not invalidated by a failure to indorse upon the execution the statement that it was issued by the personal representatives of the deceased judgment creditor, where no objection is made until after the appointment of a receiver. *Deyo v. Borley* (Supreme Ct.), 43 N. Y. St. Rep. 638.

Where one has been imprisoned upon an attachment for a contempt in disobeying an injunctive order, he cannot, on an application for discharge by *habeas corpus*, avail himself of mere irregularities in the proceedings upon which the order was based, but must show lack of jurisdiction to make the order. *In re Perry*, 30 Wis. 268.

When the affidavit states all the necessary facts to give the judge juris-

dition to grant an order for the judgment debtor's examination, and he appears and submits to the examination and to the appointment of a receiver without objection, it is too late to move to vacate the order upon the ground that the sheriff's return upon the execution is defective, when it appears by the judgment debtor's examination that he has not been prejudiced by the defect complained of. *Baker v. Herkimer*, 43 Hun (N. Y.) 86.

Errors, Omissions, Irregularities.—That the papers are entitled as of the wrong court is an irregularity merely. *People v. Oliver*, 66 Barb. (N. Y.) 570.

The use of the word "attached" instead of "punished," in an order to show cause why the debtor should not be punished as for contempt, is an irregularity merely. *People v. Kenny*, 4 Thomp. & C. (N. Y.) 572.

It seems that an order appointing a receiver, where witnesses were examined without notice to the judgment debtor, would constitute an irregularity. *Seyfert v. Edison*, 47 N. J. L. 428.

Mere clerical errors or clerical omissions should not be allowed to affect the validity of the proceedings. *Henlein v. Graham*, 32 S. Car. 307.

An order made before the report of the referee is made discontinuing the proceedings and imposing costs, is irregular, and should be vacated and set aside. *Kennedy v. Norcott*, 54 How. Pr. (N. Y. Supreme Ct.) 87.

Appointment of Referee.—Irregularities as to the appointment of a referee cannot be raised before him, but a special motion must be made before the judge to set the appointment aside. *Wilcox v. Harris (Monroe Co. Ct.)*, 59 How. Pr. (N. Y.) 262.

2. **Amendment.**—Where the averments that the judgment debtor has no equitable interests in property subject to execution are omitted from the affidavit on which supplementary proceedings are based, the omission may be supplied by amendment with the permission of the court. *Weiller v. Lawrence*, 81 N. Car. 65. See *Ken-*

omissions which are not jurisdictional, but which are mere irregularities of practice, may be supplied by amendment.¹

Where a defect or irregularity exists in an order, objection to it should be taken upon the first attempt to assert jurisdiction under it; if the party appears and is examined, any irregularity is thereby waived.² Where the judge or court has no jurisdiction over the subject-matter, the order is wholly void,³ and objection

nedy v. Weed, 10 Abb. Pr. (N. Y. C. Pl.) 62.

It is provided by statute in *Indiana* that all supplementary proceedings, after the order requiring the parties to appear and answer, shall be summary, without further pleadings; but that the sufficiency of the order and affidavit may be first tested by motion to dismiss or strike out. This does not prevent the amendment after a demurrer there-to has been upheld. *Burkett v. Holman*, 119 Ind. 141; *Burkett v. Bowen*, 118 Ind. 379.

Where a demurrer has been sustained to the original affidavit, the plaintiff may be allowed to amend and proceed as in other civil actions. *Hutchinson v. Trauerman*, 112 Ind. 21.

As to the amendment of process and return, see *Kelly v. McCormick*, 2 E. D. Smith (N. Y.) 503; *M'Conkey v. Glen*, 1 Cow. (N. Y.) 141; *Morrell v. Waggoner*, 5 Johns. (N. Y.) 233.

1. *Goodall v. Demarest*, 2 Hilt. (N. Y.) 534.

Where no valid judgment is rendered or execution issued, an order for the examination of a judgment debtor in supplementary proceedings based thereon, is invalid, and the defect, being jurisdictional, cannot be cured by the subsequent entry of a judgment *nunc pro tunc*. *Barber v. Briscoe*, 9 Mont. 341.

2. *Viburt v. Frost*, 3 Abb. Pr. (N. Y. Super. Ct.) 119; *Dresser v. Van Pelt*, 15 How. Pr. (N. Y. Supreme Ct.) 19; *Deyo v. Borley* (Supreme Ct.), 43 N. Y. St. Rep. 638; *Ammidon v. Holcott*, 15 Abb. Pr. (N. Y.) 314.

The voluntary appearance of the debtor admits the requisite facts to give jurisdiction, and a receiver may be appointed then. *Baker v. Herkimer*, 43 Hun (N. Y.) 86; *Hart v. Johnson*, 43 Hun (N. Y.) 505.

In *Underwood v. Sutcliffe*, 10 Hun (N. Y.) 453, reversed upon another point in 77 N. Y. 58, the attorney for the judgment debtor appeared before the judge in obedience to the notice to show cause why a receiver should not be appointed, and made no objec-

tion to the appointment. It was held that all objections to irregularity of the proceedings were thereby waived.

The regularity of a judgment or execution cannot be collaterally inquired into in these proceedings. *Gardner v. Lay*, 2 Daly (N. Y.) 113; *Union Bank v. Sargeant*, 53 Barb. (N. Y.) 422; *U. S. Land, etc., Co. v. Pike*, 2 N. Y. Month. Law Bull. 31.

A defect in the proof of the service of the original order for his examination cannot be urged by the debtor after he has appeared, with his attorney, and submitted to an examination in which he admitted its service. *Hart v. Johnson*, 43 Hun (N. Y.) 505.

Where a warrant of attachment was issued against a debtor for his failure to appear and be examined, and, on the return thereof, it was ordered that he be released on condition that he appear before the examining officer, and he did appear, it was held that jurisdiction was restored in the proceedings and irregularities waived. *Coursen v. Dearborn*, 7 Robt. (N. Y.) 143.

Where the original order is not shown to the debtor, it is merely an irregularity in the service, which may be waived by his appearing without objection and submitting to the examination. *Newell v. Cutler*, 19 Hun (N. Y.) 74, citing *Billings v. Carver*, 54 Barb. (N. Y.) 40; *Pitt v. Davison*, 37 N. Y. 242; *Shultz v. Andrews*, 54 How. Pr. (N. Y. Supreme Ct.) 376.

3. *Viburt v. Frost*, 3 Abb. Pr. (N. Y. Super. Ct.) 119.

Lack of jurisdiction of a state court to examine a foreign consul in supplementary proceedings is fatal to such proceedings. *Griffin v. Dominguez*, 2 Duer (N. Y.) 658.

And in *Wegman v. Childs*, 44 Barb. (N. Y.) 403, reversed on another point in 41 N. Y. 159, the court said: "In order to sustain this action, the plaintiff is bound to show not only the judgment, but also an execution from a court having a right to issue it, and that the same was delivered to the sheriff of

may be made at any stage of the proceedings.¹ But in other cases the court may acquire jurisdiction by waiver and submission of the parties.²

An order, not null and void on its face,³ cannot be disregarded, but the party must appear and object, in order to save his rights.⁴ Where the judgment debtor has waived the irregularity, a third person cannot raise it.⁵ Mere irregularities cannot be raised for the first time on an appeal.⁶

the proper county and by him returned unsatisfied. Without each and all of these being proved the judge had no jurisdiction to entertain proceedings supplementary to execution." See also *Barber v. Briscoe*, 9 Mont. 348; *Flint v. Webb*, 25 Minn. 263; *Lynch v. Johnson*, 48 N. Y. 33; *Adams v. Hackett*, 7 Cal. 201; *Byrd v. Badger*, 1 McAll. (U. S.) 443; *Pacific Bank v. Robinson*, 57 Cal. 522; 40 Am. Rep. 120; *Griffin v. Dominguez*, 2 Duer (N. Y.) 656; *Sackett v. Newton*, 10 How. Pr. (N. Y. Supreme Ct.) 560.

1. *Henderson v. Stone*, 40 How. Pr. (N. Y. Super. Ct.) 333.

2. The correct principle is stated by Duer, J., in *Viburt v. Frost*, 3 Abb. Pr. (N. Y. Super. Ct.) 119, where it is said: "The appearance and submission for examination must be regarded, if the order was null, as voluntary acts, and it cannot be reasonably doubted that a valid order for the appointment of a receiver may be founded upon a voluntary appearance and examination of the judgment debtor. It is only when a judge or court has no jurisdiction of the subject-matter of the proceeding in which an order is made, that the order is wholly void for want of jurisdiction. It is to such cases that the maxim 'consent cannot give jurisdiction' applies. In all other cases the objection to the jurisdiction may be waived."

The appearance of the judgment debtor for the purpose of raising objections will not confer jurisdiction. *Henderson v. Stone*, 40 How. Pr. (N. Y. Super. Ct.) 333.

3. As where the order was made returnable on Sunday. *Arctic F. Ins. Co. v. Hicks*, 7 Abb. Pr. (N. Y. Supreme Ct.) 204.

An order which omits to state the place at which the debtor is to attend, is fatally defective. *Kelty v. Yerby*, 31 How. Pr. (N. Y. C. Pl.) 95.

4. *Billings v. Carver*, 54 Barb. (N. Y.) 40; *Diossy v. West*, 1 N. Y. Month.

Law Bull. 23; *Hilton v. Patterson*, 18 Abb. Pr. (N. Y. Supreme Ct.) 247.

When an order is issued by a judge having jurisdiction, the person upon whom it is served has two paths to pursue and only two. If he desires to avoid contempt of court, he must either obey it or procure it to be set aside. Even if it be erroneous he has no right to disregard it. *Wilcox v. Harris*, 59 How. Pr. (N. Y. Monroe Co. Ct.) 262.

A judgment debtor may not disregard an order to appear in supplementary proceedings because affidavit is not served with such order. *Arctic F. Ins. Co. v. Hicks*, 7 Abb. Pr. (N. Y. Supreme Ct.) 204.

5. *Tyler v. Willis*, 33 Barb. (N. Y.) 327; *Wright v. Nostrand*, 94 N. Y. 45; *Richards v. Allen*, 3 E. D. Smith (N. Y.) 399; *Tyler v. Whitney*, 12 Abb. Pr. (N. Y. Supreme Ct.) 465; *Underwood v. Sutcliffe*, 10 Hun (N. Y.) 453. This latter case has been overruled, but upon another point.

Where the debtor assents to the jurisdiction by executing an assignment to the receiver appointed, a third person cannot impeach the title of such assignee for any irregularity in the proceedings prior to the assignment. *Richards v. Allen*, 3 E. D. Smith (N. Y.) 399.

The fact that the obligation filed by a receiver appointed in supplementary proceedings is not under seal, is an irregularity which the judgment debtor only can take advantage of. *Morgan v. Potter*, 17 Hun (N. Y.) 405.

6. *People v. Oliver*, 66 Barb. (N. Y.) 570; *Hart v. Stearns* (Supreme Ct.), 4 N. Y. Wkly. Dig. 540.

So any irregularity as to the issue of execution cannot be first raised on appeal. *Ammidon v. Wolcott*, 15 Abb. Pr. (N. Y. Supreme Ct.) 314; *Haggerty v. Rogers*, 15 Abb. Pr. (N. Y. Super. Ct.) 314 n.; *Dresser v. Van Pelt*, 15 How. Pr. (N. Y. Supreme Ct.) 19. And see generally *Conway v. Hitchins*, 9

XVII. ALLOWANCE OF COSTS—1. To the Judgment Creditor.—The *New York* Code provides that the judge may make an order allowing to the judgment creditor a fixed sum as costs, consisting of his witnesses' fees and other disbursements, and of a sum in addition thereto not exceeding thirty dollars; and directing the payment thereof out of any money which has come, or may come, to the hands of the receiver or of the sheriff; or, within a time specified in the order, by the judgment debtor or other persons against whom the special proceeding is instituted.¹

Barb. (N. Y.) 378; *Union Bank v. Sargeant*, 53 Barb. (N. Y.) 422; *Lindsay v. Sherman*, 5 How. Pr. (N. Y. Supreme Ct.) 308; *Bank of Genesee v. Spencer*, 15 How. Pr. (N. Y. Supreme Ct.) 14; *Owen v. Dupignac*, 17 How. Pr. (N. Y. C. Pl.) 512; *Tinkey v. Langdon*, 60 How. Pr. (N. Y. Supreme Ct.) 180.

A motion to vacate a warrant in supplementary proceedings waives all the irregularities in recitals not specified therein. *Frost v. Craig*, 16 Daly (N. Y.) 108.

1. *New York* Code Civ. Proc., § 2455. Apart from this section—and § 2456, which refers to the costs of a judgment debtor, or others against whom the special proceeding is instituted, and for discussion of which, see the next section of this article—the judge has no authority to allow costs in supplementary proceedings. See *Sims v. Frier*, 2 N. Y. Month. Law Bull. 97.

As to when stenographer's fees are taxable as costs or disbursements, see *STENOGRAPHERS*, vol. 23, p. 556.

Distinction Between "Costs" and "Disbursements."—In *Dauntless Mfg. Co. v. Davis*, 24 S. Car. 536, McIver, J., said: "There seems to be no little confusion, even in the books, in the use of the terms 'costs' and 'disbursements,' one sometimes being used for the other, and we must look to the sense in which those terms are intended to be used more than to their strict technical signification. The theory seems to have been that the fees of the several officers of the court, as well as the witnesses, would be paid by the party at the time he called their services into requisition, and when that is done the amounts thus paid would properly constitute disbursements; but unless this is done, we do not see how such fees could be properly classed as disbursements, when nothing has been disbursed; and in such case, which very frequently occurs, we do not see why

such fees may not properly be taxed as costs due to the several officers of the court. *Lewis v. Brown*, 16 S. Car. 58. Indeed, we suppose that a good deal of the confusion in the use of the terms 'costs' and 'disbursements' has arisen from this conflict between the theory and the practice—the theory being that the fees of the several officers of court and the fees of the witnesses are paid by the plaintiff, or defendant, as the case may be, at the time the services are rendered, in which case they would very properly be termed disbursements, and taxed as such, in order to reimburse the party for the outlay he has been required to make; while the practice, in many cases, is that such fees are not paid at the time, but remaining due to the several officers at the termination of the action, are taxed as costs due to such officers. We do not think, then, that any stress is to be laid upon the manner in which those terms are used in the order which we are called upon to construe, for the allowance is there spoken of as an allowance for disbursements, while in the Code, § 321, such allowance is termed costs, and such it was manifestly intended to be. The order directs 'that the plaintiffs be allowed the usual costs of this proceeding to be taxed by the clerk, together with \$30 in addition for his disbursements.' It is quite clear that the order does not confine the allowance granted the plaintiff to the \$30, but that in addition thereto the plaintiff must be allowed 'the usual costs;' and this, we think, is in strict accordance with the provisions of section 321 of the Code, which reads as follows: 'The judge may allow to the judgment creditor, or to any party so examined, whether a party to the action or not, witness' fees and disbursements, and a fixed sum in addition not exceeding \$30 as costs.' In this case, the plaintiff's attorney under the order above stated, was adjudged en-

titled to have taxed as costs the following items: \$5 for order of injunction; \$25 for five days' references; and \$3 for three sub-writs, in addition to the \$30 allowed by the said order. But it was further held that he could not tax as costs \$10 for motion for appointment of a receiver, there being no order of the court allowing the costs of such motion. See also *Cheatam v. Seawright*, 30 S. Car. 101.

"Counsel Fees"—"Costs."—Section 301 of the former code of *New York* provided for an allowance for "witness fees, disbursements, and a fixed sum in addition not exceeding \$30, as costs." Where the officer allowed a fixed sum (\$30) in the order for "counsel fees" instead of saying "as costs," it was held that this was sufficient—that the additional allowance must be intended to embrace counsel fees. The court said: "In common parlance, costs include counsel fees. Those terms, as used, are often synonymous. The section plainly contemplates an allowance for the expenses of the party examined, besides his disbursements; and what can it be for, unless to cover his necessary expenses in the protection of his legal rights. He is entitled to have the advice of counsel. *Corning v. Tooker*, 5 How. Pr. (N. Y.) 16. The additional allowance, I apprehend, must be intended to embrace counsel fees. In granting allowances under section 308, the court generally takes into consideration what would be a reasonable counsel fee under the circumstances of the case. *Sheldon v. Allerton*, 2 Sandf. (N. Y.) 630. There is a wide difference between the meaning of section 301 and the section of the Revised Statutes which provides for the payment of costs in summary proceedings to recover the possession of land. Costs in these cases are deemed to embrace officers' fees only; but section 301 provides for an allowance for 'witness fees and disbursements and a fixed sum in addition not exceeding \$30, as costs.' The allowance, it will be seen, is not limited to costs as heretofore understood, but a sum by way of indemnity to the party for his expenses in the action or proceeding, is contemplated. Those allowances are now termed costs. (Code, section 303.) When an order speaks the clear intent of the law in regard to the matter to which it relates, it should not be held void because the precise language of the statute is not

employed." *Hulsaver v. Wiles*, 11 How. Pr. (N. Y.) 446.

Taxing Costs.—Proceedings supplementary to execution are proceedings in the action, and not the special proceedings designated by the code. Accordingly, the proceedings by attachment for a violation of an order in supplementary proceedings, is a proceeding in the action, and costs therein are to be taxed as costs in the action, and not as costs of an action which are allowed in special proceedings. See *Seely v. Black*, 35 How. Pr. (N. Y.) 369.

Before Referee—Costs—When Imposed.—The imposition of costs in cases where the proceedings are had before a referee should not be made until the report of the referee is made; and before acting, the parties on either side should have notice from the other of the motion to be made founded on such report. Such a practice would be more in analogy with proceedings in the court by motion for costs in cases within the discretion of the court. *Kennedy v. Norcott*, 54 How. Pr. (N. Y.) 87.

When Application for Allowance may be Made.—Under section 301 of the former code of *New York*, it was held to be competent for the judgment creditor to apply for allowance of costs at any time after the transfer of property to the sheriff or receiver, before the order for its application to the judgment was made. *Webber v. Hobbie*, 13 How. Pr. (N. Y.) 382. The matter is now regulated by §§ 2455 and 2456 *New York Code Civ. Proc.*

Costs in an appeal from an order committing for contempt are motion costs only—\$10. *Jones v. Sherman*, 11 Civ. Pro. Rep. (N. Y.) 416. See also *Pennell v. Wilson*, 2 Abb. Pr. N. S. (N. Y.) 466; *Savage v. Darrow*, 4 How. Pr. (N. Y.) 74.

Collection of Costs Conditional.—The collection of costs under the order mentioned in the text is entirely conditional on the coming of assets into the hands of the receiver or sheriff, and there is no personal liability on the part of the judgment debtor for their payment. *Valiente v. Bryan*, 65 How. Pr. (N. Y.) 203.

Sections 297 and 301, of the former code of *New York*, taken together, authorized the judge before whom supplementary proceedings were pending, to order the payment of the costs of the proceedings, if property were found in the debtor's hands sufficient

The court may grant costs to the judgment creditor, although, after the beginning of the supplementary proceedings and before the examination of the debtor, the amount due is paid.¹

2. To the Judgment Debtor or Third Person Examined.—So the *New York* code provides that where the judgment debtor, or the person against whom the special proceeding is instituted, has been examined,² and property applicable to the payment of the judgment has not been discovered in the course of the special proceeding,³ the judge may make an order allowing him a like sum

for that purpose, and disobedience of the order by the debtor was punishable as a contempt. *People v. Kelly*, 22 How. Pr. (N. Y.) 309; 13 Abb. Pr. (N. Y.) 459. See also *Brush v. Lee*, 6 Abb. Pr. N. S. (N. Y.) 51.

How Collectible.—Prior to the amendment of 1882 to *New York* Code Civ. Proc., § 779, execution or precept could not be issued to collect costs allowed in an order made in supplementary proceedings—such an order being held not to be “an order of court,” and therefore not within the statute (Sess. Law *New York*, 1847, p. 390). A distinction was recognized between orders made by the court and a judge or officer out of court; for example, in supplementary proceedings. *Hulsaver v. Wiles*, 11 How. Pr. (N. Y.) 446; *McCulloch v. Hoffman*, 1 N. Y. Month. Law Bull. 27. But by the amendment above mentioned such costs are collectible by execution.

In *Valiente v. Bryan*, 65 How. Pr. (N. Y.) 203, it was held, where supplementary proceedings were instituted upon return of an execution, and during the course of the proceeding \$10 costs were allowed by the judge, and also the further sum of \$30 at the conclusion of the examination, when a receiver was appointed, that the first allowance was clearly motion costs and collectible by execution. Further, that in supplementary proceedings, the final costs cannot be considered motion costs and are not, therefore, collectible by execution.

It seems that no previous demand for costs or leave to issue execution is needed. *Weitzel v. Schultz*, 3 Abb. Pr. (N. Y.) 469; *Lucas v. Johnson*, 6 How. Pr. (N. Y.) 121; *Mitchell v. Westervelt*, 6 How. Pr. (N. Y.) 265; *affirmed*, 6 How. Pr. (N. Y.) 311, note. Compare *Eckerson v. Spoor*, 4 How. Pr. (N. Y.) 361; *Boyce v. Bates*, 8 How. Pr. (N. Y.) 495.

1. *Colne v. Girard*, 19 Abb. N. Cas.

(N. Y.) 288. This was held by the *New York* City court. It was said that *New York* Code of Civil Procedure, section 2455, was sufficiently comprehensive to cover the case stated; the next section, 2456, providing for costs to the judgment debtor, was limited to cases in which an examination has been had, and this restriction is the feature which distinguishes the two sections. The limitation is not found in section 2455, which regulates costs which may be allowed to the creditor. See also the succeeding section of this article.

2. *New York* Code Civ. Proc., § 2456. The debtor will not be allowed costs unless there has been an examination. *Simms v. Frier*, 2 N. Y. Month. Law Bull. 97; *Engle v. Bonneau*, 2 Sandf. (N. Y.) 679.

Wisconsin Rev. St., § 3038, expressly authorizes the allowance to the defendant, in supplementary proceedings, of “witness fees and disbursements, and a fixed sum in addition not exceeding \$25 as costs.” *Blabon v. Gilchrist*, 67 Wis. 38.

3. It was formerly held that if, on the examination of the debtor, no property or effects should be discovered, the creditor would be ordered to pay him costs, unless he could show some good reason for requiring the debtor to submit to the examination. *Anonymous*, 3 Sandf. (N. Y.) 725. But now, in such cases, the practice seems to be otherwise, and the creditor will not be required to pay the debtor costs unless he proceeds *mala fide* or vexatiously. Supplementary proceedings after judgment are meritorious, and should be favored. *Kress v. Morehead*, 8 N. Y. St. Rep. 858. Compare *Boelger v. Swivel*, 1 How. Pr. N. S. (N. Y.) 372.

But an examination of a third party, without discovering applicable assets, entitles him to costs. *Matter of Castle*, 2 N. Y. St. Rep. 362; *Sloane v. Hig-*

as the judgment creditor, as costs; and directing the payment thereof, within a time specified in the order, by the judgment creditor; or, except where it is allowed to the judgment debtor, out of any money which has come or may come, to the hands of the receiver or of the sheriff.¹

A third party required by order in supplementary proceedings to attend and submit to an examination as to property in his posses-

gins, 2 N. Y. Month. Law Bull. 11; Anonymous, 11 Abb. Pr. (N. Y.) 108.

Costs of Motion to Dismiss.—In *Hutson v. Weld*, 38 Hun (N. Y.) 142, the appellant contended that no costs should have been imposed upon him, even though the order for the examination of the debtor was improvidently granted, because by the provision of §§ 2455, 2456, *New York Code Civ. Proc.*, costs may not, in proceedings of this kind, be awarded to the judgment debtor unless he has been examined, and property applicable to the payment of the judgment has not been discovered. The court held that these provisions relate only to costs in the proceeding for examination, and have no application whatever to the costs of the motion to dismiss it; that there is no provision in the code which interferes with the right of the court in a matter of this character to impose costs of a motion to dismiss it before any examination has taken place under its terms.

1. In *Kress v. Morehead*, 8 N. Y. St. Rep. 858, it was held that costs granted against the judgment creditor in favor of the judgment debtor should be deducted from the judgment. See also *Robens v. Sweet*, 16 N. Y. St. Rep. 334; 48 Hun (N. Y.) 436. But see *Boelger v. Swivel*, 1 How. Pr. N. S. (N. Y.) 372. In this case, in supplementary proceedings after examination, a motion was made to compel the defendant to pay a certain sum to a receiver theretofore duly appointed, which sum the plaintiff claimed that the defendant was entitled to receive from a third party, and which the defendant claimed to have disposed of by delivering to his attorney before the second order was served. An order was made referring the question of fact to a receiver, who took testimony and made his report in substance that the defendant's claim was true, which report was confirmed. It was held that the allowance of costs to defendant was proper, but that a provision in the order that defendant first pay the fees of the referee

and stenographer, amounted in effect to a direction that the said judgment be satisfied *pro tanto*, and that in this particular the order was without authority of law—that under § 2447, *New York Code Civ. Proc.*, the justice is vested only with power to direct the application of any money or property in the possession or under the control of the defendant belonging to him to a sheriff, designated in the order, or to a receiver, if one was appointed.

Assignment of Judgment—Costs Due Judgment Debtor.—The assignee of a judgment takes the assignment subject to the equities existing between the original parties; and where costs have been granted to the judgment debtor in supplementary proceedings instituted upon the judgment, he is entitled to have them paid before any execution may issue thereon. The assignee might, perhaps, proceed with the execution after deducting the costs due to the defendant from the amount of the judgment, or crediting the amount of them upon the execution. But Van Brunt, P. J., in reference to this last point, said: "I do not concur in the view that the assignee was not compelled to pay these costs as a condition precedent to proceeding, but might have credited them upon the judgment. The code requires payment, and giving credit is not payment." *Mac Whinnie v. Cameron*, 57 Hun (N. Y.) 463.

Security for Costs.—In *Estey v. Fuller Implement Co.*, 82 Iowa 678, upon the return of an execution against the defendant unsatisfied, the plaintiff filed an affidavit with the court, alleging that the co-defendants had in their possession property of the defendant which had been taken by them without consideration and in fraud of creditors, and that the said defendant was left without means to pay the plaintiff's debt. Upon this affidavit the court ordered the defendants to appear and submit to an examination concerning matters therein alleged. After their appearance, answers to the charges made in the affidavit were filed by each

sion belonging to the debtor, may not claim to be paid witness fees as a condition to his obedience to the order.¹

Final costs cannot be allowed until the termination of the proceeding, though interlocutory costs may be allowed.²

XVIII. DISCONTINUANCE OR DISMISSAL OF PROCEEDINGS.—The *New York* code provides for discontinuance by order of the judge, upon the application of the judgment creditor, or for a dismissal, upon the application of the judgment debtor, in case of unreasonable delay in proceeding on the part of the creditor, or in case the judgment has been satisfied. Terms may be imposed. If a receiver has been appointed, notice of the application for a discontinuance or dismissal must be given, in such a manner as the judge deems proper, to all persons interested in the receivership as far as they can conveniently be ascertained.³

of the defendants, and upon the hearing, other witnesses than the defendants were subpoenaed and examined in open court. The court made a finding of facts and directed that one of the defendants pay to the clerk a certain sum to be applied in satisfaction of plaintiff's judgment. It was held that this proceeding was not to be considered as an equitable action, but simply as a proceeding supplementary to execution for the discovery of property, and that the defendants were not entitled therefore to demand of the plaintiffs, as non-residents, security for costs.

1. "The order requiring the third person to attend and submit to an examination as to property in his possession belonging to the debtor, is in the nature of a special proceeding commenced against such person commanding him to appear. (*New York Code Civ. Proc.*, §§ 2441, 2433.) Section 2452 prescribes the mode of serving the order, but there is nothing in this or any other section of the code requiring the creditor to pay the third person witness fees as a condition to his obedience to the order. The different sections of the act discriminate between a mere witness required to attend upon subpoena and a person commanded to appear by order. The witness served with the subpoena is entitled to the usual witness fee (*New York Code Civ. Proc.*, § 3318), but the person proceeded against by order is so far regarded as a party to the special proceeding (see *Corning v. Tooker*, 5 How. Pr. (N. Y.) 16), that the court, in its discretion, may award him costs not exceeding \$30 in amount, in all cases in which no property is discovered." Per McAdam, C. J., in *Heckman v. Bach*, 20 Abb. N. Cas. (N. Y.) 401.

In *Davis v. Turner*, 4 How. Pr. (N. Y.) 190, and *Boice v. Turner*, 4 How. Pr. (N. Y.) 195, it was held that a person examined as a mere witness before a referee in supplementary proceedings in pursuance of §§ 295-300 of the code, is entitled to fees as a witness as allowed by statute (N. Y. Laws of 1840, p. 331, § 8), but to nothing more; and his remedy for fees is against the party calling him, and it seems he is not bound to give evidence until his fees are paid. Compare *Webber v. Hobbie*, 13 How. Pr. (N. Y.) 382.

2. *Davis v. Turner*, 4 How. Pr. (N. Y.) 190; *Boice v. Turner*, 4 How. Pr. (N. Y.) 195.

3. *New York Code Civ. Proc.*, § 2454.

While an appeal with requisite security for costs upon the judgment on which the proceedings are based, suspends the latter, it does not authorize the judge before whom such proceedings are pending to dismiss them. The object of the examination is to reach the equitable interests and things in action of the judgment debtor, which cannot be reached by execution upon the judgment. By the service of the order and the restraint of the debtor, the creditor obtains an equitable lien upon such interests and things in action, which he has the right to retain as a security pending the suspension of his power to proceed on his judgment. Having acquired such lien previous to the appeal, he cannot, in the absence of some express provision of law, be deprived of it. The delay suspends his right to obtain the benefit of his lien, but does not take it away. *Cowdrey v. Carpenter*, 17 Abb. Pr. (N. Y. Supreme Ct.) 107.

In *Arnoux v. Homans*, 32 How. Pr. (N.Y. C. Pl.) 382, followed in *Matter of Darragh*, 1 Conn. (N.Y.) 171, the defendant having served notice of appeal, the mere service of notice of argument by the plaintiff was held not to preclude him from enforcing payment of the judgment—no stay of proceedings having been given or applied for.

Non-Adjournment—Injunction in full Force.—Where, the proceedings standing adjourned to a certain day, the defendant meanwhile obtains an order to show cause why they should not be set aside, and a stay of proceedings until the motion to set aside should be decided, and succeeds in obtaining an order granting this motion, which, however, on appeal is reversed, but no adjournment of the proceedings was had on the day to which it stood adjourned, at the time when the stay was granted; it is held, that under these circumstances, notwithstanding the non-adjournment of the proceedings and the order at special term setting aside the proceedings, the injunction continues in full force. *Woolf v. Jacobs*, 36 N. Y. Super. Ct. 408.

Abandonment.—In *Meyers v. Herbert*, 64 Hun (N. Y.) 200, the examination of the judgment debtor was completed on the second of November, 1887, and an adjournment was taken to the 12th inst., on which day the judgment creditors obtained a further postponement to a future day in November, which was not fixed. The supplemental order contained the usual injunction against a disposition of property by the judgment debtor. After the 12th of November, there was no further hearing under the order of 1887. In April, 1891, the plaintiffs obtained a new order for the examination of the debtor. Meanwhile (April 1, 1891) the debtor, being destitute, disposed of certain jewelry belonging to her in order to provide herself with necessities. It was held that the failure for so long a time to reinstate the hearing or to apply for a receiver, must be deemed an abandonment of the proceeding, and that under the circumstances it was not a contempt for the debtor to sell her jewelry, after the proceeding had been so long dormant.

Abandonment—Under Former Code of New York.—Abandonment of supplementary proceedings might have been inferred from the mere delay of the creditor to prosecute them, provided the delay was unreasonable in view of

all the circumstances attending it. *Ballou v. Boland*, 14 Hun (N. Y.) 355; *Gaylord v. Jones*, 7 Hun (N. Y.) 480; *Schanck v. Conover*, 56 How. Pr. (N. Y. Supreme Ct.) 437; *Bennett v. McGuire*, 58 Barb. (N. Y.) 625; *Carter v. Clarke*, 7 Robt. (N. Y.) 490; *Edmonston v. McLoud*, 16 N. Y. 543; *DeComeau v. People*, 7 Robt. (N. Y.) 498; *Stanley v. Lovett*, 14 Hun (N. Y.) 412. (See this case for delay which was held not to constitute an abandonment of the proceedings.) *Contra*, *Underwood v. Sutcliffe*, 10 Hun (N. Y.) 453.

In *Squire v. Young*, 1 Bosw. (N. Y.) 690, it was said that supplementary proceedings could be terminated as absolutely by the plaintiff's abandonment of them as by an order of the judge before whom they were commenced. In this case the proceedings were adjourned to the 9th of July, and on that day the plaintiff neither moved the matter before the judge, nor called his attention to it, nor did he again move in the matter until the following October. On the 16th of December, an order was made, based on the original order (granted on the 11th of March), and on an examination of the debtor and of a witness had on the 17th and 24th of April, appointing a receiver of the debtor's property, it was held that the order of the 11th of March and the proceedings had thereon must be deemed to have been absolutely abandoned and terminated, and that the subsequent order of December was unauthorized and erroneous.

A creditor in supplementary proceedings who neglects to adjourn or extend the proceedings after the debtor has been examined, thereby allows the proceedings to drop and may not subsequently, without notice to the debtor, compel the witness to appear and testify. *Thomas v. Kircher*, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 343. See also *Ammidon v. Wolcott*, 15 Abb. Pr. (N. Y. Supreme Ct.) 314; *Hawes v. Barr*, 7 Robt. (N. Y.) 452.

But in *Reynolds v. McElhone*, 20 How. Pr. (N. Y. Supreme Ct.) 454, it was held that where the judge did not appear at his office at the time appointed in the order for the examination, the order was not spent, but the defendant must wait a reasonable time for his appearance; and a defendant having on the same day paid over money in his possession in violation of the order was held in contempt. In this case it was also held that the pro-

On a motion to set aside supplementary proceedings to examine a judgment debtor, on the ground that after the recovery of the judgment the debtor has been discharged in insolvency, such discharge is conclusive and its validity may not be tried.¹

Beginning a second proceeding against property acquired by the judgment debtor subsequently to the institution of prior proceedings does not discontinue the prior proceedings.² Nor does the issuing a second execution operate a waiver of supplementary proceedings commenced against the defendant under a prior execution which was returned "unsatisfied."³

An order for examination of a debtor in proceedings supplementary to execution, and a subsequent warrant for his arrest in such proceedings, are entirely independent of one another, and vacating the order does not affect the warrant.⁴

ceedings might be revived by the subsequent appearance of the judgment debtor.

And in *Wright v. Nostrand*, 94 N. Y. 31, supplementary proceedings were commenced in April, 1875. A receiver was appointed therein in February, 1878. It was not shown that the proceedings were adjourned from time to time. It was held that the court would not presume a loss of jurisdiction from the omission to show regular adjournments.

Again, in *Allen v. Starring*, 26 How. Pr. (N. Y. Supreme Ct.) 57, a judge of the supreme court made an order in supplementary proceedings that the debtor appear and submit to an examination before the referee. The parties appeared at the time appointed, but the referee failing to do so, the creditor immediately obtained an order from another judge appointing another referee and reference. It was held that the first proceedings were still in force, and the creditor might have applied to the judge who granted that order for the appointment of another referee, or of another time and place before the same referee.

In *Holstein v. Rice*, 15 Abb. Pr. (N. Y. Supreme Ct.) 307, it was held that supplementary proceedings taken before a county judge, and proceedings therein to punish for a contempt by a fine for the benefit of the party, do not abate upon the expiration of the judge's term of office, but may be continued before his successor.

Failure of Officer to Make Formal Entry of Adjournment.—In *Wisconsin*, the failure of a court commissioner before whom proceedings supplementary to execution are pending, to make a formal entry that the proceedings are

adjourned to a particular day and hour, does not operate as a dismissal of the proceedings, and divest him of the right to continue the examination, on giving proper notice of the next hearing. *Holton v. Burton*, 78 Wis. 321.

1. *Robens v. Sweet* (Supreme Ct.), 16 N. Y. St. Rep. 334; 48 Hun (N. Y.) 436. But at the same time the court said that this ruling was without prejudice to any proper proceeding by the judgment creditor to test the validity of the debtor's discharge. See also, as to the main proposition, *Rich v. Salinger*, 11 Abb. Pr. (N. Y. C. Pl.) 344; *Russell, etc., Mfg. Co. v. Armstrong*, 10 Abb. Pr. (N. Y.) 258, note; *affirmed*, 12 Abb. Pr. (N. Y.) 472; *Dresser v. Shufeldt*, 7 How. Pr. (N. Y. Supreme Ct.) 85; *Trumbull v. Healy*, 21 Wend. (N. Y.) 670.

2. *Walter v. Pecare*, 11 N. Y. Supp. 146; 57 Hun (N. Y.) 587.

3. *Fellerman's Case*, 2 Abb. Pr. (N. Y. Supreme Ct.) 155.

In *Iowa*, proceedings supplementary to execution for the discovery of property belonging to a judgment debtor, may be maintained contemporaneously with an action in equity to subject such property to the payment of the judgment. *Estey v. Fuller Implement Co.*, 82 Iowa 679.

4. The *New York Code*, § 2437, permits supplementary proceedings to be instituted by warrant instead of by order, and also permits the warrant to be issued at any time after an order is granted. But it does not appear that in the latter case the subsequent vacating of the order requires the vacating of the warrant. The section provides that the judge may, if necessary, direct the adjournment, or if the return day of the

Where the proceedings are had before a referee, they should not be discontinued before the report of the referee is made.¹

XIX. THE RECEIVER—(See also RECEIVERS, vol. 20, p. 307)—

1. Appointment.—At any time after making the order requiring the judgment debtor or any other person to attend and be examined, or after issuing a warrant, as provided for in these proceedings, the judge to whom the order or warrant is returnable, may make an order appointing a receiver of the judgment debtor's property.²

order has elapsed, the continuance of the proceedings under the order until after the return of the warrant and his decision thereupon. This shows that the judgment creditor may abandon the proceedings instituted by the order and elect to proceed under the warrant, or may keep the proceedings under the order alive until his right to proceed under the warrant is established. But the complete independence of the two proceedings is thus clearly indicated. *Frost v. Craig*, 16 Daly (N. Y.) 107.

1. *Kennedy v. Norcott*, 54 How. Pr. (N. Y. Supreme Ct.) 87.

2. At What Stage of Proceedings Receiver May be Appointed.—This is the language of *New York Code Civ. Proc.*, § 2464. The provisions in the other states, as a rule, follow this quite closely.

In *Flint v. Webb*, 25 Minn. 263, Cornell, J., said: "That a receiver may, in the discretion of the court, be appointed immediately upon granting the order for the examination there can be no doubt; and such, it seems, is the safer and better practice, inasmuch as it effectually secures to the prosecuting creditor that priority of lien upon his debtor's property which his vigilance justly entitles him to. And it is not perceived how, in any case, any harm can result to the debtor by the appointment of a receiver in the first instance, because such officer and all his proceedings are under the supervision and control of the court, whose jurisdiction is adequate to the protection of the interests of both debtor and creditor."

In *Fitch v. Mead*, 29 How. Pr. (N. Y. Supreme Ct.) 360, it was held that, by analogy to the former practice in chancery upon filing a creditor's bill and the appointment of a receiver, the judge may, in his discretion, appoint the receiver at any time while the proceedings are pending before him. See also *Groot v. Greeley* (Supreme Ct.), 5 N. Y. Month. Law Bull. 69.

New York Code Civ. Proc., § 2464,

authorizes the appointment of a receiver in proceedings instituted either before or after the return of the execution, upon the examination of a third person indebted to, or having property of, the judgment debtor. *De Vivier v. Smyth*, 6 Civ. Pro. Rep. (N. Y. City Ct.) 394; 1 How. Pr. N. S. (N. Y.) 48.

And in *New Jersey*, where an order for the examination of the debtor in supplementary proceedings has been duly served on him, and he fails to attend for examination, the creditor may proceed to examine witnesses, and an order appointing a receiver may be made on such examination without examining the debtor. *Colton v. Bigelow*, 41 N. J. L. 266.

Under the former code of *New York* the decisions were not uniform upon the questions whether a receiver could be appointed in proceedings taken before the return of the execution, and whether the application for the appointment could be founded upon the examination of a third party.

In *Union Bank v. Sargeant*, 53 Barb. (N. Y.) 422, it was held that a receiver could be appointed in proceedings taken before the return of the execution. And Mr. Throop, in a note to his edition of the code (see note preceding section 2464), says: "The books are full of cases where the validity of such an appointment has been tacitly, if not expressly, recognized." And he refers to *Tillotson v. Wolcott*, 48 N. Y. 188, and *West Side Bank v. Pugsley*, 47 N. Y. 368. He adds "that the practice of appointing a receiver in proceedings taken before as well as after the return of an execution, had become so inveterate that the commissioners were unwilling to propose its abrogation." But in the following cases it was held that a receiver could not be appointed in proceedings before the return of the execution. *Darrow v. Lee*, 16 Abb. Pr. (N. Y. C. Pl.) 215 (*overruling* *Hansom v. Tripler*, 3 Sandf. (N. Y.) 733); *Holbrook v. Orgler*, 40 N. Y.

Super. Ct. 33; 49 How. Pr. (N. Y.) 289, 1 N. Y. Wkly. Dig. 3. Nor on the examination of third persons as to the property of the debtor in their hands. *Kemp v. Harding*, 4 How. Pr. (N. Y. Supreme Ct.) 178. See also *infra*, this title, *Notice of Application For Receiver*.

Receiver of Particular Debts.—In *New York*, a receiver may not be appointed of particular debts, or of a specified part or articles of the judgment debtor's property. *Andrews v. Glenville Woolen Co.*, 11 Abb. Pr. N. S. (N. Y. Supreme Ct.) 78. See also *Kemp v. Harding*, 4 How. Pr. (N. Y. Supreme Ct.) 178.

Receiver of Foreign Corporation.—In *De Berner v. Drew*, 57 Barb. (N. Y.) 438; 39 How. Pr. (N. Y.) 466, it was held that if the court has obtained jurisdiction of an action against a foreign corporation by its appearance by attorney, it may, after judgment rendered in the action and execution returned unsatisfied, appoint a receiver of the property and effects of the corporation.

Receiver of Joint Stock Company.—In *Bruns v. Kane*, 12 Civ. Pro. Rep. (N. Y. City Ct.) 86, it was held to be doubtful whether a receiver of a joint stock company may be appointed in supplementary proceedings. See also *Waterbury v. Merchants' Union Express Co.*, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 163.

Voluntary Appearance of Debtor.—Appointment of Receiver.—In *Bingham v. Disbrow*, 37 Barb. (N. Y.) 24, where the debtor voluntarily appeared for examination without an order and submitted to an examination, the appointment of a receiver founded thereon was upheld.

In *Viburt v. Frost*, 3 Abb. Pr. (N. Y. Super. Ct.) 119, Duer, J., said: "If the original order for the debtor's appearance was a nullity he was not bound to appear; nor was he bound, when he appeared, to submit to an examination. His appearance and submission to an examination must, therefore, be regarded as voluntary acts, and it cannot be reasonably doubted that a valid order for the appointment of a receiver may be founded upon a voluntary appearance and examination of the judgment debtor." This language was quoted approvingly in *Green v. Bookhart*, 19 S. Car. 466.

Who May Appoint the Receiver.—Under the *North Carolina Act of 1877*, ch. 223, modified by the *Act of 1879*, ch. 663, a motion for the appointment of a receiver may be made before the

resident judge of the district, or one assigned to the district, or one holding the courts therein by exchange, at the option of the mover. *Corbin v. Berry*, 83 N. Car. 27.

The appointment must be made by the judge and not by the clerk. *Parks v. Sprinkle*, 64 N. Car. 637.

In *Wisconsin*, the county court, having civil jurisdiction, may appoint a receiver in a proper case in supplementary proceedings against a debtor, against whom a judgment has been rendered in that court. *Second Ward Bank v. Upmann*, 12 Wis. 499.

In *Clark v. Bergenthal*, 52 Wis. 103, it was held that if the proceedings against a judgment debtor after execution returned unsatisfied are commenced before a county judge or court commissioner, the latter may, in a proper case, appoint a receiver. And the circuit court in which the judgment was rendered may not, by order, transfer the proceedings pending before such officer, or the papers therein, to that court, and proceed thereupon to appoint a receiver. Its power is limited to a review of the order of the inferior officer.

In *New York*, any judge who has jurisdiction to entertain supplementary proceedings may appoint a receiver; and a receiver duly appointed by a judge of the city court of New York has the same rights as a receiver in supplementary proceedings duly appointed by a judge of the supreme court. *Hyatt v. Dusenbury* (B'klyn City Ct.), 5 N. Y. St. Rep. 846; 12 Civ. Pro. Rep. (N. Y.) 152.

In *Jacobson v. Doty Plaster Mfg. Co.*, 32 Hun (N. Y.) 436, it was held to be not necessary that supplementary proceedings should be prosecuted in the judicial district in which the action was tried and the judgment entered. They may be brought before a justice of the supreme court in another judicial district, and an order appointing a receiver may be there made by him.

Where a judgment was obtained in the superior court of the city of New York, and a transcript thereof filed in Kings county, the appointment of a receiver thereon by a judge of the latter county was held regular. *Terry v. Bange* (Supreme Ct.), 24 N. Y. St. Rep. 599.

In *Gildersleeve v. Lester*, 69 Hun (N. Y.) 344, it was held that while an order for the examination of a third person in supplementary proceedings,

may be made by a judge outside of the judicial district in which the debtor resides, all proceedings after the examination, including the appointment of a receiver, must be had before a judge of the district of the judgment debtor's residence.

Under the former code of *New York*, the application for the appointment of the receiver must have been made to the judge who granted the order of reference and appointed the referee; no other judge out of court had the power. *Ball v. Goodenough*, 37 How. Pr. (N. Y. Super. Ct.) 479; *Smith v. Johnson*, 7 How. Pr. (N. Y. Supreme Ct.) 39.

Who May Be Appointed Receiver.—In *Chamberlain v. Greenleaf*, 4 Abb. N. Cas. (N. Y. C. Pl.) 92, it was held that the judgment creditor could be appointed receiver of his debtor's property, but that a non-resident or temporary resident of the state could not be. The court said: "It was urged as a forcible argument that plaintiff, as between himself and the other creditors, was not an indifferent party, and apprehensions were suggested that he might take advantage of his position to his own benefit. As an official of the court, controlled and restricted by the order of his appointment, I fail to discover any vantage ground which his personal relation to the case afforded. He is amenable to the direction of the court, and cannot legally dispose of the trust property except by judicial sanction."

But in *Gillin v. Campbell* (City Ct.), 9 N. Y. St. Rep. 538, where the assignor of the claim upon which the judgment was recovered was appointed receiver, the court, in granting a motion for his removal, said: "Without imputing anything against the integrity of Harvier, he ought not to have been appointed receiver. And had the court known then that he was the assignor of the Brady claim, he would not have received the appointment, because it would only be in some extraordinary case that the court would appoint a real or nominal plaintiff receiver of the property of his judgment debtor (2 Wait's Pr. 223), and no facts calling for the exercise of such special authority were made to appear in this instance. It is true that in partnership contracts one of the parties is sometimes appointed receiver, without compensation (2 Wait's Pr. 224), but this is done to protect the assets for the general benefit of the members of the firm,

and then only on the giving of abundant security for the proper performance of the trust confided to him, in view of his special fitness for the place on account of his peculiar knowledge of the business, and his interest in its economical and proper liquidation.

. . . A receiver, as a rule, should be a strictly impartial and disinterested person, of unimpeachable honor and integrity, having sufficient knowledge and ability to manage the estate properly, without the intervention of any third person. He should not be the agent or representative of either party to the action, and should exercise his functions disinterestedly for the common benefit of all persons interested in the estate."

By *New York Code Civ. Proc.*, § 90, a clerk, deputy clerk, special deputy, or assistant in the clerk's office of a court of record, or of the surrogate's court of New York or Kings county, may not be appointed receiver, except upon the written consent of all the parties who have appeared in the proceedings. But a party who appears without objection in proceedings to fix the amount of certain liens on the debtor's property, had on the petition of the receiver, and accepts a benefit from those proceedings based on the order appointing the clerk as receiver, must be deemed to have waived the statutory condition of consent. *Southwick v. Moore*, 54 N. Y. Super. Ct. 126.

According to the practice in New York City a person may not be appointed receiver who occupies offices in the same building with the applicant or the latter's attorney. *Fraser v. Hunt* (Supreme Ct.), N. Y. Daily Reg., Dec. 19th, 1882.

The Order.—The order may restrain a third party from disposing of the money or property pending the bringing of an action by the receiver to determine the title. *Teller v. Randall*, 40 Barb. (N. Y.) 242. See also *Ball v. Goodenough*, 37 How. Pr. (N. Y. Super. Ct.) 479; *People v. Hulbert*, 5 How. Pr. (N. Y. Supreme Ct.) 446.

Where the order was entitled "The N. Y. Superior Court" instead of "the superior court of the city of New York," the objection was held to be not substantial, as the language identified the court. *Terry v. Bange*, 18 Civ. Pro. Rep. (N. Y. Super Ct.) 288.

As to the necessity of filing the order, and the place where it should be filed, under section 298 of the former

Generally speaking, in order to warrant the appointment of a receiver, it is not necessary that it should appear with certainty that the debtor has property which ought to be applied to the judgment—the appointment should be made if there is reasonable ground to believe that he has such property.¹ But if, from the

code of *New York*, see *Fredericks v. Niver*, 28 Hun (N. Y.) 417; *Scroggs v. Palmer*, 66 Barb. (N. Y.) 505; *Ball v. Goodenough*, 37 How. Pr. (N. Y. Super. Ct.) 497; *Wright v. Nostrand*, 94 N. Y. 32; *Rockwell v. Merwin*, 45 N. Y. 166.

The matter is now regulated by §§ 2467, 2468, 2470 of the Code Civil Procedure.

The Bond.—The receiver must qualify by executing and filing his bond. *Voorhees v. Seymour*, 26 Barb. (N. Y.) 569; *Conger v. Sands*, 19 How. Pr. (N. Y. Super. Ct.) 8; *Johnson v. Martin*, 1 Thomp. & C. (N. Y.) 504; *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183; *Wilson v. Allen*, 6 Barb. (N. Y.) 542.

The fact that the bond has no seal does not render it void. The defect may be remedied on application to the appointing power. *Hyatt v. Dusenbury*, 12 Civ. Pro. Rep. (N. Y., B'klyn City Ct.) 152.

And it is an irregularity which only the judgment debtor can take advantage of. *Morgan v. Potter*, 17 Hun (N. Y.) 403.

In *Holmes v. McDowell*, 15 Hun (N. Y.) 585, *aff'd* 76 N. Y. 596, it was held that the order appointing a receiver was not void because it required the bond to be given with one surety only, instead of two; that the court may, at a special term, by virtue of its general equity powers, amend it so as to require a bond with two sureties to be given without prejudice to proceedings already taken.

In *South Carolina*, it is the usual and better practice to require bonds from receivers appointed in supplementary proceedings, but it is not essential to do so. *Dilling v. Foster*, 21 S. Car. 335.

In *Banks v. Potter*, 21 How. Pr. (N. Y.) 469, it was held that in supplementary proceedings, when the receiver has given ample security on his first appointment, there is no need of requiring him to give security over again in every proceeding which may be subsequently brought. But see *Conger v. Sands*, 19 How. Pr. (N. Y. Super. Ct.) 8.

The question of the defectiveness of a receiver's bond can be raised only in

the court creating the receiver. *Peters v. Carr*, 2 Dem. (N. Y.) 22.

1. *Colton v. Bigelow*, 41 N. J. L. 266; *Coates v. Wilkes*, 92 N. Car. 376. In this case it was also held that the appointment of a receiver does not rest solely in the discretion of the judge, and his action in granting or denying the application is reviewable by the supreme court; also, the motion for the receiver may be made before the judge, pending an appeal to him for the ruling of the clerk upon other questions.

Though the debtor swears that he has no property, yet if the facts and circumstances disclosed by him on his examination, raise a very strong presumption to the contrary, a receiver may be appointed in order that he may take such steps in the premises as subsequent information and investigation may warrant. *Journey v. Brown*, 26 N. J. L. 111.

And where the examination of the debtor discloses the possession of choses in action, or the existence of a relation, as, for example, a partnership, which makes it likely that he may have assets, an application for the appointment of a receiver should be granted, although the debtor denies that the property disclosed is of any value. *Webb v. Overman*, 6 Abb. Pr. (N. Y. Supreme Ct.) 92.

In *Hoyt v. Mann* (Supreme Ct.), 7 N. Y. St. Rep. 420, it appeared from the books of a certain company that certain shares of stock stood in the judgment debtor's name. He, however, denied that the stock was his, and stated that it had been previously sold and disposed of by him. It was held that the creditor was not concluded by this statement, but could have a receiver appointed, who would be empowered to contest the fact as to the debtor having parted with such shares.

And where a bank account standing in the debtor's name was claimed by his wife, the creditor was adjudged entitled to a receiver, to try the conflicting claims. *Ormes v. Baker* (Supreme Ct.), 17 N. Y. Wkly. Dig. 104.

In *Corning v. Tooker*, 5 How. Pr.

examination, it is entirely clear that the debtor has no property, or only such as is exempt under the law, a receiver should not be appointed.¹

(N. Y. Supreme Ct.) 16, it is held that where it appears from the examination that it is doubtful whether the party who is alleged to be indebted to the judgment debtor, or another person not under examination, is really indebted to him, and as a conclusion of law upon the facts is uncertain, a receiver should be appointed, in order that the creditor, or the person entitled to the right, may be enabled to pursue the claim by action.

In *Minnesota*, a debt due to the judgment debtor, even though denied by the party or corporation against whom it exists, may be reached by the final order in supplementary proceedings, and a receiver may be appointed with adequate powers to collect the same. *Knight v. Nash*, 22 Minn. 452.

1. *Colton v. Bigelow*, 41 N. J. L. 266; *Keiher v. Shipherd*, 4 Civ. Pro. Rep. (N. Y. City Ct.) 274. In this latter case it appeared that the judgment debtor was the owner of one of the original shares of the "New York Law Institute" of the value of \$150; that he was a lawyer in active practice, and that this property and the privileges conferred by it, constituted his necessary working tools and library as a member of the legal profession. The shares being exempt from judgment creditors, a motion for a receiver of the property of the debtor, founded on the ownership of the shares, was denied.

In *De Camp v. Dempsey*, 10 Civ. Pro. Rep. (N. Y. Supreme Ct.) 210, it appeared on the examination in supplementary proceedings that all the property possessed by the debtor, other than a trust fund, which could not be reached in such proceedings, consisted of judgments in her favor against the judgment creditors which she offered, and was willing, to set off against the judgment recovered against her. It was held that the application for the appointment of a receiver of the debtor's property was properly denied; that as the satisfaction of the judgment against her had been prevented by the acts of the creditors, a receiver should not be appointed upon their application, to enable them to harass and disturb her; and the fact that their judgment was recovered for costs did not stand in the way of this disposition.

In *Rodman v. Harvey*, 102 N. Car. 1, where in the supplementary proceedings it did not appear probable that the debtor had anything except certain notes which, though made payable to him, were made so by mistake and belonged in fact to his wife—being taken to secure the purchase-money for lands sold by her—the court denied a motion for the appointment of a receiver of the debtor's property. See also *Williams v. Green*, 68 N. Car. 183.

According to the early practice in *New York*, the appointment of a receiver was quite a matter of course—regardless of whether the examination disclosed the debtor to be the owner of any property or not. *Myre's Case*, 2 Abb. Pr. (N. Y. Supreme Ct.) 476. See also *Bloodgood v. Clark*, 4 Paige (N. Y.) 574; *Browning v. Bettis*, 8 Paige (N. Y.) 568; *Fitzburgh v. Everingham*, 6 Paige (N. Y.) 28.

In *Bailey v. Lane*, *note* to *Ward v. Beebe*, 15 Abb. Pr. (N. Y. Supreme Ct.) 373, it is held to be no objection to the appointment of a receiver in the proceedings that the judgment debtor has no property other than an equity of redemption in real property, which he has always been willing to have sold on execution. See also *Beamish v. Hoyt*, 2 Robt. (N. Y.) 307.

And in *Baker v. Herkimer*, 43 Hun (N. Y.) 86, the fact that the examination showed that defendant held the legal title to heavily incumbered real estate, out of which it was improbable that the execution could be collected, wholly or partially, was deemed not a sufficient reason for refusing to appoint a receiver. See also *Fenton v. Flagg*, 24 How. Pr. (N. Y. Supreme Ct.) 499.

But in *Bunn v. Daly*, 24 Hun (N. Y.) 527, it was held that where the examination discloses the debtor to be the owner of an estate as tenant by the curtesy, and it is not shown that an execution has been issued and returned upon the judgment since he acquired such estate, a receiver to sell the same should not be appointed; the proper course for the creditor in such a case is to issue an execution upon his judgment and sell the debtor's estate thereunder. The court said: "The property of the judgment debtor discovered

The validity of the receiver's appointment may not be tested collaterally, as, for example, on an accounting in a surrogate's court, by an administratrix of the debtor's estate.¹ The judgment debtor is the only person who can avail himself of any irregularity in the proceedings to appoint a receiver. If the irregularity is waived by him, no one else may object;² and con-

in this case, is a freehold estate in land. The statute provides for the sale on execution of such estate, and gives the judgment debtor one year after the sale to redeem. The appointment of a receiver of such property would deprive the judgment debtor of the right conferred by that statute. We think the provisions of the code were not intended to produce that result."

See also *First Nat. Bank v. Martin* (Supreme Ct.), 2 N. Y. Supp. 315; *Albany City Nat. Bank v. Gaynor*, 67 How. Pr. (N. Y. Supreme Ct.) 421; *Tinkey v. Langdon*, 25 Hun (N. Y.) 562; *Inglehart, Petitioner*, 1 Buff. Super. Ct. (N. Y.) 514.

But as the rule that a creditor should sell his debtor's land on execution, and not attempt to collect his judgment by means of supplementary proceeding, is for the purpose of saving the debtor's right of redemption, he may not complain where he has formally consented to an order extending the receivership to the land in question. *Webb v. Osborne* (C. Pl.), 7 N. Y. Supp. 762.

Where the debtor had the equity of redemption in mortgaged chattels, a receiver was appointed with a view to reaching such interest by suit to redeem. *Bunacleugh v. Poolman*, 3 Daly (N. Y.) 236.

In *Towne v. Campbell*, 35 Minn. 231, it is held that a receiver may be appointed in supplementary proceedings, although the only property disclosed is an interest in real estate in another state, and the debtor may be required to convey that interest to the receiver.

Although it is disclosed by the examination that the property which the creditor seeks to reach may be seized on an execution, yet the creditor will not be driven to that remedy if a stranger lay title to the property. A receiver will be appointed who may contest, in a suit brought by him, the title to the property. *Todd v. Croke*, 4 Sandf. (N. Y.) 694. See also *Heroy v. Gibson*, 10 Bosw. (N. Y.) 591.

And in *South Carolina*, a receiver may be appointed though the examination discloses property sufficient to pay

the judgment which may be reached by execution. *Dilling v. Foster*, 21 S. Car. 334.

But in *Wisconsin*, where it appears in the proceedings that the judgment debtor has property liable to levy, sufficient to pay the judgment, the appointment of a receiver by the court is unauthorized. *Second Ward Bank v. Upmann*, 12 Wis. 499. See also *Williams v. Sexton*, 19 Wis. 42.

In *Frazier v. Barnum*, 19 N. J. Eq. 316; 97 Am. Dec. 666, a receiver was appointed to take charge of the rings and jewelry of the defendant, on the ground that such articles being usually worn upon the person the sheriff might not be able to levy upon them.

1. *Peters v. Carr*, 2 Dem. (N. Y.) 22. See also *Moore v. Taylor*, 40 Hun (N. Y.) 56.

An order appointing a receiver, made by a duly authorized court or judge, is presumed regular until annulled in a direct proceeding; and if it contains a proper recital of jurisdictional facts, it is *prima facie* evidence of the existence of such facts. *Wright v. Nostrand*, 94 N. Y. 31.

In *Tyler v. Whitney*, 12 Abb. Pr. (N. Y. Supreme Ct.) 465, it was held that a third person indebted to, or having property of, a debtor of whose property a receiver is appointed with the debtor's consent, may not, in any action brought by the receiver to reach the debtor's property in his hands, avail himself of any irregularities in the proceedings in which the receiver was appointed which do not go to the jurisdiction of the court or officer making the appointment.

2. *Underwood v. Sutcliffe*, 10 Hun (N. Y.) 453; *Tyler v. Willis*, 33 Barb. (N. Y.) 327; *Powell v. Waldron*, 89 N. Y. 328; 42 Am. Rep. 301; *Moore v. Taylor*, 40 Hun (N. Y.) 56.

The fact that the receiver's bond is not under seal is an irregularity of which only the judgment debtor can avail himself. *Morgan v. Potter*, 17 Hun (N. Y.) 403.

In *Johnson v. Martin*, 1 Thomp. & C. (N. Y.) 504, where an order appoint-

senting to the appointment,¹ or omitting to object thereto, seasonably,² will constitute a waiver. And an appeal from an order appointing a receiver must be deemed a waiver of such irregularities as are not brought up for review.³

An appointment procured by fraud or collusion will be revoked, without regard to the question of the appointee's fitness.⁴ So an appointment made upon a judgment against a debtor, who has been discharged in bankruptcy after the recovery of the judgment, will be set aside if the debt for which the judgment was entered was such as to be discharged by the debtor's discharge.⁵

In supplementary proceedings the court does not appoint more than one person receiver of the property of the judgment debtor, however numerous may be the proceedings against him; the usual practice is to make an order extending the original receivership to the special proceeding before the court.⁶ But in supplementary proceedings in a federal court, the court is not bound to appoint the same person as receiver who was previously appointed in a prior proceeding in the state court.⁷

ing a receiver required him to execute a bond with sureties, it was held that at least two sureties were required, and an undertaking under seal; and that the execution and filing of an instrument, in the form of a bond not sealed, and signed by one surety only, did not authorize the receiver to act. In this case it does not appear whether the objection to the defectiveness of the bond was taken by the judgment debtor or a third party.

1. *Powell v. Waldron*, 89 N. Y. 328; 42 Am. Rep. 301.

2. Where a judgment debtor was present with his attorney at the appointment of a receiver in supplementary proceedings and made no objection thereto, he may not, two years later, when the receiver becomes involved in litigation with his wife, be heard to say that the proceedings at their institution were barred by the Statute of Limitations. *Bolt v. Houser* (Erie Co. Ct.), 10 N. Y. Supp. 397. See also *Southwick v. Moore*, 54 N. Y. Super. Ct. 126.

3. *Tinkey v. Langdon*, 60 How. Pr. (N. Y.) 180.

4. *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183.

5. *Gibson v. Gorman*, 44 N. J. L. 325. **Assignment by Debtor—Receiver.**—In *Tomlinson, etc., Mfg. Co. v. Shatto*, 34 Fed. Rep. 380, the fact that a voluntary assignment of his property had been made by a judgment debtor to an as-

signee of his own selection, after the institution of supplementary proceedings against him, was held to be no bar to the appointment of a receiver.

In *Holton v. Burton*, 78 Wis. 321, it was held that a lawful voluntary assignment for the benefit of all his creditors, made by a judgment debtor, renders invalid the appointment of a receiver made thereafter. See also *Sexton v. Mann*, 15 Wis. 178.

6. *Sparks v. Davis*, 25 S. Car. 381; *Kellogg v. Collier*, 41 Wis. 649; *Myrick v. Seldon*, 36 Barb. (N. Y.) 15.

New York Code Civ. Proc., § 2466, provides that only one receiver shall be appointed, and that when the order is made extending that receivership, the judgment creditor in whose behalf it is made has the same rights as if a receiver was then appointed upon his application.

Rule When Application is Made in an Action.—But the fact that a receiver has already been appointed in supplementary proceedings, will not bar an application for a receiver made in a judgment creditor's action. In such an action the court may, or may not, appoint as receiver the person who was appointed in the supplementary proceedings. *State Bank v. Gill*, 23 Hun (N. Y.) 410.

7. *Young v. Aronson*, 27 Fed. Rep. 241. Here *Brown, J.*, said: "Confusion and conflict between independent jurisdictions will usually be best avoided by

The same reason for giving notice to the judgment debtor on the appointment of a receiver applies to an application extending a receivership.¹

2. Notice of Application.—Usually it is required that notice of the application for the appointment of a receiver should be given to the judgment debtor.² It has been held that the notice should

the appointment of independent receivers of this kind."

1. Benjamin v. Myers (City Ct.), 3 N. Y. St. Rep. 284. See *infra*, this title, *Notice of Application for Receiver*.

2. As by statute in Iowa and Indiana. See *Howe v. Jones*, 57 Iowa 130. So under *New York Code Civ. Proc.*, § 2464; and also, under the old *New York* code, notice was required to be personally served upon the debtor. *Barker v. Johnson*, 4 Abb. Pr. (N. Y. Supreme Ct.) 435; *Clark v. Savage* (Supreme Ct.), 5 N. Y. Wkly. Dig. 193; *Vandeburgh v. Gaylord* (Supreme Ct.), 7 N. Y. Wkly. Dig. 136; *Whitney v. Welch*, 2 Abb. N. Cas. (N. Y. Supreme Ct.) 442; and if he could not be served with notice, the creditor had to proceed by a new action in the nature of a creditor's suit. *Kemp v. Harding* 4 How. Pr. (N. Y. Supreme Ct.) 178; *Dorr v. Noxon*, 5 How. Pr. (N. Y. Supreme Ct.) 29. See also *Goddard v. Stiles*, 90 N. Y. 199.

In *New Jersey*, under the act concerning executions, where an order for the examination of the judgment debtor in supplementary proceedings has been duly served on him, and he fails to appear for examination, the judgment creditor may proceed to examine witnesses, and an order appointing a receiver may be made on such examination without examining the judgment debtor, and without further notice to him. *Colton v. Bigelow*, 41 N. J. L. 266. See also *Seyfert v. Edison*, 47 N. J. L. 428. The statutes in *New Jersey* providing for notice of the application are similar to those of the *New York* code.

In *Minnesota*, it is held that a receiver may, in the discretion of the court, be appointed immediately upon granting the order for the examination. *Flint v. Webb*, 25 Minn. 263.

In *South Carolina*, a specific notice that a receiver will be applied for in supplementary proceedings is not necessary where there is a general notice. *Dilling v. Foster*, 21 S. Car. 334.

Under *New York Code Civ. Proc.*, §

2464, two day's notice of the application is required, unless the judge is satisfied that the judgment debtor to whom the notice should be given cannot, with reasonable diligence, be found within the state.

The appointment of a second receiver, after the vacating, for lack of notice, of the order appointing the first, was upheld, notice having been served on the debtor two days before the return day of the motion that application would be made for another receiver in case the order appointing the first was vacated. *Clark v. Clark*, 11 Abb. N. Cas. (N. Y., B'klyn City Ct.) 333.

Failure to give a two day's notice of the application, where the judgment debtor can be found and is not actually or constructively before the judge, is an irregularity for which the order of appointment must be set aside. *Strong v. Epstein*, 14 Abb. N. Cas. (N. Y. City Ct.) 322; *Morgan v. Von Kohnstamm*, 9 Daly (N. Y.) 355; *Grace v. Curtiss*, 3 Misc. (N. Y. City Ct.) 558.

Objection, however, can be raised only by the judgment debtor. *Darrow v. Riley*, 5 Misc. (N. Y., Monroe Co. Ct.) 363.

Where there was a recital of the fact that the residence of the judgment debtor was in a distant territory, it was held sufficient to justify the dispensing with notice. *O'Connor v. Mechanic's Bank*, 54 Hun (N. Y.) 272.

It is not sufficient, however, that the order simply states that notice to the judgment debtor cannot be given. *Grace v. Curtiss*, 3 Misc. (N. Y., City Ct.) 558; *Morgan v. Von Kohnstamm*, 9 Daly (N. Y.) 355. The order must recite the fact of the debtor's non-residence. *New York Code Civ. Proc.*, § 2464.

Where the order to attend and be examined, or the warrant, has been served upon the judgment debtor, a receiver may be appointed upon the return day thereof, or at the close of the examination, without further notice to him. *New York Code Civ. Proc.*, § 2464; *Groot v. Greeley* (Super Ct.), 5

be in writing; a verbal notice of such application given at the close of the examination was not sufficient.¹

Notice must be given, although the application is made upon the examination of a third party indebted to, or having property of, the judgment debtor.²

Notice should be given the judgment debtor on the extension of a receivership.³

Notice of the application is also required to be given to creditors prosecuting similar proceedings against the judgment debtor.⁴

If the required notice has not been given, the order of appointment is void.⁵

3. Title.—A receiver's title takes effect generally from the time of filing the order of appointment, without an assignment or conveyance.⁶

N. Y. Month. Law Bull. 69. In *Sickels v. Hanley*, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 231, decided under the old practice, where an order was made directing the debtor to appear before the judge on the Monday succeeding the close of the examination, a receiver was appointed notwithstanding the debtor did not appear, and the proceedings were held to be regular.

Where there has been an examination before a referee, notice must be given of the time and place of application for a receiver. *Strong v. Epstein*, 14 Abb. N. Cas. (N. Y. City Ct.) 322; *Ashley v. Turner*, 22 Hun (N. Y.) 226; *Todd v. Crooke*, 4 Sandf. (N. Y.) 694; *Dorr v. Noxon*, 5 How. Pr. (N. Y. Supreme Ct.) 29; *Barker v. Johnson*, 4 Abb. Pr. (N. Y. Supreme Ct.) 435.

1. *Ashley v. Turner*, 22 Hun (N. Y.) 226.

2. *Morgan v. Von Kohnstamm*, 60 How. Pr. (N. Y.) 161. See also *De Vivier v. Smith*, 6 Civ. Pro. Rep. (N. Y. City Ct.) 394.

Under the former *New York* code, a receiver could not be appointed on the examination of third persons, as to the property of the debtor in their hands. *Holbrook v. Orgler*, 49 How. Pr. (N. Y. Super. Ct.) 289; *Kemp v. Harding*, 4 How. Pr. (N. Y. Supreme Ct.) 178.

3. *Benjamin v. Myers* (City Ct.), 3 N. Y. St. Rep. 284.

4. *New York* Code Civ. Proc., § 2465. Under this section oral notice to the creditor, as directed by the judge, has been held sufficient. *Darrow v. Riley*, 5 Misc. (N. Y., Monroe Co. Ct.) 363.

Under the former *New York* code,

notice of the application was required to be given to the creditors who had commenced like proceedings, but they were not entitled to service of a copy of the examination on which it was founded. *Todd v. Crooke*, 4 Sandf. (N. Y.) 694.

A stranger claiming a lien on the funds sought to be reached, but who has no action or special proceeding pending against the judgment debtor, is not entitled to notice. *Corning v. Glenville Woollen Co.*, 14 Abb. Pr. (N. Y. Supreme Ct.) 339.

In *Leggett v. Sloan*, 24 How. Pr. (N. Y. Supreme Ct.) 479, it was held that eight day's notice was not required.

The rule in *Wisconsin* is similar to that of *New York*. *Clark v. Berenthal*, 52 Wis. 103. See *Kellogg v. Collier*, 47 Wis. 649. And so in *North Carolina*. *Corbin v. Berry*, 83 N. Car. 27.

5. *Sayles v. Best* (Supreme Ct.), 49 N. Y. St. Rep. 460; *Grace v. Curtiss*, 3 Misc. (N. Y. City Ct.) 559; *Benjamin v. Myers* (City Ct.), 3 N. Y. St. Rep. 284; *Kemp v. Harding*, 5 How. Pr. (N. Y. Supreme Ct.) 178. See also *Fraser v. Hunt*, N. Y. Daily Reg., Dec. 19, 1882.

6. *New York* Code Civ. Proc., § 2468; *Swartout v. Schwerter*, 5 Redf. (N. Y.) 497; *Kimball v. Burrell* (Supreme Ct.), 14 N. Y. St. Rep. 536; *First Nat. Bank v. Martin*, 49 Hun (N. Y.) 571; *Pfuger v. Cornell*, 2 City Ct. Rep. (N. Y.) 145; *Smith v. Woodruff*, 1 Hilt. (N. Y.) 462; *West v. Fraser*, 5 Sandf. (N. Y.) 653; *Porter v. Williams*, 9 N. Y. 142; 59 Am. Dec. 519; *Wing v. Disse*, 15 Hun (N. Y.) 190;

People v. Hulburt, 5 How. Pr. (N. Y. Supreme Ct.) 446; *Manning v. Evans*, 19 Hun (N. Y.) 500; *Cooney v. Cooney*, 65 Barb. (N. Y.) 524; *Hays v. Buckley*, 53 How. Pr. (N. Y.) 173. See also *Spencer v. Berdell*, 45 Hun (N. Y.) 179; *McCorkle v. Herrman*, 5 N. Y. Supp. 881; 52 Hun (N. Y.) 610; *First Nat. Bank v. Martin*, 49 Hun (N. Y.) 571; *Peters v. Carr*, 2 Dem. (N. Y.) 22; *Staats v. Wemple*, 2 How. Pr. N. S. (N. Y. Supreme Ct.) 161; *Du Bois v. Cassidy*, 75 N. Y. 298; *Steele v. Sturges*, 5 Abb. Pr. (N. Y. Supreme Ct.) 442; *Parks v. Sprinkle*, 64 N. Car. 637.

The title to the property of the judgment debtor having once vested in the receiver by virtue of his appointment, it is not in the power of the court to divest him of it by a mere order made in proceedings to which he is not a party. *Rogers v. Corning*, 44 Barb. (N. Y.) 229.

By virtue of his appointment, the receiver becomes the legal assignee of the judgment, invested with the property therein, and the judgment debtor will be enjoined from any interference therewith. *Turner v. Holden*, 94 N. Car. 70.

But he does not, by his appointment, acquire the legal title to property previously transferred by the judgment debtor in fraud of his creditors. *Metcalf v. Del Valle*, 64 Hun (N. Y.) 245; *Pettibone v. Drakeford*, 37 Hun (N. Y.) 628; *Olney v. Tanner*, 18 Fed. Rep. 636; *Bostwick v. Menck*, 40 N. Y. 383.

Real property of the judgment debtor vests in the receiver on filing in the proper county clerk's office an order extending the receivership, whether or not the original order of appointment has been filed. *Webb v. Osborne* (C. Pl.), 7 N. Y. Supp. 762.

So, where the execution on which the original appointment was based was countermanded, the filing of orders extending the receivership, before the first order was vacated, vested the judgment debtor's property in the receiver. *Palmer v. Colville*, 63 Hun (N. Y.) 536.

All the property of which the debtor was seised at the time of the receiver's appointment, vests in the latter. This applies to a right of dower, which, though not admeasured, is absolute. *Sayles v. Naylor* (Buff. Super. Ct.), 5 N. Y. St. Rep. 816.

When the judgment debtor dies before the filing of the order of appoint-

ment, the receiver gets no title; nor the judgment creditor any lien on the property of the debtor as against his administrator. *Rankin v. Minor*, 72 N. Car. 424.

Where an assignment was made and delivered by the debtor, but not recorded prior to the making of an order appointing a receiver in a county different from that of the residence of the debtor, which order was not filed in the proper county until after the assignment was recorded, the rights of the assignee were held superior to those of the receiver. *Nicoll v. Spowers*, 105 N. Y. 1.

Where a receiver was appointed in one action and duly qualified as such, and the order was not filed in the county clerk's office for more than a year thereafter, but the receivership was afterwards extended to another action and the order of extension filed, property held by the debtor at that time vested in the receiver, though the order in the first action was not filed until after a conveyance of real estate had been made by the debtor, subsequent to the filing of the order of extension. *Webb v. Osborne* (C. Pl.), 27 N. Y. St. Rep. 792.

Title Extending Back by Relation.—*New York Code Civ. Proc.*, § 2469, defines under what circumstances the receiver's title to personal property extends back by relation. See *Clark v. Gilbert*, 10 Daly (N. Y.) 316; *Coleman v. Roff*, 45 N. J. L. 7.

By the institution of proceedings the judgment creditor acquires an equitable lien on a debt owing to his debtor, which, on the appointment of a receiver, becomes a legal title in him as of the date of the commencement of the proceedings. *McCorkle v. Herrman*, 117 N. Y. 297.

Where, after service of an order for examination in one set of supplementary proceedings, the judgment debtor, without the service of an order for examination, voluntarily appeared and was examined on a proceeding instituted by another judgment creditor, on which examination a receiver was appointed and the receivership was afterwards extended to the first judgment, it was held that the title should relate back for the benefit of the first judgment creditor who has a prior lien. *Youngs v. Klunder* (City Ct.), 7 N. Y. Supp. 498. See also *Guggenheimer v. Stevens* (City Ct.), 7 N. Y. Supp. 263.

He takes subject to existing liens,¹ and subject to the rights of *bona fide* purchasers without notice.²

4. **Office; Duties, Rights, Powers, and Liabilities.**—The receiver is an officer of, and subject to, the control of the court out of which the execution, on which supplementary proceedings are had, is issued; and this control continues in that court upon the extension of the receivership.³ The court exercising control over the receiver must enforce its direction and control according to the

1. A mortgage which is valid against the mortgagor is also valid as against the receiver, although it may be void as to creditors, subsequent purchasers, or mortgagees in good faith. *Steward v. Cole* (Supreme Ct.), 4 N. Y. St. Rep. 428.

Under the mechanic's lien law of 1885 (Laws of 1885, ch. 342), one who has furnished labor or materials in the erection of a building has, prior to the filing of his notice of lien, no preferential right to be paid for his labor or materials out of a sum due from the owner of the building to the contractors, but stands in the same position as other creditors; and if, before he has filed his lien, another creditor, pursuing the usual remedies for the collection of debts, has acquired a legal or equitable right to have the debt applied in satisfaction of his claim, this right is not overreached by liens subsequently filed under said act, save where priority is given by the provisions of the act (section 5). *McCorkle v. Herrman*, 117 N. Y. 297, *reversing* 52 Hun (N. Y.) 610. Compare *Deady v. Fink* (City Ct.), 5 N. Y. Supp. 3.

Where the judgment debtor has mortgaged his property before the appointment of the receiver, he takes only the interest which the judgment debtor then had—the mere equity of redemption, and acquires no legal title in the property by virtue of his appointment. *Gardner v. Smith*, 29 Barb. (N. Y.) 68.

Where an action is pending against the real estate at the time of his appointment, the receiver is bound by a judgment subsequently recovered against the judgment debtor. *Spencer v. Berdell*, 45 Hun (N. Y.) 179.

2. N. Y. Code Civ. Proc., § 2469.

3. N. Y. Code Civ. Proc., § 2471; *Porter v. Williams*, 9 N. Y. 147; 59 Am. Dec. 519; 5 How. Pr. (N. Y.) 441; *Hyatt v. Dusenbury*, 12 Civ. Pro. Rep. (N. Y., B'klyn City Ct.) 152; *Tillotson*

v. Wolcott, 48 N. Y. 188; *Dickerson v. Van Tine*, 1 Sandf. (N. Y.) 724; *Baldwin v. Eazler*, 34 N. Y. Super. Ct. 276; *Van Rensselaer v. Emery*, 9 How. Pr. (N. Y. Supreme Ct.) 138.

The receiver can exercise no powers other than those conferred upon him by an order made for his appointment, or such as he obtains by special order of the court, or by the usual course and practice of law and equity. *Devendorf v. Dickinson*, 21 How. Pr. (N. Y. Supreme Ct.) 275.

When it is said that the receiver holds funds subject to the order of the court, what is meant is that he is subject to that court by whose order he was appointed and which has jurisdiction of the fund, and that court can only dispose of the fund in the action in which this jurisdiction is acquired; or if in another action the parties to the original action must be brought in. *Galster v. Syracuse Sav. Bank*, 29 Hun (N. Y.) 594.

The rights and duties of a receiver in these proceedings are analogous to those of a receiver appointed on a creditor's bill. *Inglehart's Petition*, 1 Buff. Super. Ct. (N. Y.) 514.

His duties are fixed by law, and among them are these: to appropriate the property of the judgment debtor to the satisfaction of the judgment under which he is appointed, and any other to which his receivership may be duly extended, and to restore the surplus, if any, to the judgment debtor. *Goddard v. Stiles*, 90 N. Y. 199; *Porter v. Williams*, 9 N. Y. 150; 59 Am. Dec. 519; *Banks v. Potter*, 21 How. Pr. (N. Y. C. Pl.) 473; *Howell v. Ripley*, 10 Paige (N. Y.) 43; *Cumming v. Egerton*, 9 Bosw. (N. Y.) 684.

A receiver duly appointed by the judge of the city court of New York, has the same rights as a receiver in supplementary proceedings duly appointed by a judge of the supreme court. *Hyatt v. Dusenbury*, 12 Civ. Pro. Rep. (N. Y., B'klyn City Ct.) 152.

powers and duties of courts of equity applicable to receivers in other cases;¹ and to the court all motions touching the receivership should be made;² the court exercises the control and not the judge.³ And the receiver should obtain leave of court to

In *North Carolina*, the receiver is subject to the direction and control of the court in which the judgment was obtained, upon which the proceedings are founded. N. Car. Code Civ. Proc., § 495. See also *Turner v. Holden*, 94 N. Car. 70.

Compensation of Receiver.—The court, in the absence of legislation, has authority to determine the compensation of the receiver, as an officer of the court. *Baldwin v. Eazler*, 34 N. Y. Super. Ct. 276.

A receiver is not entitled to commissions and expenses out of a fund which came into his hands by mistake, to which he was never entitled. *Syracuse Sav. Bank v. Hess*, 23 N. Y. Wkly. Dig. 280.

Having lawful possession of the funds in his hands, a receiver is entitled to retain therefrom his commissions and expenses, and an order directing him to pay over the entire fund without authorizing him to deduct his commissions and expenses is unjust. *Galster v. Syracuse Sav. Bank*, 29 Hun (N. Y.) 597. See RECEIVERS, vol. 20, p. 168.

1. *Tillotson v. Wolcott*, 48 N. Y. 188; *Devendorf v. Dickinson*, 21 How. Pr. (N. Y. Supreme Ct.) 375.

2. A motion to compel payment of funds in the hands of a receiver to third persons must be made in an action in which the receiver was appointed. *Galster v. Syracuse Sav. Bank*, 29 Hun (N. Y.) 594.

The court may order the receiver to release to the debtor a judgment recovered for an unlawful levy and sale. *Tillotson v. Wolcott*, 48 N. Y. 188; and to restore property, though taken in the possession of the debtor, if claimed by one not a party to the proceedings, upon his undertaking to hold it subject to the order of the court. *Dickerson v. Van Tine*, 1 Sandf. (N. Y.) 724.

In *Riggs v. Whitney*, 15 Abb. Pr. (N. Y.) 388, *Hilton, J.*, said: "Where property in the possession of the receiver is claimed by a third person, the proper course is to apply to the court from which he derived his appointment by petition, for an order that he pay or deliver it over to the party to whom it rightfully belongs."

The proper mode of restraining such an officer, when engaged in the discharge of his official trust, is by application to the court for instructions, and not by making him party to an action and obtaining an injunction against him. *VanRensselaer v. Emery*, 9 How. Pr. (N. Y. Supreme Ct.) 135; *Winfield v. Bacon*, 24 Barb. (N. Y.) 154.

The court will not order funds to be paid over to judgment creditors when the receiver has been made liable to an action of false imprisonment, even though he be not personally liable. *Morris v. Hiller*, 57 How. Pr. (N. Y. C. Pl.) 322.

The court cannot, without personal notice to the judgment debtor, order a receiver appointed in supplementary proceedings, to apply any portion of funds coming to his hands in payment of judgments other than those under which he was appointed, or those to which his receivership has been extended. *Goddard v. Stiles*, 90 N. Y. 199.

3. Under a provision of the former code of *New York*, similar to section 2471 of the present code, it was held that the authority of a judge ends with the appointment, and the receiver is thereafter subject to the control of the court. *Pool v. Safford*, 14 Hun (N. Y.) 370.

A motion to set aside an order appointing a receiver in supplementary proceedings, should be made to the court and not to a judge thereof. *Lippincott v. Westray*, 6 Civ. Pro. Rep. (N. Y.) 74. See *Bruns v. Stewart Mfg. Co.*, 31 Hun (N. Y.) 195. However, in virtue of his power of appointment, the judge has the power to accept the resignation of a receiver and appoint his successor. *Wing v. Disse*, 15 Hun (N. Y.) 192, followed in 5 N. Y. St. Rep. 817. In this case it was said: "It is true a receiver appointed by a judge in supplementary proceedings is subject to the direction and control of the court in which the judgment was obtained; but that provision is fully satisfied by holding that the court has the direction and control of the receiver, in respect to his discharge of the trust confided to him, and does not relate to his appointment or to the acceptance of his resignation by which

bring his suit or action, for otherwise, he may incur a personal liability for costs in the event of failure.¹ He may also incur a personal liability for costs when guilty of fraud or mismanagement in the action.² The receiver, although representing the debtor, is trustee for the benefit of the creditor or creditors upon whose application he has been appointed, or for whom the receivership has been extended, as well;³ but he does not hold his trust for the benefit of all the creditors of the debtor.⁴ The receiver, unless restricted by special order of the court, has general power to sue

he is relieved of the trust." See *supra*, this title, *Receiver's Appointment*; *infra*, this title, *Removal*.

Under the former practice (section 208 of the former code prior to the amendment of 1862), the receiver was subject to the order of the judge. *Webber v. Hobbie*, 13 How. Pr. (N. Y. Supreme Ct.) 384.

1. As an officer of the court, charged with the duty of taking care of property in possession of the court, he cannot incur expenses in regard to it without the court's leave. *Phelps v. Cole*, 3 Code Rep. (N. Y. Supreme Ct.) 157. In *Smith v. Woodruff*, 6 Abb. Pr. (N. Y. C. Pl.) 65, the action having been brought without leave of court, it was held that the receiver prosecuted it at his peril and should be left to the consequences of his own acts.

2. See § 3246, *New York Code Civ. Proc.* But the receiver will not be charged personally with the judgment for costs, unless the court shall direct it, for mismanagement or bad faith in the action on his part. *Devendorf v. Dickinson*, 21 How. Pr. (N. Y. Supreme Ct.) 277, decided under a provision of the old *New York* code similar to § 3246, *New York Code Civ. Proc.*

It ought to be considered conclusive evidence of bad faith under that section, if the receiver has no funds in his hands, to pay costs to the successful party who has been vexed by an unnecessary action. *Cumming v. Egerton*, 9 Bosw. (N. Y.) 684.

Security for Costs.—Under § 3271, *New York Code Civ. Proc.*, the receiver may be compelled, in the discretion of the court, to give security for costs. See *Smith v. Clarke* (Supreme Ct.), 1 N. Y. Month. Law Bull. 83. Security should be required by the receiver when he has no funds in his hands to pay costs in the event of failure, although he has obtained leave of court for suit. *Welch v. Bogert*, 3 N. Y. Wkly. Dig. 402.

3. *Banks v. Potter*, 21 How. Pr. (N. Y. C. Pl.) 473; *Porter v. Williams*, 9 N. Y. 146; 59 Am. Dec. 519; *Cumming v. Egerton*, 9 Bosw. (N. Y.) 684; *Devendorf v. Dickinson*, 21 How. Pr. (N. Y. Supreme Ct.) 275. See also *Howell v. Ripley*, 10 Paige (N. Y.) 43.

Where a receiver sued to set aside a conveyance fraudulent as to creditors but valid as to the judgment debtor, it was held that the interest of the receiver was not limited to that of the debtor, but he succeeded to that of the creditor. *Fox v. Hodge*, 17 N. Y. Wkly. Dig. 412.

4. *Porter v. Williams*, 9 N. Y. 142; 59 Am. Dec. 519. The receiver is not a trustee for all the creditors of the judgment debtor; he is appointed for the purpose of discovering concealed property of the judgment debtor and applying it to the satisfaction of the judgment or judgments on which proceedings are taken. When property enough to satisfy such judgment or judgments is reached, the purpose of a receiver is accomplished; and that officer owes no duty to other creditors of the debtor. *Bostwick v. Menck*, 40 N. Y. 390.

The duties of a receiver in proceedings supplementary to execution are ended when the judgment he is appointed to enforce is fully paid. After that he cannot, by virtue of his receivership, collect additional demands. When the judgment is not actually paid, but abundantly secured, and the receiver has enough in his hands to extinguish the judgment, there is no reason why he should be allowed to recover other judgments or collect other demands. *Gifford v. Rising*, 59 Hun (N. Y.) 45; particularly as against a third party. *O'Connor v. Mechanics' Bank*, 54 Hun (N. Y.) 272.

By the discharge of the judgment, the receiver is, in effect, *fructus officio*, and cannot continue an action by making other creditors parties plaintiff

for, and collect debts due to the judgment debtor,¹ in any court in

who have not instituted supplementary proceedings. *Righton v. Pruden*, 73 N. Car. 61.

1. See RECEIVERS, vol. 20, p. 314.

Where the mortgagee sells under a chattel mortgage, property more than sufficient to discharge the debt, and bids in the same and takes possession thereof, claiming the property under this title, the mortgagor may elect to treat the entire sale as valid, and to consider the amount for which the property sold in excess of the mortgage debt as unpaid purchase-money in the hands of the mortgagee; and the receiver, succeeding to the rights of the debtor, may maintain an action against the mortgagee to recover such excess. *Davenport v. McChesney*, 86 N. Y. 243.

In *Fessenden v. Woods*, 3 Bosw. (N. Y.) 550, the receiver, to whom an assignment had been executed by the debtor of all his property, was allowed to recover from a creditor by judgment obtained subsequently to that in which the supplementary proceedings were had, but prior to the receiver's appointment, the value of property afterwards levied upon by such creditor's direction under such subsequent judgment and sold.

A receiver appointed under *New York Code Civ. Proc.*, ch. 17, tit. 12, art. 2, may maintain an action to set aside a mortgage of chattels not duly filed, notwithstanding the mortgage was properly filed before the appointment of the receiver, if it was not so filed before the service upon the mortgagor of the order requiring him to appear and be examined as a judgment debtor in the proceeding in which the receiver was appointed; and even though the mortgage was executed and delivered before the passage of the provision of the code referred to, by which the title of such a receiver is made to relate back to the time of the service of such order. *Clark v. Gilbert*, 10 Daly (N. Y.) 316.

But in *Fillmore v. Horton*, 31 How. Pr. (N. Y. Supreme Ct.) 424, under the old code of *New York*, it was held that where a creditor by a *bona fide* chattel mortgage sells the property of the debtor upon the mortgage and delivers possession to the purchaser before a receiver of the debtor's property is appointed, the sale does not constitute a conversion of the property as against the receiver for which he may main-

tain an action. See *supra*, this title, *The Receiver's Title*.

Where debts due the judgment debtor have been attached, the proper parties to institute an action for the collection of the same, are the sheriff, to whom the attachment was issued, or the attaching creditors, and not the receiver appointed in supplementary proceedings in the suit in which the attachment issued. *Andrews v. Glenville Woolen Co.*, 11 Abb. Pr. N. S. (N. Y. Supreme Ct.) 78.

In *Campbell v. Fish*, 8 Daly (N. Y.) 162, it was held that the receiver takes only an equitable title of redemption in chattels mortgaged by the judgment debtor and reduced to possession by the mortgagee before the commencement of the supplementary proceedings, and cannot maintain an action of replevin against the mortgagee for the chattels.

Where the trustee of the judgment debtor obtained an *ex parte* order directing the county treasurer to pay over certain funds deposited with him for the benefit of the debtor in an action of partition, the receiver of such debtor cannot obtain title to the funds by an order setting the order aside. The title to the fund must be tried by action. *Matter of Castle* (Supreme Ct.), 2 N. Y. St. Rep. 352.

The receiver cannot maintain an action against the debtor's wife to recover the value of services rendered by the husband in conducting the separate business of the wife, where such services are rendered without any express agreement on the part of the wife to pay him therefor. *Lynn v. Smith*, 35 Hun (N. Y.) 275; *distinguishing Kingman v. Frank*, 33 Hun (N. Y.) 471; 19 N. Y. Wkly. Dig. 554.

A receiver cannot maintain an action to reach the surplus of a trust fund created by a third person for the benefit of the debtor. *Campbell v. Foster*, 35 N. Y. 361; *affirming* 16 How. Pr. (N. Y.) 275; *Levey v. Bull*, 47 Hun (N. Y.) 350; *Williams v. Thorn*, 81 N. Y. 382; *Tolles v. Wood*, 99 N. Y. 616; *Manning v. Evans*, 19 Hun (N. Y.) 500. See *supra*, this title, *Property that Cannot be Reached*.

Property found in the hands of the debtor to which a third party claims title, may not be taken by the receiver. Such interest is only recoverable in

the state having jurisdiction.¹ But, strictly speaking, he may not, as a matter of right, demand recognition in foreign tribunals,² though, as a general rule, this privilege is accorded him upon principles of comity.³ The receiver may maintain an action against the judgment debtor of whose property he is appointed receiver, for a conversion thereof, where the conversion occurs after the property has vested in the receiver.⁴ He may institute

an action by the receiver against such third party. *Rodman v. Henry*, 17 N. Y. 482.

Where, in supplementary proceedings, it was decided that the fund in question belonged to the judgment debtor, and an order was made that the fund be paid into court, and afterwards, upon a claim made by another, the clerk refused to pay the money to him and appointed a receiver, who instituted an action against the debtor to try the question of title, it was held, first, that the action was improperly brought; second, that the claimants to the fund should have been allowed to interplead in the supplementary proceedings; third, that the action by the receiver was improperly brought and should be dismissed, but without prejudice to any of the parties. *Wilson v. Chichester*, 107 N. Car. 386.

Accounting—Power of Receiver to Compel, etc.—A receiver of "all the debts, property, equitable interests, and things in action" of the judgment debtor, who is appointed executor of an estate, has not such an interest in the estate as entitles him to an accounting by the executor in order to ascertain the amount of the latter's commissions already earned, and to appropriate any surplus thereof, after satisfying all prior equities of the estate against the executor. *Worrall v. Driggs*, 1 Redf. (N. Y.) 449.

In *Sistare's Estate*, 27 Abb. N. Cas. (N. Y. Surr. Ct.) 34, it was held that the receiver cannot compel the testamentary trustee of an estate, in which the judgment debtor has an interest, to account before the surrogate, where it appears that the order for examination in the supplementary proceeding was never served upon the judgment debtor, and was not served upon the testamentary trustee until after the assignment by the debtor of his interest in the estate.

The receiver may appear on the accounting of the judgment debtor as administrator of his deceased wife, under *New York Code Civ. Proc.*, § 2743,

which provides that where an account has been settled and any principal of the estate remains to be distributed to creditors, legatees, etc., or their assigns, the decree must direct its payment and distribution. *In re Gillilan's Estate* (Surr. Ct.), 3 N. Y. Supp. 17.

In *Bliss v. Beekman* (City Ct.), N. Y. Daily Reg., May 28th, 1884, the trust deed gave the trustee the exclusive possession and management of the estate, with the sole power of collecting the rents and using the same in furtherance of the trust; in supplementary proceedings the agent of the trustee was appointed receiver of the creditor's property. It was held that as he was bound to account to the trustee, as agent, for the funds collected, it was error to direct him to pay over the proceeds of such rents as applicable to the judgment before he had accounted therefor to the trustee.

1. See RECEIVERS, vol. 20, p. 314. *Rockwell v. Merwin*, 8 Abb. Pr. N. S. (N. Y. Supreme Ct.) 330.

2. **Power to Sue in Another Jurisdiction.**—In *Booth v. Clark*, 17 How. (U. S.) 322, it was held that a receiver appointed in the State of *New York* cannot sue out of that state; to-wit, in the *United States* circuit court for the *District of Columbia*. To the same effect is *Brigham v. Luddington*, 12 Blatchf. (U. S.) 237.

And in *Olney v. Tanner*, 21 Blatchf. (U. S.) 540, affirming 10 Fed. Rep. 101, it was held that a receiver appointed in *New York* in supplementary proceedings cannot bring suit in the district court of the *United States* to set aside, as in fraud of creditors, a general assignment made by the debtor of all his property before the appointment of the receiver, where, after the appointment, an assignee in bankruptcy of the debtor is appointed who is made a party to the suit. Such right belongs solely to the assignee.

3. See RECEIVERS, vol. 20, p. 241 *et seq.*

4. *Gardner v. Smith*, 29 Barb. (N. Y.) 68. See also *Wilson v. Allen*, 6

appropriate proceedings to set aside fraudulent transfers of the debtor's property.¹ In such a case his recovery should be limited to the amount of the judgment upon which he was appointed receiver, and interest and costs.² In such an action the debtor is a proper party.³ The rights of the receiver are no greater than

Barb. (N. Y.) 542; Gillet v. Fairchild, 4 Den. (N. Y.) 82; Brouwer v. Hill, 1 Sandf. (N. Y.) 629; Porter v. Williams, 9 N. Y. 142; 59 Am. Dec. 519.

1. Barker v. Dayton, 28 Wis. 367; Hamlin v. Wright, 26 Wis. 50; Miller v. Mackenzie, 29 N. J. Eq. 291; Bergen v. Littell, 41 N. J. Eq. 18. The receiver has no authority to set aside legal and valid acts of the debtor, but such as are illegal and forbidden by law he may successfully assail. The property of the debtor, transferred by him in fraud of creditors, still remains, as to them, the debtor's property. Porter v. Williams, 9 N. Y. 142; 59 Am. Dec. 519, *affirming* 5 How. Pr. (N. Y.) 441; Underwood v. Sutcliffe, 77 N. Y. 58.

In Underwood v. Sutcliffe, 77 N. Y. 58, it was held that the receiver could not maintain an action to enforce the trust created by 1 *New York Rev. Sts.* 728, § 52, in favor of the creditors of one paying the consideration for lands which are conveyed to another. See also Masten v. Amerman, 51 Hun (N. Y.) 245; Browning v. Bettis, 8 Paige (N. Y.) 568; Williams v. Thorn, 70 N. Y. 270; Farnsworth v. Wood, 91 N. Y. 308.

In Murphy v. Briggs (Supreme Ct.), 11 N. Y. Wkly. Dig. 207, the facts were these: The husband conveyed real estate to his wife without consideration; subsequently, at his request, she gave mortgages upon this property to certain of his creditors, for the amount of notes held by them against him; the creditors were ignorant of his insolvency, and of the character and purpose of the conveyance to the wife—they were *bona fide* creditors. It was decided, in a suit by the receiver of the husband's property, that the conveyance was not fraudulent as to the creditor—that it was equivalent to an assignment with a preference in favor of the creditor.

All the fraudulent grantees may be united as defendants in such action, although they hold by separate conveyances and each is charged only with fraud in his own purchase. Hamlin v. Wright, 23 Wis. 491.

The question of fraudulent intent is one of fact. Hyatt v. Dusenbury, 12

Civ. Pro. Rep. (N. Y., B'klyn City Ct.) 152.

The receiver may maintain an action to avoid a fraudulent conveyance of real estate made by a judgment debtor, although there has been no transfer of the property to the receiver. Dunham v. Byrnes, 36 Minn. 106.

The receiver cannot maintain an action of replevin to recover personal property transferred by the debtor in fraud of creditors by chattel mortgage, where the mortgage has been foreclosed and the property purchased and taken possession of by the mortgagee before the appointment of the receiver. The remedy of the receiver, under such circumstances, is to bring an action in equity to set aside or remove the fraudulent mortgage. Pettibone v. Drakeford, 37 Hun (N. Y.) 628.

In First Nat. Bank v. Navarro, 17 N. Y. Supp. 900; 63 Hun (N. Y.) 630, the receiver, after waiting two years after a judgment creditor brought suit against the debtor to vacate an assignment made by him, asked leave of the court to bring such action himself, and also for an injunction restraining the creditor from prosecuting the action. The judgment creditor was not a party to the judgment represented by the receiver. It was held that the injunction was properly denied because of the delay on the part of the receiver.

An action by the receiver to set aside a mortgage and foreclosure sale of the debtor's property made before the judgment on which the proceedings were founded was obtained, and to compel the mortgagee to account for the value of the property, alleging that the mortgage was in fraud of creditors, is an equitable action and triable by the court; and it is error to send it to the circuit to be there tried as an action at law. Mandeville v. Avery, 3 N. Y. Supp. 745; 51 Hun (N. Y.) 636.

2. Bostwick v. Menck, 40 N. Y. 383; Salter v. Bowe, 32 Hun (N. Y.) 236; Lore v. Dierkes, 16 Abb. N. Cas. (N. Y. Super. Ct.) 55. See also Kennedy v. Thorp, 51 N. Y. 174; Underwood v. Sutcliffe, 77 N. Y. 63.

3. Allison v. Weller, 6 Thomp. & C. (N. Y.) 291; 3 Hun (N. Y.) 608; *aff'd*

those of the creditor whom he represents, accordingly, a waiver of the fraud by the creditor binds the receiver.¹ It seems that the receiver to whom the debtor has conveyed his interest in real property, cannot, as such, maintain an action for partition thereof.² Nor can he contest the probate of the will of the wife of the judgment debtor depriving the latter of all interest in her estate.³

The claim of the receiver, appointed in proceedings supplementary to an execution issued upon a judgment against a legatee subsequently deceased, to the legacy, cannot properly be determined in an action to obtain construction of the will.⁴ If the debtor is plaintiff in a suit and has an interest in its further prosecution, the receiver, it seems, is entitled to be substituted in his place.⁵ An action begun by the receiver is not abated by his death.⁶ It is a contempt to sue the receiver without leave of the court whose officer he is, and the proceedings in such an action will be stayed.⁷

An order appointing a receiver of certain property of the judgment debtor is an adjudication that such property is not exempt,

in 66 N. Y. 614; *Shaver v. Brainard*, 29 Barb. (N. Y.) 25.

In *Miller v. Hall*, 70 N. Y. 250, affirming 40 N. Y. Super. Ct. 262, it was held that in an action by the receiver to set aside a transfer made by the debtor, the latter is a necessary party. And where there are grounds for claiming that the property belonged to an estate of which the debtor is the personal representative, he is entitled to be a party as such.

In *Palen v. Bushnell*, 18 Abb. Pr. (N. Y. Supreme Ct.) 301, it was held that the receiver may maintain an action in his own name for usurious premiums paid by the debtor, and the latter is not a necessary party thereto. But in an action brought by the receiver to set aside as fraudulent, contracts made by the debtor, the latter has an interest in the action and may be made a party thereto.

1. Thus, where one from whom goods had been fraudulently purchased, instead of retaking the goods, or suing for their wrongful conversion, thereby disaffirming the contract, sues for the price and obtains judgment, thereby affirming the contract, a receiver in supplementary proceedings upon such judgment may not set up the fraud in the sale to defeat an assignment of the property made by the purchaser for the benefit of creditors, although the assignment is made in furtherance of the fraud, with full notice of the same to the assignee. *Kennedy v. Thorp*, 51

N. Y. 175, reversing 2 Daly (N. Y.) 258; 3 Abb. Pr. N. S. (N. Y.) 131.

2. *Miller v. Levy*, 46 N. Y. Super. Ct. 207; *Du Bois v. Cassidy* (Supreme Ct.), 5 N. Y. Wkly. Dig. 210. *Contra*, *Powelson v. Reeve* (Supreme Ct.), 2 N. Y. Wkly. Dig. 375. See also *Payne v. Becker*, 87 N. Y. 153, reversing 22 Hun (N. Y.) 28.

3. *Matter of Brown*, 47 Hun (N. Y.) 360.

4. *Smith v. Edwards*, 23 Hun (N. Y.) 223, affirmed in 88 N. Y. 92.

5. *Matter of Wilds*, 6 Abb. N. Cas. (N. Y. C. Pl.) 307. And it was further held that if the receiver's security is not sufficient, it may be increased before the entry of the order of substitution; the court may, also, in its discretion, direct that the order of substitution shall provide that the receiver make no change of attorney of record for the plaintiff, without application to the court showing a satisfactory cause therefor. *Compare In re Lansing* (Supreme Ct.), 17 N. Y. Wkly. Dig. 288.

6. *Nicoll v. Boyd*, 90 N. Y. 516.

7. *Taylor v. Baldwin*, 14 Abb. Pr. (N. Y. Supreme Ct.) 166; *Parker v. Browning*, 8 Paige (N. Y.) 388; 35 Am. Dec. 717.

In *Riggs v. Whitney*, 15 Abb. Pr. (N. Y. C. Pl.) 388, it is said to attempt by suit or otherwise to deprive the receiver of property in his possession by virtue of his office, is a willful contempt and the subject of punishment by attachment.

and will furnish full protection to the receiver for acts done under it and in strict conformity therewith, while in force, though subsequently reversed on the ground that the property is exempt.¹ The receiver has no authority to waive the equitable rights of the judgment creditor for the protection of whom he was appointed.² The receiver may, when necessary, appoint agents and attorneys to assist him in the duties of his office.³

It is the duty of the receiver to convert all the personal estate and effects into money as speedily as possible, but he may not sell any real estate belonging to the judgment debtor without special order or judgment of the court directing such sale,⁴ and it seems that the receiver should not be authorized to sell the

And in *DeGroot v. Jay*, 30 Barb. (N. Y.) 483, it was said that the rule requiring permission of the court in order to sue its receiver, is essential for the protection of receivers against unnecessary and oppressive litigation, and should be carefully maintained.

But where a receiver, without an order therefor, forcibly seizes and carries away property claimed by, and in the possession of, a third person, not a party to the proceedings, and without notice thereof, such person is entitled to the usual remedies given by the common law, and is not punishable for contempt in instituting an action for trespass against the receiver, without leave of court. *Dewey v. Finn* (Supreme Ct.), 18 N. Y. Wkly. Dig. 558.

In *Dickerson v. Van Tine*, 1 Sandf. (N. Y.) 724, the receiver, having taken goods apparently in the debtor's possession, but which were claimed by one not a party to the suit, was ordered to restore them on the claimant's engaging to hold them subject to the order of the court, and a reference as to the title was directed.

Judgment creditors may maintain on their own account, after a receiver has been appointed, a creditor's suit to set aside as fraudulent and declare void a mortgage previously given by the debtor, where their judgments were recovered and became a lien on the property mortgaged prior to the appointment of a receiver, and the receiver may be made a party defendant with the consent of the court. *Gere v. Dibble*, 17 How. Pr. (N. Y.) 31.

1. *Holcombe v. Johnson*, 27 Minn. 353.

2. *Keiley v. Dusenbury*, 42 N. Y. Super. Ct. 238, affirmed 77 N. Y. 597.

3. See generally RECEIVERS, vol. 20, p. 1.

A receiver may employ the attorney of the party for whose benefit the proceedings are instituted. *Baker v. Van Epps*, 60 How. Pr. (N. Y. Supreme Ct.) 79, overruling *Branch v. Harrington*, 49 How. Pr. (N. Y. Supreme Ct.) 196; *Cumming v. Egerton*, 9 Bosw. (N. Y.) 685.

But the court may not authorize the receiver to employ any particular attorney to conduct an action attacking an assignment made by the judgment debtor. *First Nat. Bank v. Navarro*, 17 N. Y. Supp. 900; 63 Hun (N. Y.) 630.

In *Ross v. Bridge*, 24 How. Pr. (N. Y. Supreme Ct.) 163; 15 Abb. Pr. (N. Y.) 153, the employment by the receiver of the judgment debtor to make collections for him, it appearing that no part of the fund was used for the benefit of the debtor, was held not a sufficient ground for removing the receiver.

4. *New York Gen. Ct. Rule 78; Wisconsin Circuit Ct. Rule 28, § 5.* Where the judgment recovered in an action by the receiver to set aside a fraudulent conveyance made by the judgment debtor to his wife, required him to sell the lands, and also to pay to the wife her inchoate right of dower, it was held that the court had no authority to make this order, but the sale by the receiver should be made subject to the dower rights of the wife, and it was improper to direct the payment to her of an estimated amount in lieu thereof. *Lowry v. Smith*, 9 Hun (N. Y.) 514.

Where the value of the property in the hands of the receiver amounted to at least \$60,000, the court restrained the receiver from selling the whole by public auction in order to satisfy small judgments which only amounted to about \$1,000. *Wardell v. Leavenworth*, 3 Edw. Ch. (N. Y.) 244. See

lands where they are bound by the judgment and no impediment exists to a sale under an execution upon the judgment;¹ nor should he authorize the sale of choses in action except where they represent desperate debts. His duties in respect to that class of property are to sue for and collect the same, or to compromise and settle such as are unsafe and of a doubtful character.² After applying the judgment debtor's property to the satisfaction of the judgment under which he was appointed, or any other to which his receivership has been duly extended, the surplus, if any, must be restored to the judgment debtor.³ Various decisions upon matters of pleading and practice are collected in the notes.⁴

also *People v. McAdam*, 1 City Ct. Supp. (N. Y.) 38, note.

1. *Inglehart's Petition*, Buff. Super. Ct. (N. Y.) 514; *Porter v. Williams*, 9 N. Y. 152; 59 Am. Dec. 519.

2. *New York* Gen. Ct. Rule 78; *Wisconsin* Circuit Ct. Rule 28, § 5; *South Carolina* Circuit Ct. Rule 70; *Dilling v. Foster*, 21 S. Car. 334. In this case the referee reported that the judgment debtor was the owner and in possession of property consisting of choses in action to a certain amount and other personal property besides a growing crop. The judge ordered that a receiver of all the property be appointed with power and authority to sell the same. It was held that this order was improper, that it should be modified so as not to authorize the sale of any choses in action except those which represented "desperate debts."

3. *Goddard v. Stiles*, 90 N. Y. 199. In this case it was also held that the court had no authority, without a personal service of notice of the judgment debtor, to order the receiver to apply any portion of the judgment debtor's property in his hands to any other judgment than the one under which he was appointed or to which his receivership had been extended.

In *New Jersey*, under the statute, the receiver is directed to apply the property of the judgment debtor in payment of the judgment and the costs of the proceedings thereon, and a reasonable compensation of said receiver to be taxed by the judge, and to pay the rest into the court wherein the judgment was recovered, to be disposed of according to law. It was held that this only means the excess after such payments are made which may result from one or more collections or suits by the receiver, and does not authorize him to bring into court all of the

judgment debtor's property and choses in action to an unreasonable amount. *Shay v. Dickson* (N. J. 1888), 15 Atl. Rep. 252.

Accounting.—Under the *New Jersey* statutes, a receiver is made expressly subject to the authority and orders of the court which appoints him, and is bound to account only to the judge who appointed him. *Hackensack Sav. Bank v. Terhune* (N. J. 1892), 23 Atl. Rep. 482.

4. **Pleading, Practice, etc.**—An allegation that the receiver was "duly" appointed by an order of one of the justices of the supreme court upon the application of a judgment creditor, is sufficient in the complaint, and gives the receiver the right to show upon the trial all the facts conferring jurisdiction. *Rockwell v. Merwin*, 45 N. Y. 166, *affirming* 1 *Sweeny* (N. Y.) 484. See also *Scroggs v. Palmer*, 66 Barb. (N. Y.) 505; *Manley v. Rassiga*, 13 Hun (N. Y.) 288.

In *Wright v. Nostrand*, 98 N. Y. 669, it was held that in an action brought by the receiver to set aside a conveyance of real estate made by the judgment debtor, on the ground of fraud, so as to subject the property to levy and sale on execution, where the receiver merely proves his appointment, without showing the proceedings necessary to vest in him title to the property, he is not entitled to recover the rents and profits.

Where the receiver asks for an injunction to restrain the disposition of money on deposit in bank, it is necessary that the complaint set out the amount of the judgment, or contain some allegation showing that the matter in controversy ought to be heard in a court of equity. *Hughes v. McKenzie* (Supreme Ct.), 39 N. Y. St. Rep. 31.

In *Wegman v. Childs*, 44 Barb. (N.

5. Removal.—A receiver appointed in supplementary proceedings may be removed, for cause, by the court appointing him, but no other court has such power.¹ A receiver should not be re-

Y.) 403, it was held that in order to sustain an action brought by the receiver, he must show, not only the judgment, but also an execution from a court having a right to issue the same, delivery to the proper officer, and a return by him of "unsatisfied."

In an action by a receiver appointed in supplementary proceedings instituted upon a judgment recovered in the *New York* common pleas, it is not essential that the affidavit to obtain the debtor's examination in the supplementary proceedings, or the complaint, should state that a transcript of the judgment has been docketed in the office of the county clerk, especially if defendant, without interposing a demurrer, goes to trial upon the merits. And if it were necessary that the affidavit to obtain an order for examination should show that a transcript had been filed in the office of the county clerk, the defect may be remedied by amendment. *Kennedy v. Thorp*, 3 Abb. Pr. N. S. (N. Y. C. Pl.) 131; 2 Daly (N. Y.) 258; *reversed* in 51 N. Y. 175 on another point.

1. See, generally, RECEIVERS, vol. 20, p. 198.

There is no power in the city court of *New York* to remove a receiver appointed by the supreme court. Such removal can only be made by the supreme court by whom he was appointed. *Garfield Nat. Bank v. Bostwick* (City Ct.), 39 N. Y. St. Rep. 358. In this case, in supplementary proceedings, C was appointed receiver of the judgment debtor's property by order of the supreme court, and duly qualified as such. Subsequently, a judgment was recovered in the city court of *New York* against the same defendant, execution returned unsatisfied and proceedings supplementary thereto had, and an order entered by a justice of that court extending C's receivership to the proceedings in the action. Thereafter an order was made by the justice vacating C's receivership and appointing another in his place. It was held that this removal and appointment was unauthorized by section 2466 of the *New York Code Civ. Proc.*

In *Chamberlain v. Greenleaf*, 4 Abb. N. Cas. (N. Y. C. Pl.) 92, it was held

that a receiver appointed by a court of competent jurisdiction, and in the exercise of its discretion, should not be removed by another judge of the same court except for valid cause; and the fact that the receiver is the judgment creditor is not a valid cause.

The employment of the judgment debtor by the receiver to make collections for him, where it appears that no part of the assigned fund has been used for the benefit of the judgment debtor, is not a sufficient ground for the removal of the receiver. *Ross v. Bridge*, 24 How. Pr. (N. Y. Supreme Ct.) 163.

In *Connolly v. Kretz*, 78 N. Y. 620, it was held that where a receiver has been appointed in supplementary proceedings instituted in favor of one judgment creditor, in an action brought by another judgment creditor to set aside such proceedings on the ground of collusion, it is in the discretion of the court to remove such receiver and to appoint another, and to direct the first receiver to hand over to his successor the property received by him; and such an order is not reviewable in the court of appeals.

In *Fraser v. Hunt* (Supreme Ct.), N. Y. Daily Reg., Dec. 19th, 1882, it appearing that no notice of the application for the appointment of the receiver was given to the parties prosecuting the proceedings, and that the party moving for the appointment and his attorney occupied offices in the same building with the receiver, the latter was removed on motion.

A motion to set aside an order appointing a receiver in the place of one who had resigned, is properly made to the court and not to a judge thereof. *Lippincott v. Westray*, 6 Civ. Pro. Rep. (N. Y. Supreme Ct.) 74.

A county judge has authority to accept the resignation of the receiver, and to appoint his successor. *Wing v. Disse*, 15 Hun (N. Y.) 190.

There should be no removal of a receiver appointed in these proceedings on the ground that he is a non-resident, unless the removal is accompanied by the substitution of a qualified receiver in his stead. *Terry v. Bange*, 18 Civ. Pro. Rep. (N. Y. Super. Ct.) 288.

moved without notice of the charges against him and an opportunity to be heard in opposition thereto.¹

XX. REVIEW; APPEAL.—The *New York* code provides that an order made in the course of the proceeding may be vacated or modified by the judge who made it, as if it were made in an action; or by the court out of which the execution issued; and that, where the execution issued out of a county court, an appeal from an order may be taken as though the order was made in an action brought in the same court.² The appeal is to the court and district to which an appeal from the judgment would lie.³

1. *Campbell v. Spratt* (Supreme Ct.), 5 N. Y. Wkly. Dig. 25; *Bruns v. Stewart Mfg. Co.*, 31 Hun (N. Y.) 195. In this latter case a motion to vacate an order of the supreme court appointing a receiver was made by one M., who alleged that he had been previously appointed receiver by the court of common pleas, and had entered upon the duties of his office and was still discharging the same. This motion was denied, "with leave to the defendant, or any party in interest, to move to remove said receiver and appoint a new one, if objection was made to him within twenty-four hours after the service of the order." The order then proceeded: "and objection being now made, it is ordered that James J. Nealis, Esq., be, and he hereby is, substituted as receiver of the defendant in the place of Adolph E. Dick" (the former receiver). It was held that the motion to vacate the order having been denied, it was not competent for the court upon objections made by other parties to remove the receiver for different and other reasons, without giving him notice of the charges against him and an opportunity to be heard.

2. *New York* Code Civ. Proc., § 2433; *Jones v. Sherman*, 18 Abb. N. Cas. (N. Y.) 461. See *Terry v. Bange*, 57 N. Y. Super. Ct. 546; *Hutchinson v. Trauerman*, 112 Ind. 21; *Grant v. Warner*, 51 Hun (N. Y.) 53; *Kissell v. Anderson*, 73 Ind. 485.

An order appointing a receiver of the debtor's property in supplementary proceedings is reviewable only under section 2433 of the *New York* Code Civ. Proc. *Matter of Rapplee*, 66 Hun (N. Y.) 557.

An appeal does not lie directly from an original order made by a judge out of court in proceedings supplementary to execution. But if a review of such

order is desired, a motion or notice should be made either to the judge who made the order or to the court to vacate the order; and from the order granted on such motion, an appeal will lie. *Palen v. Bushnell*, 68 Hun (N. Y.) 554.

In *Pool v. Safford*, 10 Hun (N. Y.) 497, it was held that an order made by the county judge at chambers directing that a receiver should account, and show cause why an attachment should not issue against him for contempt, could not be reviewed on appeal, unless entered with the clerk of the court. See also *Marshall v. Francisco*, 10 How. Pr. (N. Y.) 147.

3. *New York* Code Civ. Proc., §§ 1355, 1356, 1361; *Finck v. Mannering*, 46 Hun (N. Y.) 323; *Chamberlain v. Gallup*, 25 Hun (N. Y.) 318; *Mallory v. Gulick*, 15 Abb. Pr. (N. Y.) 307, note; *Gould v. Torrance*, 19 How. Pr. (N. Y.) 560.

An order made by a county judge vacating an order made by him after the examination of the creditor of the judgment debtor upon an execution issued from his own court, is appealable. *Schenck v. Irwin*, 66 Hun (N. Y.) 361.

An appeal will lie from an order made by a county judge in proceedings supplementary to execution in a cause originating in a justice's court. *Crounse v. Whipple*, 34 How. Pr. (N. Y.) 333. But see *Smith v. Hart*, 11 How. Pr. (N. Y.) 203.

It is irregular to move at a general term of the court to set aside an *ex parte* order made by a county judge for the examination of the defendant before a referee on the ground of irregularity. If such order is erroneous, the remedy of the defendant is to apply to the county judge to vacate or modify it; and if this application is denied, it seems the defendant may appeal. Con-

SUPPLETORY OATH.—See OATH, vol. 16, p. 1017.

SUPPLICAVIT.—A mandatory writ issued out of the court of chancery to compel a justice to give security of peace to a party who is in bodily danger.¹

SUPPLIES.—See note 2.

way v. Hitchins, 9 Barb. (N. Y.) 378. Compare Lancaster v. Boorman, 20 How. Pr. (N. Y.) 421.

Who Can Appeal.—In Livingston v. Swift, 23 How. Pr. (N. Y.) 1, the plaintiff's assignee appealed from an order made by a county judge in proceedings supplementary to execution discharging the defendant from an order to show cause why he should not be punished for contempt. The court said: "The order was plainly appealable by the relator. It affected a substantial right to his prejudice. He was substantially a party to the proceedings, and the non-conviction for the contempt and non-imposition of a fine was a direct damage to him to the extent of the money clearly received."

In What Cases Appeals Allowed.—In Matter of Duff, 41 How. Pr. (N. Y.) 350, it was held that an appeal would lie from an order of the special term prescribing the terms upon which a lease of certain real and personal property was directed to be executed. It was held in Dollard v. Taylor, 33 N. Y. Super. Ct. 496, that a motion denying the appointment of a receiver in proceedings supplementary to an execution was reviewable by the general term, although a matter within the judge's discretion. See also Bailey v. Lane, 15 Abb. Pr. (N. Y.) 373, note; Heroy v. Gibson, 10 Bosw. (N. Y.) 591.

In Christensen v. Tostevin (Minn.), 53 N. W. Rep. 461, it was held that a judgment debtor may appeal from an order directing him to pay money upon a judgment against him.

In Wisconsin, an order denying a motion to set aside a former order whereby an attachment was granted to punish a party for contempt, is appealable. Lamonte v. Pierce, 34 Wis. 483.

As to the right of appeal from an order adjudging one in contempt, see Hart v. Johnson, 43 Hun (N. Y.) 505; Newell v. Cutler, 19 Hun (N. Y.) 74; Forbes v. Willard, 54 Barb. (N. Y.) 520; Sudlow v. Knox, 7 Abb. Pr. N. S. (N. Y.) 411; Hagerman v. Tong Lee, 12 Nev. 331.

And as to the right of appeal gen-

erally under the *New York* procedure, see Farmers' Nat. Bank v. Burns, 107 N. Car. 465; Sperling v. Calfee, 7 Mont. 514; Barber v. Briscoe, 9 Mont. 347; Hays v. First Judicial District Ct., 11 Mont. 225; Holstein v. Rice, 15 Abb. Pr. (N. Y.) 307; O'Neil v. Martin, 1 E. D. Smith (N. Y.) 404; Hawes v. Barr, 7 Robt. (N. Y.) 452; Carter v. Clarke, 7 Robt. (N. Y.) 490; Kaufman v. Thrasher, 10 Hun (N. Y.) 438; Foster v. Prince, 8 Abb. Pr. (N. Y.) 407; Welch v. Pittsburgh, etc., R. Co., 11 Ohio St. 569; Lindsay v. Sherman, 5 How. (N. Y.) 308; Conway v. Hitchins, 9 Barb. (N. Y.) 378; Blake v. Locy, 6 How. Pr. (N. Y.) 108.

1. Brown's L. Dict. The writ is practically obsolete in the *United States*, and was refused in Adams v. Adams, 100 Mass. 364.

2. Board.—A Wisconsin statute provides for a lien in favor of persons furnishing "supplies" to men engaged in getting out logs and timber. It has been held that the word "supplies" includes the board of men, even when furnished at a hotel in a city several miles from the place where they were at work. Kollock v. Pacher, 52 Wis. 393. See also Winslow v. Urquhart, 39 Wis. 260. And where the landlord furnished the tenant with board, for which the tenant agreed to pay 875 pounds of lint cotton, it was held that the landlord was entitled to a lien upon the tenant's crops for "supplies," under Georgia Code, § 1978. The court, by Simmons, J., said: "We are inclined to think that, under this state of facts, when the landlord furnished board to the tenant, the board was in the nature of 'supplies.' If the landlord had furnished meat and meal or flour, no one would say that the tenant could not, under the section above quoted, give the landlord a lien therefor upon the crop. We can see but little difference between furnishing the tenant the raw material and furnishing it to him cooked." Jones v. Eubanks, 86 Ga. 616. See also CROPS, vol. 4, p. 901; LIENS, vol. 13, p. 594.

SUPPORT.—The word support is generally used to mean articles for the sustenance of the family, as food, etc.¹

Maritime Supplies.—See MARITIME LIENS, vol. 14, p. 412.

1. *Grant v. Dabney*, 19 Kan. 388; 27 Am. Rep. 125. In that case it was held, that an order to let a family have whatever they want for their support, addressed to one who is not a physician or druggist, does not authorize him to buy drugs for them in sickness. But in *May v. Smith*, 48 Ala. 483, it was held that "articles of comfort and support," for which the wife's estate might become liable, included medicines, and the professional services of a physician. And in *Wall v. Williams*, 93 N. Car. 327; 53 Am. Rep. 458, where for a valuable consideration one contracted to "support" another, it was held that the term support included nursing in sickness. The court, by Ashe, J., said: "The only question presented for our determination arises upon the construction of the contract between the plaintiff and the testator. The plaintiff contends that the word 'support,' as used in the instrument, can only be interpreted as meaning 'food or provisions,' and the defendant insists that the word is not to be construed in any such restricted sense, but the use of it in the contract was intended to comprehend a reasonable and comfortable maintenance, suitable to the estate, the mode of living, and the habits of life of the person to be supported. When the case was before us at a former term, 91 N. Car. 477, it was then said in the opinion delivered by Smith, C. J.: 'Are not the service and attention incident to those being supported, though in the present case they were far more onerous than perhaps ever contemplated by either party? Would a total neglect of the most common wants, when living on the same farm, be consistent with the agreement for a support to be afforded by the plaintiff? Is the word to be construed as restricting the contract to the furnishing of food merely, and fuel for cooking and warmth?' The point now involved did not necessarily arise there; but it will be seen from the above extract, that the court leans to the construction now contended for by the defendants, and after further consideration of the subject, we think that is the proper construction of the instrument."

Support and Take Care of.—It has

been said that an undertaking by one person "to support and take care of" another, is to be understood according to the varied circumstances of the parties. It does not imply that the person to be supported is not to use exertions to support himself. *Bull v. McCrea*, 8 B. Mon. (Ky.) 425. Thus in *Keltner v. Keltner*, 6 B. Mon. (Ky.) 40, the engagement of two sons (as the consideration of the conveyance of a tract of land) "to maintain, support, and take care of their parents," who were the grantors of the land, was regarded as not intended to exempt the parents from all exertion toward their own support. In this sense of the contract, the land conveyed would not have been adequate, in the circumstances of the parties, to accomplish the objects of the parties; and besides, the parents had been accustomed to labor for their own support.

Married Woman's Act.—Goods supplied to a married woman for the purposes of a boarding-house, from which the family derive their support, are not for the support of the family, within the meaning of the code of *North Carolina*, § 1826, which provides that no married woman may contract so as to affect her estate, except "for the support of the family," etc., without the written consent of the husband; and for goods so supplied without such consent her separate estate is not liable. *Clark v. Hay*, 98 N. Car. 421.

In a Devise.—A direction to provide "a good and sufficient support" to the wife of the testator's son, was construed to mean such sum as is proper for a mother and head of a family having the fortune and station held by her husband and her children. *Jacobus v. Jacobus*, 20 N. J. Eq. 49. See also *Ellerbe v. Ellerbe*, Spear's Eq. (S. Car.) 328; 40 Am. Dec. 623.

A devise for the "support of the family of the testator" is a devise for the support of his wife, and for the maintenance and education of his children. *Addison v. Bowie*, 2 Bland (Md.) 606. See also *Whilden v. Whilden*, Riley Eq. (S. Car.) 205.

Means of Support.—See CIVIL DAMAGE ACT, vol. 3, p. 262, for many cases construing the term as used in the several civil damage acts.

Lateral and Subjacent Support.—See

SUPPORTS.—See note 1.

SUPPOSE.—The term “suppose” is an equivalent of “believe.”²

SUPPRESS.—(See also **REGULATE**, and references there given).—To suppress must mean to prevent and not to license or sanction the act to be suppressed.³

SUPPRESSIO VERI.—See **FRAUD**, vol. 8, p. 635, and references there given.

SUPPRESSION OF EVIDENCE.—(See also **ILLEGAL CONTRACTS**, vol. 9, p. 879; **OBSTRUCTING JUSTICE**, vol. 17, p. 13; **PRESUMPTIONS**, vol. 19, p. 69.)

- I. Criminal Liability, 707.
- II. Contract to Suppress, 707.
- III. Duty of Prosecution, 709.

- IV. Presumptions; *Omnia Præsumuntur Contra Spoliatores* (See also **PRESUMPTIONS**, vol. 19, p. 69), 710.

I. CRIMINAL LIABILITY.—A willful and corrupt attempt to prevent the attendance of a witness before any lawful tribunal organized for the administration of justice, is an indictable offense at common law; the essence of the offense consists in a willful and corrupt attempt to interfere with and obstruct the due course of public justice.⁴

It is not necessary to aver in the indictment that the witness had been summoned, or that a summons had issued, or that there was a cause pending requiring the attendance of the witness.⁵

II. CONTRACT TO SUPPRESS.—An agreement, the consideration of which, either in whole or in part, is to cripple, stifle, or embarrass a prosecution for a criminal offense, by destroying or withholding

LATERAL AND SUBJACENT SUPPORT, vol. 12, p. 933; **PARTY-WALLS**, vol. 18, p. 3.

1. The “supports” of a bridge are the abutments, piers, and trestles on which the string pieces rest from beneath; and the cross-pieces under the string pieces and to which they are bolted, are not the supports. *Abbott v. Wolcott*, 38 Vt. 666.

2. See **BELIEVE**, vol. 2, p. 165.

3. *Schwushow v. Chicago*, 68 Ill. 448. In that case it was held, accordingly, that a city having charter authority to “suppress” groceries where liquor is sold, or to “regulate” them, might wholly prohibit or license such traffic.

“To ‘suppress’ anything is to put a stop to it when actually existing; and does not extend to preventing it by suppressing what may lead to it.” *Chelsea v. King*, 17 C. B. N. S. 625; 112 E. C. L. 625.

4. See **OBSTRUCTING JUSTICE**, vol.

17, p. 13, where this question is discussed at length. See also *State v. Keyes*, 8 Vt. 57; *State v. Holt*, 84 Me. 502. In this latter case it was said that intentionally and designedly to get a witness drunk for the express purpose of preventing his attendance before the grand jury or in open court, is such an interference with the proceedings and administration of justice as will constitute an indictable offense, and one for which the guilty party ought to be promptly and severely punished.

5. *State v. Holt*, 84 Me. 502.

Where a person, who it is known will be a witness on the trial of an indictment, he having been a material witness before the grand jury, is solicited and bribed to stay away from the trial, the parties so inducing him are guilty of an attempt to obstruct public justice, whether or not such person has, at the time, been recognized or summoned as a witness at the trial. *State*

evidence, suppressing facts, or other acts of that character, is contrary to public policy and void.¹ Thus, a contract to withdraw a prosecution for perjury and consent not to give evidence against

v. Horner (Del. 1893), 26 Atl. Rep. 73. See also *OBSTRUCTING JUSTICE*, vol. 17, p. 13.

1. *Nickelson v. Wilson*, 60 N. Y. 362.

Contract to Evade Process of Court.—In *Bierbauer v. Wirth*, 10 Biss. (U. S.) 60, the plaintiff was employed as a book-keeper at the defendant's place of business, which, with a large number of distilleries and rectifying houses, was seized by the government for frauds upon the revenue. On the evening of the day of seizure the plaintiff made an arrangement with some of the defendants by which he was to go out of the jurisdiction of the court, so that he could not be reached by its process and his presence compelled as a witness against them in the criminal and forfeiture proceedings, and remain away until the proceedings should be terminated. The defendants promised, in consideration of such service, that his salary should be continued, and all expenses incurred during his absence and consequent upon carrying out the arrangement on his part, should be repaid him. Pursuant to this understanding, the plaintiff immediately went away, and thereafter traveled in various parts of the *United States and Canada*, and continued absent for the purpose of avoiding the process of the court for more than a year. It was held that the agreement was void, and no recovery could be had thereon, and, further, that the plaintiff could not recover his expenses as money expended at the request of the defendants, for the law will go behind the request to unravel the transaction and discover its origin. In the course of his opinion upon the case *Dyer, J.*, made the following observation: "Courts owe it to public justice, and to their own integrity to refuse to become parties to contracts essentially violating morality or public policy, by entertaining actions upon them. It is a judicial duty always to turn a suitor upon such a contract out of court, whenever and however the character of the contract is made to appear."

Contract for Non-Appearance of Witness.—In *Badger v. Williams*, 1 D. Chip. (Vt.) 137, the facts were as follows: The plaintiff's daughter had

sworn a rape on the defendant's son, who was under bonds for trial before the supreme court. An action of trespass had been commenced against the son for the injury. A proposal was made for settling the private injury for which the action had been commenced against the son, and it was finally agreed that the daughter should not appear to give evidence on the criminal prosecution against the son, and that the defendant should secure to the plaintiff fifty pounds in satisfaction of the injury. Accordingly, the defendant, to make a settlement for his son, gave two notes amounting to fifty pounds; and the plaintiff, as a part of the same settlement, executed at the same time a bond to the defendant in the penal sum of one hundred pounds, conditioned that the daughter should not appear to give evidence against the defendant's son, in the said criminal prosecution before the supreme court. It appeared in evidence that the plaintiff came to the defendant's house for the purpose of making a settlement of the matter before stated, and both parties stated before the witness that a settlement had been made; that the defendant, for the injury done by his son to the plaintiff's daughter, gave his notes to the plaintiff, and that plaintiff agreed that his daughter should not appear before the supreme court to give evidence against defendant's son, and that he agreed to give defendant a bond conditioned to that effect. That the defendant said he would not sign the notes unless the plaintiff would give the bond—and that the notes were executed accordingly. On one of these notes this action was brought. *Chipman, C. J.*, in delivering the opinion of the court, said: "It is difficult to disconnect the notes and the bond even in idea. They were made at the same time, between the same parties, and relative to and for the settlement of the same matters. Though the plaintiff said that the notes must be paid although his daughter should appear as a witness against defendant's son, yet the defendant would not sign the notes but on condition that the plaintiff would execute the bond; and the bond was executed, and the notes were

the accused, is founded upon an unlawful consideration and void;¹ and it is immaterial whether the accused is innocent or guilty, since if innocent, the law is abused for the purpose of extortion, if guilty, the law is eluded by a corrupt compromise screening the criminal for a bribe.² And a party indicted for agreeing to withhold evidence may not plead the acquittal of the accused in bar of his own conviction.³ There is no difference in principle between a contract to keep a witness out of the way, and an agreement to suppress and get from the archives of the government a deposition, a knowledge of which may be of importance to the government.⁴

III. DUTY OF PROSECUTION.—The public prosecutor is a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty, and therefore has no right to suppress testimony.⁵ But this rule does not make it incumbent upon him always to call all witnesses; thus, where the number is large, the production of a part may be dispensed with after so many have

signed. The execution of the bond then by the plaintiff was a part of the material compromise then made; and must, under the circumstances of a pending prosecution for a most enormous crime against the defendant's son, have been a most powerful inducement to the defendant to sign the notes. . . . The suppression of evidence in criminal prosecutions is clearly criminal; it is an indictable offense. An agreement to suppress evidence in a criminal prosecution is an agreement to commit a crime which deeply affects public justice and the peace and good order of the community. An illegal consideration effects every part of a contract with which it is connected, and renders it void. It is so even when it affects innocent persons, who happen to be interested in such contract—much more is it so, between the parties who have made the commission of a crime the consideration of such contract. This, if we may trust the evidence which has been given (and the material facts have not been contested), is the case with the present plaintiff."

Duty of the Citizen.—As a general rule, it may be said that public policy requires of every individual citizen, as a civil duty, to assist, as far as is reasonably within his power, in the administration of justice, and when an agreement is calculated to prevent the faithful discharge of this duty, public policy declares it void. *Raguet v. Roll*, 7 Ohio 70.

1. *Collins v. Blantern*, 1 Smith's Lead. Cas. 382.

2. *Keir v. Leeman*, 6 Q. B. 308; 51 E. C. L. 308.

3. *People v. Buckland*, 13 Wend. (N. Y.) 592.

4. *Valentine v. Stewart*, 15 Cal. 387.

5. *Chapman's Case*, 8 C. & P. 559; *Reg. v. Holden*, 8 C. & P. 606; *Hurd v. People*, 25 Mich. 404; *People v. Kenyon*, Mich. Law J. (Oct. 1892), vol. 1, p. 338; *Thomas v. People*, 39 Mich. 309. In this case a saloonist fired a pistol through his door in trying to keep out a disorderly crowd. His son and another man were the only persons inside. It was held on his prosecution for assault with intent to murder, that the saloonist was entitled to demand that the prosecution, having subpoenaed the stranger who had been inside, should put him on the stand, since it was presumable that he could give important evidence not otherwise obtainable.

In *Wellar v. People*, 30 Mich. 16, it was held that in cases of homicide and other cases where analogous reasons exist, those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, should always be called by the prosecution, unless possibly too numerous; and the fact that the witness may not be favorable to the prosecution is no excuse for not calling him, though it may authorize the prosecutor, when necessary, to press him with searching questions.

been sworn as to lead to the inference that the testimony of the rest would be only cumulative, and there is no ground to suspect an intent to conceal a part of the transaction,¹ and particularly where the offense is not a crime of violence.²

It is generally considered that all witnesses whose names are on the back of the indictment should either be called by the counsel for the prosecution, or be present in court so that they may be called for the defense in the event they are wanted for that purpose.³

IV. PRESUMPTIONS; OMNIA PRÆSUMUNTUR CONTRA SPOLIATOREM— (See also PRESUMPTIONS, vol. 19, p. 69).—Every presumption will be adopted to the disadvantage of one withholding or suppressing the evidence by which the nature of his case would be manifested; ⁴ for such conduct can be explained only on the sup-

In *Maher v. People*, 10 Mich. 226, it was held to be the duty of the prosecution to call a material witness, even though he should testify to a portion of the transaction which ill suited the theory of the prosecution.

But in *State v. Martin*, 2 Ired. (N. Car.) 101, it was held that it is not the duty of the prosecuting officer on a criminal trial to examine all the witnesses who were present at the perpetration of the act, or the witnesses who had been sent to the grand jury; and that it is the province of the prosecuting officer, and not of the court, to determine who shall be examined as witnesses on the part of the state.

1. *Hurd v. People*, 25 Mich. 404.

2. *Bonker v. People*, 37 Mich. 4, a case on the solemnization of unlawful marriages.

In *People v. Goldberg*, 39 Mich. 545, it was held that in a prosecution for receiving stolen goods, the people are not obliged to call as a witness a person at whose house the goods were afterwards found.

3. *Reg. v. Bull*, 9 C. & P. 22; *Rex v. Simmonds*, 1 C. & P. 84; *Rex v. Bodle*, 6 C. & P. 186; *Reg. v. Woodhead*, 2 C. & K. 520; *Wellar v. People*, 30 Mich. 22.

4. *Atty. Gen'l v. Windsor*, 24 Beav. 679; *Crosby v. Buchanan*, 23 Wall. (U. S.) 420; *Hefflebower v. Detrick*, 27 W. Va. 16; *Chicago City R. Co. v. McMahon*, 103 Ill. 485; 42 Am. Rep. 29; *Lyons v. Lawrence*, 12 Ill. App. 531; *Paige v. Stephens*, 23 Mich. 357; *Reavis v. Orenshaw*, 104 N. Car. 369; *Fowler v. Sergeant*, 1 Grant's Cas. (Pa.) 355; *Mordecai v. Beal*, 8 Port. (Ala.) 529; *Brown v. Shock*, 77 Pa. St. 471; *Frick v. Barbour*, 64 Pa. St. 120; *Cres-*

cent City Ice Co. v. Ermann, 36 La. Ann. 841.

Where one who has wrongfully converted property, will not produce it, it shall be presumed as against him to be of the best description. *Armorie v. Delamire*, 1 Stra. 504 (1 Smith's Lead. Cas. 679).

Where a plaintiff proposed to give in evidence a copy of an agreement, the original having been shown to be in the hands of the defendant, and it was objected by the defendant that before an unstamped copy could be read, it was necessary to prove that the original agreement was stamped, Lord Ellenborough said he should assume it to have been stamped until the contrary should appear. *Crisp v. Anderson*, 1 Stark. 35.

In *Com. v. Webster*, 5 Cush. (Mass.) 316; 52 Am. Dec. 711, Shaw, C. J., said: "Where probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered, though not alone entitled to much weight, because the burden of proof lies on the accuser to make out the whole case of substantive evidence. But when pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain the charge."

position that the truth would have operated against him;¹ a principle which finds its further development in the familiar rule of law which excludes such evidence of facts as, from the nature of the case, supposes still better evidence in the party's possession or power.² But no presumption will be raised against one withholding documents which he has no right to give in evidence without the consent of the adverse party.³ Nor will the non-calling of a witness justify an arbitrary presumption of suppression;⁴ and in general, the presumption arising from mere non-production of evidence cannot be used to relieve the opposing party from the burden of proving his case.⁵ It is otherwise, however, when there

1. *Miller v. Jones*, 32 Ark. 337; *Clifton v. U. S.*, 4 How. (U. S.) 242; *Barber v. Lyon*, 22 Barb. (N. Y.) 622; *Haldam v. Harvey*, 4 Burr. 2484; *Towne v. Milner*, 31 Kan. 207; *Cole v. Lake Shore, etc.*, R. Co., 95 Mich. 77; *Werner v. Litzsinger*, 45 Mo. App. 106; *Toomey v. Lyon* (Supreme Ct.), 15 N. Y. Supp. 883; *Atlanta, etc., R. Co. v. Holcombe*, 88 Ga. 9; *Wilmer v. Smith*, 22 Oregon 469; *Bent v. Lewis*, 88 Mo. 462; *Houser v. Austin*, 2 Idaho 188.

Where the plaintiff, in an action of trespass *quare clausum fregit*, relied upon his possession of the *locus in quo*, and failed to produce the lease under which he had taken the premises, it was held that, in order to entitle himself to more than nominal damages, he should have shown the duration of his term, and that the non-production of the lease raised a presumption that the production of it would do him no good. *Twyman v. Knowles*, 13 C. B. 222; 76 E. C. L. 222.

The failure of one charged with fraud to appear and testify in denial of the charge of something peculiarly within his own knowledge, carries with it the usual unfavorable presumptions. *Connecticut Mut. L. Ins. Co. v. Smith* (Mo. 1893), 22 S. W. Rep. 623; *Eck v. Hatchet*, 58 Mo. 235; *Mabary v. McClurg*, 74 Mo. 575.

In an action against a railway company to recover damages for killing a horse by the alleged negligent operation of the defendant's train, there was satisfactory proof of circumstances tending strongly to show negligence, and the defendant's engineer, who must have had actual knowledge of all the facts as they existed, was not called upon to testify in rebuttal of the inferences which the circumstances in proof tended to establish. This failure to examine the engineer gave rise to the pre-

sumption that the proof, if produced, instead of rebutting, would support the inferences against defendant. *Gulf, etc., R. Co. v. Ellis*, 54 Fed. Rep. 481.

A refusal to produce a writing which it is sought to annul as a forgery, raises the presumption that its production would show its falsity. *Sharon v. Hill*, 26 Fed. Rep. 337.

2. *Lumley v. Wagner*, 1 DeG. M. & G. 604.

3. In an action of trover, where it was sought to raise a presumption against the plaintiff for not producing his books, it was held that, as the plaintiff's books were not legal evidence in support of his title, and, had they been produced, could not have been read to the jury without the defendant's permission, the refusal to produce them did not warrant the presumption that they contained evidence hostile to the interests of the plaintiff. *Merwin v. Ward*, 15 Conn. 377.

But a party withholding evidence which he has an absolute right to introduce, cannot escape an unfavorable presumption on the ground that the evidence withheld belongs to the privileged class. *Cooley v. Foltz*, 85 Mich. 47. In *England*, however, the rule seems to be otherwise. *Wentworth v. Lloyd*, 10 H. L. Cas. 589; 18 Jur. N. S. 961; 33 L. J. Ch. 688; 10 L. T. N. S. 767.

4. *Cramer v. Burlington*, 49 Iowa 213.

There is no ground for an unfavorable presumption in the omission of a party to call a witness who might with equal propriety have been called by the adverse party. *Scovill v. Baldwin*, 27 Conn. 316; *Diel v. Missouri Pac. R. Co.*, 37 Mo. App. 454; *Cross v. Lake Shore, etc., R. Co.*, 69 Mich. 363; 13 Am. St. Rep. 399.

5. 2 Whart. Ev., par. 1268; *Cooper v. Gibbons*, 3 Camp. 364; *Bott v. Wood*,

is an irreconcilable conflict of testimony, preponderating on neither side, in which case the non-production of evidence tending to throw much light on the issue, if unaccounted for, raises a controlling presumption against the party who might have produced it.¹

According to the same principle, if a person defaces or destroys a written instrument, a presumption thereby arises that the instrument afforded inferences unfavorable to his interest;² and slight evidence of its contents will usually be sufficient to sustain the presumption.³ The effect of spoliation is carried even further, it being said to cast a suspicion on all the other evidence adduced by the guilty party—in accordance with the maxim, *Qui semel est*

56 Miss. 136; *Chaffee v. U. S.*, 18 Wall. (U. S.) 516; *Meagley v. Hoyt*, 125 N. Y. 771; *Diel v. Missouri Pac. R. Co.*, 37 Mo. App. 454.

Except in the case of spoliation or equivalent suppression, the refusal to produce books or papers does not warrant a conclusive presumption as to the point sought to be proved by the books or papers. *Hanson v. Eustace*, 2 How. (U. S.) 653; *Cartier v. Troy Lumber Co.*, 138 Ill. 533.

1. In a proceeding *in rem* to recover of the canal boat L., the damages sustained in a collision by the canal boat I., the defense set up was an *alibi*, and there was an irreconcilable conflict of testimony. It was proved, however, that one of the hands employed on board the I. at the time of the collision knew whether the L. was the boat that did the damage, having ascertained the name of the colliding boat by inspection a very short time after the collision. This witness was not called, nor was any excuse for his non-production given, a fact which, in the opinion of the court, warranted the presumption that his testimony would not support the libellant's case, and in such a conflict, this presumption was held to be controlling. *The Fred. M. Lawrence*, 15 Fed. Rep. 635.

2. *Lucas v. Brooks*, 23 La. Ann. 117; *Jones v. Knauss*, 31 N. J. Eq. 609; *Henderson v. Hoke*, 1 Dev. & B. Eq. (N. Car.) 148; *Little v. Marsh*, 2 Ired. Eq. (N. Car.) 18; *State v. Chamberlain*, 89 Mo. 129; *State v. Dilley*, 64 Md. 314.

Where the question was whether a former will had been revoked by a will made subsequently, Lord Mansfield said that evidence of the spoliation of the last will by the claimant

under the former, would have been good ground for the presumption of a revocation. *Harwood v. Goodright*, 1 Cowp. 87.

The spoliation of papers necessary to show the neutral character of a vessel, furnishes a strong presumption against its neutrality. *The Pizarro*, 2 Wheat. (U. S.) 227.

Where a party is proved to have suppressed any species of evidence, or to have destroyed or defaced any written instrument, the presumption arises that had the truth appeared it would have been against his interest. *Winchell v. Edwards*, 57 Ill. 41.

A party who destroys evidence by which his claim or title may be impeached, raises a strong presumption against the validity of his claim. *Thompson v. Thompson*, 9 Ind. 323; 68 Am. Dec. 638.

3. The refusal to produce books and papers, has the effect of admitting parol evidence of their contents, and if such evidence be imperfect, vague, and uncertain, every presumption shall be against the party who might remove all doubt by producing the higher evidence. *Cross v. Bell*, 34 N. H. 82; *Life, etc., Ins. Co. v. Mechanic F. Ins. Co.*, 7 Wend. (N. Y.) 31. But one who has willfully destroyed the higher and better evidence, is not permitted, in face of the presumption thereby raised, to enjoy the benefit of the rule admitting secondary evidence. "*The Count Joannes*" *v. Bennett*, 5 Allen (Mass.) 169; *Blade v. Noland*, 12 Wend. (N. Y.) 173; 27 Am. Dec. 126; *Bagley v. McMickle*, 9 Cal. 430; *Tobin v. Shaw*, 45 Me. 331; 71 Am. Dec. 547; *Broadwell v. Stiles*, 8 N. J. L. 58; *Riggs v. Taylor*, 9 Wheat. (U. S.) 483. See also *Renner v. Bank of Columbia*, 9 Wheat.

SURCHARGE AND FALSIFY—SUREFOOTED.

*malus, semper præsimitur esse malus in eodem genere.*¹ And a similar effect has been given to the failure to introduce a witness who was competent to give corroborating testimony upon a point which was the subject of contradictory statements.²

SURCHARGE AND FALSIFY—(See also ACCOUNT RENDER, vol. 1, p. 128).—These terms “surcharge” and “falsify” have a distinct sense in the vocabulary of courts of equity a little removed from that which they bear in the ordinary language of common life. In the language of common life, we understand “surcharge” to import an overcharge in quantity, or price, or value, beyond what is just, correct and reasonable. In this sense it is nearly equivalent to “falsify;” for every item which is not truly charged as it should be is false, and by establishing such overcharge it is falsified. But in the sense of courts of equity these words are used in contradistinction to each other. A surcharge is apparently applied to the balance of the whole account, and supposes credits to be omitted which ought to be allowed. A falsification applies to some item in the debits, and supposes that the item is wholly false or in some part erroneous.³

SUREFOOTED.—See note 4.

(U. S.) 581; Downing v. Plate, 90 Ill. 268.

1. Best Prin. Ev., § 413.

2. Where two subscribing witnesses to a will, which was the subject of controversy, flatly contradicted each other upon a point relating to its due execution, and the beneficiaries under the will had it in their power to introduce evidence competent to corroborate the statement of their attesting witness, it was held that their failure to do so not only left no reasonable doubt of the weakness of their contention upon this particular point, but tended to discredit their witness in his other statements. *In re Bernsee's Will* (Supreme Ct.), 17 N. Y. Supp. 669.

3. Story's Eq. Jur., § 525; Bailey v. Westcott, 6 Phila. (Pa.) 525. See also Rehill v. McTague, 114 Pa. St. 82.

The right to surcharge and falsify is thus defined by Lord Ch. Hardwicke, in *Pitt v. Cholmondeley*, 2 Ves. 565: “Upon a liberty to the plaintiff to surcharge, the *onus probandi* is always on the party having that liberty; for the court takes it as a stated account and establishes it. But if any of the parties can show an omission for which credit ought to be, that is a *surcharge*; or if anything is inserted that is a wrong charge, he is at liberty to show it, and that is a *falsification*. But that must

be by proof on his side. And that makes a great difference between the general cases of an open account and where only to surcharge and falsify for such must be made out.”

“If either party can show an omission for which an entry of debit or credit ought to be made, such party surcharges, that is, adds to the account; and if anything should be inserted which is wrong, he is at liberty to show it, and this is falsification.” *Philips v. Belden*, 2 Edw. Ch. (N. Y.) 23.

For mistakes and omissions in an account stated, it can only be surcharged (which is to show an omitted credit), or falsified (which is to show a wrong charge). To surcharge and falsify leaves the account stated in full force, except so far as errors and mistakes are shown. *Rehill v. McTague*, 114 Pa. St. 82.

4. A horse whose stumbling requires the constant remedy of a particular mode of shoeing that is not disclosed by his vendor, and cannot be discovered by the vendee with the use of reasonable skill and diligence, is not “surefooted” within the meaning of a warranty, in which the only excepted causes of stumbling are those of a temporary character. *Morse v. Pitman*, 64 N. H. 11. See also *HORSES*, vol. 9, p. 766; **WARRANTY**.

SURETYSHIP.—(See also BAIL, vol. 2, p. 1; BILLS AND NOTES, vol. 2, p. 313; BONDS, vol. 2, p. 448; CONTRIBUTION, vol. 4, p. 1; FRAUDS (STATUTE OF), vol. 8, p. 657; OFFICERS (PRIVATE CORPORATIONS), vol. 17, p. 39; PUBLIC OFFICERS, vol. 19, p. 378; SUBROGATION, vol. 24, p. 187.)

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I. DEFINITION.—Suretyship is an undertaking to answer for the debt, default, or miscarriage of another, by which the surety becomes bound as the principal or original debtor is bound.¹ It is a primary obligation, and the creditor is not required to pro-

1. Bouv. L. Dict.

"The condition or undertaking of a surety is a contract by one person to be answerable for the payment of some debt, or the performance of some act or duty, in case of the failure of another person who is himself principally responsible for the payment of such debt, or the performance of the act or duty." 2 Addison on Contracts, 648 (8th ed. 1888).

In *Reigart v. White*, 52 Pa. St. 440, the court, by Agnew, J., said: "A contract of suretyship is a direct liability to the creditor for the act to be performed by the debtor."

The word "security" has an established and well-known meaning in the minds of most people and indicates an obligation to stand for the sum absolutely unless discharged by the supine negligence of the obligor after notice." *Marberger v. Pott*, 16 Pa. St. 9.

"A surety is any person who, being liable to pay a debt, is entitled, if it is enforced against him, to be indemnified by some other person who ought himself to have paid it before the surety was compelled to do so." *Wendlandt v. Sohre*, 37 Minn. 162.

Examples.—A contract indorsed on the back of a promissory note: "For value received, I, or we, hereby guaranty the payment of the within note

at maturity, and all times thereafter, and waive demand, protests, and notice of non-payment thereof," is a contract of suretyship. *Osborne v. Campbell*, 6 Pa. Co. Ct. Rep. 523; *Loomis Inst. v. Hurd*, 57 Conn. 435.

Defendants as attorneys for a third person, employed plaintiffs to do certain work, and upon the latter refusing to proceed with it, promised that if they would complete it, defendants would see that they got their pay. *Held*, that there was an original undertaking by defendants to pay for the work. *Greenough v. Eicholtz*, 1 Pa. Supr. Ct. Cas. 433.

An order reading, "I have made a contract with D for a lot of staves. Any white or burr oak timber you may sell him I will stand good for; or, in other words, will guaranty the pay for it," is an absolute undertaking, entitling the promisor to no notice of its acceptance, or of the failure of D to pay. *Nading v. McGregor*, 121 Ind. 465.

A contract sued on, read as follows: "The Philadelphia and Reading Railroad Company hereby guaranty the punctual payment of . . . the within obligation," etc. *Held*, that it was a contract of suretyship, notwithstanding the word "guaranty." *Drake v. Philadelphia, etc., R. Co.*, 5 Pa. Co. Ct. Rep. 21.

ceed first against the principal before he can recover from the surety. The surety and principal may be joined as defendants in one suit, or the surety may be sued alone, without any effort having been made to recover the debt from the principal.¹

A letter from defendant to plaintiff read as follows: "In consideration of your subscription of \$5,000 to the stock of the proposed Philadelphia and Sea Shore Railway Company, I agree that it is understood that the said road shall be completed to Cape May by Oct. 1, 1890, and, in default thereof, I agree that the money paid by you on said subscription shall be returned to you by the said company, or, in default thereof, I shall do it myself, at that time." The court held that this was a contract of suretyship. *Allison v. Wood*, 1 Pa. Advance Rep. 185 (Leg. Intel.). See also *Webster v. Smith* (Ind. 1892), 30 N. E. Rep. 139.

A, by a writing under seal, agreed "to become surety for the faithful performance of all or any of the conditions" of a certain lease, "which are to be kept, done, and performed on the part of B, lessee therein, and, in default thereof on the part of the said lessee, to be liable therefor to the lessor as fully, to all intents and purposes, as if I were the lessee." Held, that this did not make A a mere guarantor, but made him a surety. *Scott v. Swain* (Pa. 1887), 8 Atl. Rep. 24.

An agreement under seal at the foot of a lease as follows: "For consideration received I hereby agree to become security for the faithful performance of the above agreement," was held not to be a guaranty, but an engagement of suretyship. *Allen v. Hubert*, 49 Pa. St. 259.

E having contracted for goods with W and X, R wrote to X, "Will you say to W to ship the goods immediately and I will be responsible for payment." Held, that this was a contract of suretyship between R and W. *Reigart v. White*, 52 Pa. St. 438.

The assignors of a judgment who "guaranteed payment thereof in one year from this date," held, sureties and not guarantors. *Riddle v. Thompson*, 104 Pa. St. 330.

Where A, B and C, partners, made their firm note to C who indorsed the same, the firm paying interest until A withdrew, when B and C took all the assets and assumed all the liabilities, held, that between themselves B and C

were principals, and A surety. *Moore v. Topliff*, 107 Ill. 241.

There are three kinds of contracts of suretyship, between which it seems important to distinguish: (1) Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2) those in which there is a similar agreement, between the principal and surety only, to which the creditor is a stranger; and, (3) those in which, without any such contract of suretyship, there is a primary and secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid. *Duncan v. North and South Wales Bank, L. R.*, 6 App. Cas. 1.

Agreements Construed Not to be Those of Suretyship.—Where plaintiff's sole witness, his clerk, stated that he would not have sold goods to the debtor but for a promised order on a third person, and that he would not have sold them but for defendant's request "to let the debtor (introduced by the latter) have what he wanted"—held, that the evidence was insufficient to establish defendant's suretyship. *Diggs v. Staples*, 7 La. Ann. 653.

The indorser of a negotiable promissory note is not a security, within the meaning of the act concerning securities. *Clark v. Barrett*, 19 Mo. 39.

Joint vendees of land, who give their joint notes for the purchase price, are not sureties for each other, so as to give him who pays the note the right to recover from the other the amount of the latter's proportion, with ten per cent. interest, as prescribed by Mansf. Dig. *Arkansas*, § 6401, for the recovery by a surety against his principal. *McGee v. Russell*, 49 Ark. 104.

1. For distinction between suretyship and guaranty, see *GUARANTY*, vol. 9, p. 68; *Burke v. Cruger*, 8 Tex. 66; *Lathrop v. Wilson*, 30 Vt. 604.

II. HOW SURETYSHIP MAY BE CREATED—1. By Express Contract.—The relation of principal and surety may be established by any form of words which express the intention of the parties. But all the parties signing an obligation are principals, unless it appears otherwise, or it be shown by the express understanding of all the parties to the contract that the relation of principal and surety existed between the makers of the instrument.¹

2. By Indorsing or Signing Notes.—See **BILLS AND NOTES.**

3. By an Agreement to Assume a Mortgage Debt.—Where the vendee of lands agrees to assume the payment of a mortgage existing on the land at the time of the execution of the deed,

1. *Stroop v. McKenzie*, 38 Tex. 132; *Williams v. Macatee*, 86 Va. 681; *Knapp v. Morel*, 111 Ind. 570; *Boulware v. Lewis*, 83 Va. 679; *Fowler v. Alexander*, 1 Helsk. (Tenn.) 425.

When two persons jointly, or jointly and severally, sign an obligation for the payment of money, one of them may show, by evidence *aliunde*, that he was surety for the other. *Carpenter v. King*, 9 Met. (Mass.) 511.

Where several parties are jointly and severally bound by a contract, on the face of which nothing appears to show the relation of principal and surety between them, all are to be regarded as principals, and the contrary cannot be shown at law; but in equity, the true relation of the parties may be shown. *Davis v. Mikell*, 1 Freem. Ch. (Miss.) 548.

If one has executed an instrument, apparently as principal, but really as surety, he is bound to the creditor as principal, unless the creditor knew the true character of the obligation. *Goodman v. Whitaker*, 84 N. Car. 8.

Defendant, at the request of plaintiff, removed a mill belonging to himself on to land owned by plaintiff. Plaintiff and defendant together purchased of others machinery, etc., for the mill, without any understanding between themselves as to their respective rights. *Held*, that the debt for the machinery was a joint obligation of plaintiff and defendant, and equity will not declare plaintiff a mere surety. *Vincent v. Logsdon*, 17 Oregon 284.

W having given a note and mortgage, Z who did not sign the note, subscribed the mortgage, which contained a recital that he, "after taking cognizance of the foregoing act of mortgage, declared that he does not hereby bind himself jointly and *in solido* with W for the payment of the aforesaid note, at its maturity, in favor

of G, or any further holder of the same." *Held*, that Z was not a principal, but a surety. One who accedes to the existing obligation of another, and engages to see it performed, is essentially a surety. *Alter v. Zunts*, 27 La. Ann. 317.

Where, on the trial of the question of suretyship, as between A and B, the makers of a promissory note upon which they have been sued, upon pleadings by each, alleging that he was the surety and the other the principal, the evidence established that such note had been given for a loan of money by the payee, and that, when such money was procured, A, in the presence of B and the payee, took such money and carried it away—it was competent for A, in order to rebut any inference arising from such evidence that he was the principal, to introduce evidence to show that B was, at the time of such loan, indebted to him, as a circumstance tending to support his own testimony that B had procured such loan to pay such indebtedness to A. *Harvey v. Osborn*, 55 Ind. 535.

Plaintiff had sold goods to defendant's husband, in whose name the business was carried on, but refused to let the husband have more credit; whereupon the husband told plaintiff that he would give "the best security," and sent for defendant, who stated to plaintiff that she was running the business; that it belonged to her, and that she would pay for all the goods that the plaintiff would leave at the shop. *Held*, that the agreement was not one of suretyship, but a positive assertion that defendant was the principal. *Maier v. Willson*, 50 Hun (N. Y.) 605.

Obligations may be enforced against sureties, although the instruments be not under seal. *Schuster v. Weissman*, 63 Mo. 552; *Templeton v. Com.* (Pa. 1886), 8 Atl. Rep. 167.

he becomes the principal debtor for the payment of the mortgage, and the vendor becomes the surety.¹

1. In *Paine v. Jones*, 76 N. Y. 274, the defendant executed a bond secured by a mortgage which contained a clause giving the mortgagor the privilege of requiring from the mortgagee a release of any portion of the mortgaged premises at any time, upon making certain specified payments. The defendant conveyed the lands subject to the mortgage which the grantee covenanted to pay. By an agreement afterwards made between the grantee and the holder of the mortgage, who had notice of the deed and its covenants, and without the consent of the defendant, this clause was annulled. In a proceeding to foreclose the mortgage, an attempt was made to hold the defendant liable for a deficiency. The court held that as between the defendant and his grantee, the latter became the principal debtor, and the former the surety; and that the release of the privilege was such an alteration of the contract as relieved the defendant from liability. The court, by Danforth, J., said: "The bond and mortgage were given at the same time—were between the same parties and intended to secure the payment of the same sum of money. Together they constitute one contract, and thus express the measure, and define the terms, of the liability of Jones, and the conditions on which it might be discharged. (*Marsh v. Dodge*, 66 N. Y. 533; *Rogers v. Smith*, 47 N. Y. 324.) It is equally well settled that by the acceptance of a deed conveying premises subject to a mortgage which the grantee assumes and agrees to pay, he becomes, as between himself and the grantor, the principal debtor and the grantor the surety. (*Cornell v. Prescott*, 2 Barb. (N. Y.) 16; *Comstock v. Drohan*, 71 N. Y. 12.)

"The holder of the security had notice of the deed and its covenants, and was bound by this relation and under an equitable obligation to do nothing to affect or alter rights of surety. In *Calvo v. Davies*, 8 Hun (N. Y.) 222, the court says: 'The rule is absolute that there shall be no transaction with the principal without acquainting the person who has a part interest in it.' Upon appeal to this court the judgment in that case was affirmed (see *Calvo v. Davies*, 73 N. Y. 211; 29 Am. Rep. 130), and is decisive upon the

case before us. The facts were similar and the relation of the parties the same."

In *Shepherd v. May*, 115 U. S. 505, it was held that an express promise made to a vendor by the vendee of real estate, conveyed to him, subject to a deed of trust executed to secure a debt, does not, without the assent of the creditor, make the vendee the principal debtor, and the vendor the surety.

If the grantee promises to pay an existing mortgage as a part of the purchase money, the grantee is the principal debtor, and the grantor the surety. *Huyler v. Atwood*, 26 N. J. Eq. 504.

In *Flagg v. Geltmacher*, 98 Ill. 293, the owner of real estate, after having given a deed of trust thereon to secure the payment of the loan to him, conveyed the premises to another, subject to the incumbrance which the purchaser expressly agreed to assume and discharge. The purchaser subsequently conveyed to another, and that other to a third purchaser in the same way. The court held that each of the subsequent purchasers became an original promisor for the payment of the incumbrance, and the original debtor a surety. See also *Halsey v. Reed*, 9 Paige (N. Y.) 446; *Marsh v. Pike*, 10 Paige (N. Y.) 595; *Ferris v. Crawford*, 2 Den. (N. Y.) 595; *Burr v. Beers*, 24 N. Y. 178; 80 Am. Dec. 327; *Belmont v. Coman*, 22 N. Y. 438; 78 Am. Dec. 213; *Wales v. Sherwood*, 52 How. Pr. (N. Y.) 413; *Fleishhauer v. Doellner*, 9 Abb. N. Cas. (N. Y.) 373; *Comstock v. Drohan*, 71 N. Y. 9; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Trotter v. Hughes*, 12 N. Y. 74; 62 Am. Dec. 137; *Thorpe v. Keokuk Coal Co.*, 48 N. Y. 253; *Rubens v. Prindle*, 44 Barb. (N. Y.) 336; *Johnson v. Zink*, 52 Barb. (N. Y.) 396; *Marsh v. Pike*, 10 Paige (N. Y.) 595; *Ayers v. Dixon*, 78 N. Y. 318; *Ellis v. Johnson*, 96 Ind. 377; *Figart v. Halderman*, 75 Ind. 564; *Wilson v. Burton*, 52 Vt. 394; *Dean v. Walker*, 107 Ill. 540; 47 Am. Rep. 467; *George v. Andrews*, 60 Md. 28; 45 Am. Rep. 706; *Willard v. Worsham*, 76 Va. 392; *Boardman v. Larrabee*, 51 Conn. 39; *Crenshaw v. Thackston*, 14 S. Car. 437; *Unger v. Smith*, 44 Mich. 22; *Lappen v. Gill*, 129 Mass. 349; *Leeming v. Smith*, 25 Grant's Ch. 256;

4. By Mortgage of a Wife's Separate Property to Secure the Debt of Her Husband.—Where a wife pledges or mortgages her separate property to secure the debt of her husband, she occupies the position of a surety.¹

Campbell v. Robinson, 27 Grant's Ch. 634.

1. In *Bank of Albion v. Burns*, 46 N. Y. 170, it was held that where the property of a married woman has been mortgaged to secure the debt of her husband, she occupies the position of the surety, while her husband is the principal debtor. Under these circumstances, she, and those claiming under her, are entitled to the benefits of the rules prohibiting the dealing of the creditor with the principal debtor to the prejudice of the surety. See also *Hodgson v. Hodgson*, 2 Keen 704; *Wheelwright v. De Peyster*, 4 Edw. Ch. (N. Y.) 232; *Loomer v. Wheelwright*, 3 Sandf. Ch. (N. Y.) 135; *Gahn v. Neimcewicz*, 11 Wend. (N. Y.) 312; *Neimcewicz v. Gahn*, 3 Paige (N. Y.) 614; *Hubbard v. Ogden*, 22 Kan. 363; *Moffett v. Roche*, 77 Ind. 48; *Knight v. Whitehead*, 26 Miss. 245; *Johns v. Reardon*, 11 Md. 465; *Dennison v. Gibson*, 24 Mich. 187; *Christian v. Keen*, 80 Va. 369; *Purvis v. Cartsaphan*, 73 N. Car. 575; *Hood v. Jones*, 5 Del. Ch. 77.

The wife may show by parol evidence that the debt secured was really the debt of her husband, and thus establish the fact of suretyship. *Spear v. Ward*, 20 Cal. 659.

Where a wife executes a mortgage not to secure her husband's debt, but to benefit her separate estate, she will not be regarded as a surety. The rule is stated in *Vogel v. Lechner*, 102 Ind. 55, as follows: "Whether a contract executed by a married woman is one of suretyship or not will be determined by a consideration of whether or not it was made by her or on her behalf, and upon a consideration moving to her or for the benefit of her separate estate. To the extent that the consideration was received by her, or inured to the benefit of her estate, she will be held to have contracted as principal. To the extent that the consideration was received by her husband, or any other person, or that it went to pay a debt or liability for which neither she nor her property was bound, it will be held a contract of suretyship."

In *Dickinson v. Codwise*, 1 Sandf.

Ch. (N. Y.) 214, it was held that where a husband borrows money and secures it by a mortgage which his wife executes with him, on her lands, and he lays out the money in permanent buildings and improvements on such lands, she is not a surety for him in respect of the mortgage debt. The court, by Sandford, V. Ch., said: "There is no doubt that Mrs. Codwise is entitled to be subrogated, wherever she has paid a mortgage on her property, given for the debt of her husband. But is this such a debt? In form, the mortgages were executed to secure the payment of his bonds. In substance, they were made to raise money (or to pay off money previously loaned) to improve and render productive a plat of ground which principally belonged to her in her own right, and which was before of little value, and yielding, if any, only a trifling income. These improvements were substantial and permanent, and on the death of her husband, they became (so far as her portion of the lands were concerned) her absolute property; and in the portion belonging to him, she succeeded upon that event, to a valuable dower interest. It is plain to my mind, that to the extent of the proportion of this debt which went to the improvement of Mrs. Codwise's land, it is and was in equity her debt; and the residue of it was the debt of her husband. It follows that she has no right as a surety, except in reference to the latter portion of the debt." See also *McFillen v. Hoffman*, 35 N. J. Eq. 364.

And on the same principle, where a husband and wife execute a mortgage on two separate lots of land, one of which belongs to the husband and the other to the wife, and the mortgage is to secure the debt of a husband, the wife is surety only to the extent of the lot belonging to her. *Hubbard v. Ogden*, 22 Kan. 363.

A married woman who joins with her husband in a mortgage of his real estate for the payment of his debts, does not occupy the position of a surety. *Hawley v. Bradford*, 9 Paige (N. Y.) 200; 37 Am. Dec. 390; *Jenness v. Cut-*

5. By Agreement of Partner to Assume Firm Debts.—Where one partner, on the dissolution of a firm, agrees to assume the firm debts, the other partner becomes as to such partner a mere surety. Both partners, however, as to firm creditors, are liable as principals; but if the firm creditors, with full knowledge of the agreement between the partners, extend the time of payment to the partner continuing the business, the retiring partner will be discharged from liability.¹

ler, 12 Kan. 500; *Tennison v. Tennison*, 114 Ind. 424. But in *Dawson v. Bank of Whitehaven*, 4 Ch. Div. 639, it was held, as to her dower interest, the wife was surety. In that case, the wife, married before the Dower Act, joined her husband in conveying certain tracts of land to a mortgagee free from dower, with the proviso for redemption in favor of the husband, and a power of sale directing the surplus to be paid to the husband. The court held that the wife, having been a surety for the husband, was entitled, upon payment or satisfaction of the first mortgage debt, to hold the property comprised in the first mortgage as a security for her dower against the subsequent incumbrancer.

1. In *Colgrove v. Tallman*, 67 N. Y. 95; 23 Am. Rep. 90, an action was brought upon a promissory note, made by the firm of H. C. Barnes & Co., of which firm defendants were sole partners. The note was given October 3, 1863, payable "fifteen days' demand after date." About June 21, 1864, defendant, Tallman, sold out all his interest in the partnership property and effects to defendant, Barnes, who agreed to assume and pay all the firm debts. A few days thereafter, Tallman notified plaintiff, who then held the note, of the agreement, and requested him to proceed and collect the note immediately. Barnes was at the time solvent and able to pay. He failed in 1866; made an assignment and was thereafter, up to the time of trial, hopelessly insolvent. Plaintiff made a demand in June, 1865, but made no effort to collect the note until after the failure. The court, by Folger, J., held that plaintiff could not recover, and said: "By the dissolution of the copartnership, of which Barnes and Tallman were the members, and the transfer of all the property to Barnes, and his agreement with Tallman to pay all the debts of the firm, Tallman became in equity, as between himself and Barnes, a surety for Barnes as principal debtor

in those debts. (*Millerd v. Thorn*, 56 N. Y. 402; *Kinney v. M'Cullough*, 1 Sandf. Ch. (N. Y.) 370; *Morss v. Gleason*, 64 N. Y. 204.) When it was made known to Colgrove by Tallman, that Barnes and Tallman had gone into the bargain, which was thus made between them, Colgrove became bound to Tallman in equity to observe it. Thus, if he had made with Barnes a valid agreement to extend the time of payment of the note made to him by the firm, Tallman would have been discharged. *Millerd v. Thorn*, 56 N. Y. 402. This could be, only on the ground that extension of time of payment of a debt, granted by a creditor to a principal debtor, acts as a discharge of a surety of a debt, from his liability thereon. It is recognized as resting upon this principle in *Oakeley v. Pasheler* (10 Bligh N. S. 548). It was there argued for the creditor, that the doings of his debtors among themselves could not alter his rights (page 580), and that a partner retiring, with an agreement for indemnity from his co-partner, was not thereby converted into a surety (page 581). But it was ruled that he was. The opinion given by Lord Lindhurst, in the House of Lords, is that the representatives of the retiring partner stood in the character of sureties, which the creditor was bound to observe, having had notice of the dealing between the partners, his original debtors. And see *Morss v. Gleason*, 64 N. Y. 204, as bearing upon this point."

Where one member of a partnership retires from it, agreeing with the others that they should pay the firm debts, the retiring partner, as to creditors having knowledge of the agreement, is a surety. *Gourley v. Tyler* (Tex. 1891), 15 S. W. Rep. 731. See also *Conwell v. McCowan*, 81 Ill. 285; *Savage v. Putnam*, 32 N. Y. 501; *Millard v. Thorn*, 56 N. Y. 402; *Smith v. Sheldon*, 35 Mich. 42; 24 Am. Rep. 529; *Burnside v. Fetzer*, 63 Mo. 107; *Gillen v. Peters*, 39 Kan. 489; *Thurber*

6. By Pledge of Property to Secure the Debt of Another.—Where a person pledges or mortgages his own property to secure the debt of another, the property so pledged or mortgaged occupies the position of a surety.¹

v. Corbin, 51 Barb. (N. Y.) 215; *Williams v. Boyd*, 75 Ind. 286; *Palmer v. Purdy*, 83 N. Y. 144; *Bryan v. Henderson*, 88 Tenn. 23; *Barber v. Gillson*, 18 Nev. 89; *Chandler v. Higgins*, 109 Ill. 602; *Bays v. Conner*, 105 Ind. 415; *Waddington v. Vredenburg*, 2 Johns. Cas. (N. Y.) 227; *Sezer v. Ray*, 87 N. Y. 220; *Johnson v. Young*, 20 W. Va. 614.

Parties who contract a debt as partners may, by reason of subsequent arrangements or transactions, become, as between themselves, principal and surety. *Wendtlandt v. Sohre* (Minn.), 33 N. W. Rep. 700.

A surety contracted that a partner continuing the trade, after dissolution of the firm, should pay all debts of the firm. *Held*, that the contract was in its nature severable, and that an action might be brought upon it for each and every breach. *Wolf v. Welton*, 30 Pa. St. 202.

Where, upon the dissolution of a firm, it is agreed that one of the members shall retain the partnership property and pay all the debts of the firm, and a common creditor is notified of the agreement, but he does not assent thereto, such agreement does not impair any of his rights against both partners as principals, and the retiring partner cannot avail himself of *West Virginia* Code, ch. 101, §§ 1, 2, providing for the release of a surety on failure of the creditor to bring suit against the principal after he has been requested so to do by the surety. *Barnes v. Boyers*, 34 W. Va. 303.

In *Shamburg v. Abbott*, 112 Pa. St. 6, it was held that where one, by reason of his having been a partner, and not having given notice of his withdrawal, becomes liable for debts contracted by the partnership after his withdrawal, but which as between himself and the partnership, the latter were bound to pay, and being thus liable pays the same, he may recover the amount so paid in an action of *indebitatus assumpsit* against the remaining partners.

The partnership between plaintiff and defendant having been dissolved, a full accounting, adjustment, and settlement was had, as was supposed, of

all the partnership business, both as between the firm and third persons, and as between the partners themselves. But by inadvertence one debt contracted by the firm was overlooked and left unpaid. When it became due, plaintiff paid one-half of it, and upon defendant's refusal to pay the other half, brought an action against him for indemnity, and to compel him to pay it. *Held*, that, as between the plaintiff and defendant, the former bore the relation of surety for the payment of the remaining half of the debt, and as such could maintain the action. *Wendtlandt v. Sohre*, 37 Minn. 162.

1. In *Robinson v. Gee*, 1 Ves. 251, Samuel Gee, tenant in tail, desiring to raise money for the payment of debts on his estate, proposed to his brother Osgood who was the remainderman, to join in a mortgage, which was done, and both joined in the bond. Samuel received the money. The court held that after the death of Samuel, his creditors could not come upon Osgood's remainder in case of Samuel's personal estate.

In *Lowry v. McKinney*, 68 Pa. St. 294, Lowry held a judgment against James McKinney, which was a lien upon two tracts of land. James sold one tract to Ballard. Subsequently, John McKinney, with knowledge of the sale to Ballard, procured a release from Lowry of the other tract, and then bought it of James, and also bought Lowry's judgment. The court held that Ballard's land was surety for Lowry's debt, and upon payment would be entitled to subrogation against the other tract.

In *Hill v. Witmer*, 2 Phila. (Pa.) 72, a materialman took the note of the contractor for the materials furnished a building, and extended the time of payment. The owner, having no notice of the claim before the note fell due, paid the contractor in full. The court held that the owner, or rather the building itself, stood in the light of surety for the contractor, and that the agreement to give time, discharged the building from the lien.

See also *Rowan v. Sharp's Rifle Mfg. Co.*, 33 Conn. 1; *Christner v.*

7. **By Entering Into a Joint Obligation.**—Where two persons join in executing a bond or other obligation, they become sureties for each other.¹ Thus, where two administrators join in a bond for the faithful performance of their duties, they will each be a surety for the other;² or where two persons purchase land and join in a bond for the purchase money, they will be sureties each for the other.³ Where two persons execute a note, and each of them receives one-half of the consideration, they are, as between themselves, principals for one-half of the debt and sureties for each other to the extent of the other half.⁴

The joint maker of a note who has executed the note as a surety and not as a principal, may, if this fact is known to the creditor, show by parol the circumstances under which the note was signed.⁵ The same rule applies to instruments under seal;

Brown, 16 Iowa 130; White v. Ault, 19 Ga. 551; Price v. Dime Sav. Bank, 124 Ill. 317; Home Nat. Bank v. Waterman, 30 Ill. App. 535; Allen v. O'Donald, 28 Fed. Rep. 346; Campion v. Whitney, 30 Minn. 177; Leffingwell v. Freyer, 21 Wis. 392; Walker v. Goldsmith, 7 Oregon 161.

1. Hatch v. Norris, 36 Me. 419.

2. Morrow v. Peyton, 8 Leigh (Va.) 54; Nanz v. Oakley, 120 N. Y. 84; Moore v. State, 49 Ind. 558; Collins v. Carlisle, 7 B. Mon. (Ky.) 13; Newton v. Newton, 53 N. H. 537; Braxton v. State, 25 Ind. 82; Boyd v. Boyd, 3 Gratt (Va.) 113.

3. In Owen v. McGehee, 61 Ala. 440, it was held that where parties desiring to purchase parts of a tract of land, of unequal quantities, but not unequal in value, except as to the difference in quantity, procure one of them to purchase the entire tract in his name, they joining in the note for the purchase money—all are jointly and severally bound as principals to the vendor; but, as between themselves, each is principal only for the share of the purchase money he was bound to pay, and a surety for the remainder.

In Deitzler v. Mishler, 37 Pa. St. 82, one of several joint purchasers of real estate failed to pay his share of the purchase money, and his associates who had joined in the bond for the purchase money paid it. It was held that an equitable title to his share in the land became thereby vested in them, and that until such purchase money, with expenses and costs, was reimbursed to them, neither he nor those claiming under him could demand a conveyance from the trustee,

or a declaration of trust in his favor. See also Stokes v. Hodges, 11 Rich. Eq. (S. Car.) 135; Crafts v. Mott, 4 N. Y. 604.

4. Hall v. Hall, 34 Ind. 314; Traders' Nat. Bank v. Clare, 76 Tex. 47; Small v. Older, 57 Iowa 326; Fraser v. McConnell, 23 Ga. 368; M'Questen v. Noyes, 6 N. H. 19; Watriss v. Pierce, 32 N. H. 560.

5. In Pooley v. Harradine, 7 E. & B. 430; 90 E. C. L. 430, there was a plea on equitable grounds, that defendant made the notes jointly with J for J's accommodation, and as surety for J; and that the notes were delivered to plaintiff and taken by him on an agreement between them that defendant should be liable as surety only, and with notice that he was surety only; and that afterwards plaintiff, without defendant's consent, gave time to J, but for which he might have obtained payment. On demurrer, the court held that though the absolute written contract between defendant and plaintiff contained in the note could not be varied by parol in equity any more than at law, yet an equity arose from the relation of surety and principal between defendant and J, and the notice thereof to plaintiff at the time he took the note; and therefore that the plea was good.

In Hubbard v. Gurney, 64 N. Y. 457, it was held competent for one of two makers of a promissory note, in an action upon the note, to prove by parol that he signed the note as surety, to enable him to interpose as a defense that he was discharged by an extension of time given to the principal with knowledge of the suretyship. The court, by

and it has been repeatedly held that the joint maker of a bond under seal may be shown by parol to be a surety.¹ But in all such cases the creditor must have knowledge of the suretyship. If he had no

Church, C. J., said: "The general rules of evidence are the same at law as in equity, and it is no more competent to vary the terms of a written instrument by parol evidence in equitable actions than in those strictly legal, unless in exceptional cases for the purpose of maintaining an action or defense under some recognized head of equitable jurisdiction. The confusion and apparent conflict in the authorities must, I think, have originated in the idea that defenses of this character were equitable in their nature, and could only be available in a court of equity. When it was conceded that they were equally available in a court of law, it is difficult to find a reason for excluding the same evidence at law that is admissible in equity. However this may be, and without invoking any equitable rule, a conclusive answer to the objection to this evidence in any court, in my opinion is, that it does not tend to alter or vary either the terms or legal effect of the written instrument. The contract was in all respects the same, whether the defendant was principal or surety. In either case, it was an absolute promise to pay \$1,000 one day after date, nothing more and nothing less. There is neither condition nor contingency. It would have been precisely the same contract if the defendant had added the word 'surety' to his name. The addition of that word would not have varied it in the slightest degree. The only service it would have performed would have been to give notice to the other party of the fact. If this is shown *aliunde*, it is equally effective." See also *Barry v. Ransom*, 12 N. Y. 462; *Continental Nat. Bank v. Bell*, 125 N. Y. 38; *Bank of St. Mary's v. Mumford*, 6 Ga. 44; *Higdon v. Bailey*, 26 Ga. 426; *Mathewson v. Jones*, 30 Ga. 306; 76 Am. Dec. 648; *Fraser v. McConnell*, 23 Ga. 368; *Stewart v. Parker*, 55 Ga. 656; *McCart v. Turner*, 49 Ga. 311; *Lime Rock Bank v. Mallett*, 34 Me. 547; 56 Am. Dec. 673; *Lime Rock Bank v. Mallett*, 42 Me. 349; *Cummings v. Little*, 45 Me. 183; *Mariners' Bank v. Abbott*, 28 Me. 280; *Grafton Bank v. Kent*, 4 N. H. 221; 17 Am. Dec. 414; *Piper v. Newcomer*, 25 Iowa 221; *Kelly v. Gillespie*, 12 Iowa 55; 79 Am. Dec. 516;

Corielle v. Allen, 13 Iowa 289; *Murray v. Graham*, 29 Iowa 520; *Bank of St. Albans v. Smith*, 30 Vt. 148; *Davis v. Mickell*, 1 Freem. Ch. (Miss.) 548; *Roberts v. Jenkins*, 19 La. 455; *Jones v. Fleming*, 15 La. Ann. 522; *Bruce v. Edwards*, 1 Stew. (Ala.) 11; *Branch Bank v. James*, 9 Ala. 949; *Flynn v. Mudd*, 27 Ill. 323; *Kennedy v. Evans*, 31 Ill. 258; *Schools v. Southard*, 31 Ill. App. 359; *Ward v. Stout*, 32 Ill. 399; *Riley v. Gregg*, 16 Wis. 666; *Irvine v. Adams*, 48 Wis. 468; 33 Am. Rep. 817; *Mechanics' Bank v. Wright*, 53 Mo. 153; *O'Howell v. Kirk*, 41 Mo. App. 523; *Coats v. Swindle*, 55 Mo. 31; *Harmon v. Hale*, 1 Wash. Ter. 422; 34 Am. Rep. 816; *Welfare v. Thompson*, 83 N. Car. 276; *Otis v. Von Storch*, 15 R. I. 41; *Thompson v. Coffman*, 15 Oregon 631; *Stevens v. Oaks*, 58 Mich. 343; *Chapeze v. Young*, 87 Ky. 476; *Harris v. Brooks*, 21 Pick. (Mass.) 195; 32 Am. Dec. 254; *Carpenter v. King*, 9 Met. (Mass.) 511; 43 Am. Dec. 405; *Wilson v. Foot*, 11 Met. (Mass.) 285; *Roe v. Williams*, 5 Kan. 483; *Orvis v. Newell*, 17 Conn. 97.

1. *Smith v. Doak*, 3 Tex. 215; *Fowler v. Alexander*, 1 Heisk. (Tenn.) 425; *Rogers v. School Trustees*, 46 Ill. 428; *Smith v. Clopton*, 48 Miss. 66; *Dickerson v. Ripley Co.*, 6 Ind. 128; *Kennebec Bank v. Turner*, 2 Me. 42; *Greigh v. Hedrick*, 5 W. Va. 140; *Forbes v. Sheppard*, 98 N. Car. 111.

In some cases it has been held that the fact of suretyship cannot be shown by parol at law, but it may be in equity. *Hampton v. Levy*, 1 McCord (S. Car.) 107; *Pintard v. Davis*, 20 N. J. L. 205; *Willis v. Ives*, 1 Smed. & M. (Miss.) 307.

In a few cases it has been held that the fact of suretyship cannot be shown by parol under the above circumstances. See *Kerr v. Baker*, Walk. (Miss.) 140; *Farrington v. Galloway*, 10 Ohio 543; *Hartman v. Burlingame*, 9 Cal. 557; *Shriver v. Lovejoy*, 32 Cal. 574; *Coots v. Farnsworth*, 61 Mich. 497. In *Stroop v. McKenzie*, 38 Tex. 132, it was held that parol evidence of the suretyship could not be admitted, unless it was further proposed to prove that the creditor agreed to hold the surety as such.

knowledge of the fact when he took the instrument, but is subsequently informed of it, he can do no act which will defeat the rights of the joint maker as a surety.¹

III. WHO MAY BECOME SURETIES—1. *Infants*.—Where the contract of suretyship is beneficial to an infant, it is not absolutely void, but only voidable; and if the infant on arriving at full age, and with knowledge that he has a defense to the contract by reason of his infancy, ratifies it, he will be bound.²

Where a person signs a promissory note and adds the word "surety," or "security" after his name, the presumption is that he is a surety, but parol evidence may be admitted to establish the fact that he was a principal. In *Sayles v. Sims*, 73 N. Y. 551, it appeared that a joint and several promissory note was signed by one Brown Sayles and by plaintiff; the latter in fact signed as surety for the former. There was nothing upon the note, however, to indicate this. Defendant thereafter indorsed the note and it was delivered to the payee who advanced thereon to Brown Sayles the face of the note. A short time thereafter, at the request of the payee, defendant signed the note as maker after plaintiff's signature, adding to the signature the word "surety." Defendant offered to show on the trial that he was not notified, and did not know that plaintiff was surety. This was objected to as immaterial; and the objection was sustained.

The court, by Church, C. J., said: "The word 'surety' attached to defendant's name would indicate that he was surety for both the other signers, but it is not conclusive. It might be shown that he was in fact surety for only one, and that the other signer was also surety for the same one. This would show that they occupied the same relation to the principal, and hence were bound by the maxim that 'equality is equity.'" *Wells v. Miller*, 66 N. Y. 255. But here the circumstances fairly show that the defendant intended to limit his liability by becoming surety for both, and the terms of the contract indicate a like intent." See, to the same effect, *Rose v. Madden*, 1 Kan. 445; *Boulware v. Hartsook*, 83 Va. 679; *Dart v. Sherwood*, 7 Wis. 523; 76 Am. Dec. 228.

1. In *Oriental, etc., Corp. v. Overend*, L. R., 7 Ch. 142, a financial company, by agreement with an agent, accepted bills of exchange which were

discounted for the agent by a discount company, the agent guarantying payment. The discount company were not at the time aware of the relations between the acceptors and the agent, but were informed before the bills matured that the agent was principal, and that the acceptors were sureties. After this the discount company agreed with the agent not to press the acceptors for payment until certain other bills became due. The court held that the acceptors were thereby discharged. This case was affirmed in *Overend, etc., Co. v. Oriental Financial Corp.*, L. R., 7 H. L. Cas. 348. See also *Bank of Missouri v. Watson*, 26 Mo. 243; 72 Am. Dec. 208; *Wheat v. Kendall*, 6 N. H. 504.

2. In *Owen v. Long*, 112 Mass. 403, it was held that a contract entered into by an infant, in signing a promissory note as a surety for the maker, is not necessarily void if it may be beneficial to him; and that if, after becoming of full age, and knowing that his infancy was a defense, he promises to pay the note, he is liable upon it. The court, by Gray, C. J., said: "It cannot be held as a matter of law that to sign a promissory note as surety is necessarily not beneficial to an infant. It may not be beneficial to him, according to the actual circumstances of the transaction; and at the trial of this case, there was some evidence that the defendant at the time of signing the note in suit expected to receive, and did afterwards actually receive, some benefit from so doing. As his contract might be beneficial to him, it was not absolutely void, but only voidable, and would be made binding on him by a direct promise to pay the note, after coming of age, and knowing that he had a defense to it by reason of his infancy."

In *Hinely v. Margaritz*, 3 Pa. St. 428, it is said: "The principle is decided, that to make a contract entered into by a minor, as security, binding, it must appear that after his arrival at

2. Persons Non Compos Mentis.—A person *non compos mentis*, who enters into a contract of suretyship, is not liable thereon, although the person with whom he contracts has no knowledge of his mental incapacity.¹

3. Attorneys.—Although a statute may prohibit an attorney-at-law from becoming a surety for his client, yet if he does become a surety, he will be liable, notwithstanding the statute.² This rule has been applied where an attorney executes a bail bond contrary to the statute;³ or an attachment bond;⁴ or an appeal bond.⁵

In *Florida* it has been held that the rule prohibiting attorneys-at-law from becoming sureties in attachment, appeal, etc., does not prohibit them from executing bonds or undertakings as principals in behalf of parties.⁶

4. Partnerships.—As a general rule, the promise of one partner that the firm will pay the debt of a third person, is not binding on his copartnership. The reason of the rule is, that the copartnership business does not extend to the making of contracts as sureties, and therefore when one partner undertakes to bind the firm by such a contract, he acts beyond the scope of his powers as agent of the firm.⁷ The other partners may, however,

full age he confirmed the contract by some distinct act, with full knowledge that it would be void without such confirmation." *Williams v. Harrison*, 11 S. Car. 412; *State v. Satterwhite*, 20 S. Car. 536; *Fetrow v. Wiseman*, 40 Ind. 148; *Patchin v. Cromach*, 13 Vt. 330; *Reed v. Lane*, 61 Vt. 481.

A bond for stay of execution signed by an infant is voidable. *Harner v. Dipple*, 31 Ohio St. 72; 27 Am. Rep. 496.

But where the contract is manifestly prejudicial to the infant, it will be held absolutely void. *Maples v. Wightman*, 4 Conn. 376; *Chandler v. McKinney*, 6 Mich. 217; 74 Am. Dec. 686; *Robinson v. Weeks*, 56 Me. 102.

1. *Van Patton v. Beals*, 46 Iowa 62.

2. In *Hollandsworth v. Com.*, 11 Bush (Ky.) 617, the court said: "If those of the exempted or privileged classes persist in tendering themselves as bail, and by becoming such procure the discharge of persons accused of crime, they will not be heard to say that they are not bound because they violated the law." See also *Johnson v. Com.*, 2 Duv. (Ky.) 410; *Sherman v. State*, 4 Kan. 570; *Jock v. People*, 19 Ill. 57; *Wright v. Schmidt*, 47 Iowa 233; *Cook v. Caraway*, 29 Kan. 41.

The general rule also applies to judges, *State v. Findley*, 101 Mo. 368.

In *Wisconsin*, the surety is not liable. *Fond du Lac v. Moore*, 58 Wis. 170; *Gilbank v. Stephenson*, 30 Wis. 155; *Branger v. Buttrick*, 30 Wis. 153.

3. *Johnson v. Com.*, 2 Duv. (Ky.) 410; but in *New York*, the rule does not seem to apply to justices' courts. *Lawler v. Van Aernam*, 22 Alb. L. J. 156.

4. *Tessier v. Crowley*, 17 Neb. 207.

5. *Ohio, etc., R. Co. v. Hardy*, 64 Ind. 454.

6. *Cunningham v. Tucker*, 14 Fla. 251.

7. In *McQuewans v. Hamlin*, 35 Pa. St. 517, an action of *assumpsit* was brought against three persons on a promise to pay the debt of another. It was held that proof that the three persons were partners, and that one of them promised for all, was not sufficient.

In *Hasleham v. Young*, 5 Q. B. 833; 48 E. C. L. 833, Young and his son were attorneys in partnership. The son gave an undertaking that, in consideration of the plaintiff in an action giving the defendant in that action his discharge from custody, "we hereby agree" to pay such plaintiff the debt and costs on a day named. The son signed this "Young and Son, defendant's attorneys," but afterwards struck out the words "defendant's attorneys."

subsequently ratify and confirm the contract, and in such a case the firm will be bound.¹ One firm may, if all the partners consent, become the surety of another firm.²

5. Corporations.—A corporation has not, as a general rule, the

It was not proved that the defendant had employed the firm, but only the son had been employed by him to wind up his affairs; nor was any evidence given of recognition or knowledge by Young, or of authority from him to his son, by previous practice or otherwise, to give such a guaranty. *Held*, that Young was not liable on the guaranty.

In *Brettell v. Williams*, 4 Exch. 623, the defendants, who were in partnership as railway contractors, under the name of W. A. & Co., contracted with a railway company to do certain works. U. & R. made a sub-contract with the defendants to do part of the work; and for that purpose requiring coals to make bricks, A, without the knowledge or assent of his copartners, signed, in the name of the firm, and delivered to the plaintiffs, a guaranty, not addressed to any person, for payment of coals to be supplied to U. & R. The court held that the guaranty did not bind the firm, there being no evidence that it was necessary for carrying into effect the partnership contract, or that the other partners had adopted it.

In *Whitaker v. Richard*, 134 Pa. St. 191, a bond to indemnify plaintiffs against mechanics' liens had been prepared with the members of the partnership named in it as sureties. It was signed and delivered by one partner with the expectation, but not with the condition, that the other partner would execute it. The court held that the partner signing and delivering the bond would be liable, but not his firm.

In *Sweetzer v. French*, 2 Cush. (Mass.) 309; 48 Am. Dec. 666, a note not negotiable, signed by M. & P., and payable to F. T. & Company, who were partners, was indorsed in the name of the firm by T., and disposed of by him to A. & Company, for its full value. In an action on the note by A. & Company against F. T. & Company, as grantors, it was held that if the plaintiffs, when they received the note, knew that it was obtained of the defendants by false representations made by M., or that T. signed the name of the firm, without the consent of his

partners, merely for the accommodation of M. & P., the plaintiffs could not recover, unless, in the latter case, the act of T. had been afterwards ratified by his partners.

For other cases illustrating the rule that a partner cannot bind the firm on a contract of suretyship or guaranty unless expressly authorized, see *Sutton v. Irwine*, 12 S. & R. (Pa.) 13; *Hamil v. Purvis*, 2 P. & W. (Pa.) 177; *Mayberry v. Bainton*, 2 Harr. (Del.) 24; *Mauldin v. Branch Bank*, 2 Ala. 502; *Foot v. Sabin*, 19 Johns. (N. Y.) 154; 10 Am. Dec. 208; *Schermerhorn v. Schermerhorn*, 1 Wend. (N. Y.) 122; *Lavery v. Burr*, 1 Wend. (N. Y.) 529; *Boyd v. Plumb*, 7 Wend. (N. Y.) 309; *Bank of Kentucky v. Brooking*, 2 Litt. (Ky.) 41; *Whalley v. Moody*, 2 Humph. (Tenn.) 495; *Rolston v. Click*, 1 Stew. (Ala.) 526; *Fore v. Hitson*, 70 Tex. 517; *Osborne v. Stone*, 30 Minn. 25; *Osborne v. Thompson*, 35 Minn. 229; *Duncan v. Lowndes*, 3 Camp. 478; *Langan v. Hewett*, 13 Smed. & M. (Ky.) 122; *Marsh v. Thompson Nat. Bank*, 2 Ill. App. 217; *Davis v. Blackwell*, 5 Ill. App. 32; *Pahlman v. Taylor*, 75 Ill. 629; *First Nat. Bank v. Carpenter*, 41 Iowa 518; *Bell v. Faler*, 1 Grant (Pa.) 31; *Tutt v. Addams*, 24 Mo. 186; *Rollins v. Stevens*, 31 Me. 454; *Avery v. Rowell*, 59 Wis. 82; *In re Blumer*, 13 Fed. Rep. 622; *Ex parte Harding*, 12 Ch. Div. 557; *Tessier v. Crowley*, 17 Neb. 207.

1. In the leading case of *Crawford v. Stirling*, 4 Esp. 207, Lord Ellenborough said that a guaranty given by one partner, in the partnership's name, unless it was in the regular line of business, could not bind the other partners; but if they afterwards adopted it and acted on it, it should bind.

In *Sandilands v. Marsh*, 2 B. & Ald. 673, a firm was held bound by a guaranty given by one of the partners, where there was evidence of adoption and ratification by the firm of the contract. To the same effect are *Kidder v. Page*, 48 N. H. 380; *Cockroft v. Clafin*, 64 Barb. (N. Y.) 464; *Ex parte Gardom*, 15 Ves. 286.

2. *Allen v. Morgan*, 5 Humph. (Tenn.) 624.

right to enter into a contract of suretyship or guaranty. But in a number of cases where such contracts have been of manifest advantage to the corporation, they have been enforced. Thus a railroad company may guaranty the bonds of cities and counties where such bonds have been issued in aid of the construction of the road;¹ so also it may guaranty the payment of securities which it has received and disposed of in the transaction of its legitimate business.² It may also guaranty the bonds of another corporation, where such a contract will materially aid it in carrying out the purposes of its incorporation.³

1. *Railroads*.—In *Chicago, etc., R. Co. v. Howard*, 7 Wall. (U. S.) 392, it was held that under the laws of *Iowa*, a railroad company having power to issue its own bonds in order to make its road, may guaranty the bonds of cities and counties which have been lawfully issued, and are used as the means of accomplishing the same end. The court, by Clifford, J., said: "Abundant proof exists in this record, that railway companies may issue their own bonds to raise money to carry out to effect the purposes for which they were created; and it is difficult to see why they may not guaranty the payment of such bonds as they have lawfully received from cities and counties, and put them upon the market instead of their own, as the means of accomplishing the same end. Undoubtedly, they may receive such bonds under the laws of the state, and if they may receive them, they may transfer them to others; and if they may transfer them to purchasers, they may, if they deem it expedient, guaranty their payment as the means of augmenting their credit in the market, and saving the corporation from the necessity of issuing their own bonds to accomplish the same purpose."

But it has been held that a railroad company cannot, in the absence of an express grant in its charter, guaranty a specific dividend on its stock as an inducement to purchasers. *Elevator Co. v. Memphis, etc., R. Co.*, 85 Tenn. 703.

2. *Atchison, etc., R. Co. v. Fletcher*, 35 Kan. 236.

3. *Philadelphia R. Co. v. Knight*, 124 Pa. St. 58; *Harrison v. Union Pac. R. Co.*, 13 Fed. Rep. 522; *Eastern Tp. Bank v. St. Johnsbury, etc., R. Co.*, 40 Fed. Rep. 423; *Arnot v. Erie R. Co.*, 5 Hun (N. Y.) 608; *Taylor v. Memphis, etc., R. Co.*, 11 Lea (Tenn.) 186;

Yorkshire R., etc., Co. v. Maclure, 19 Ch. Div. 478.

In *Green Bay, etc., R. Co. v. Union Steamboat Co.*, 107 U. S. 98, it was held that a railroad corporation, whose railroad extends across the State of *Wisconsin* from Lake Michigan to the Mississippi River, and which is authorized, by the charter, to make "such contracts with any other person or corporation whatsoever as the management of its railroad and the convenience and interest of the corporation and the conduct of its affairs may in the judgment of its directors require;" and, by general laws, to make such contracts with any railroad company whose road terminates on the eastern shore of Lake Michigan, "as will enable them to run their roads in connection with each other in such manner as they shall deem most beneficial to their interest," and "to build, construct, and run, as part of its corporate property, such number of steamboats or vessels as they may deem necessary to facilitate the business operations of such company or companies;" and also "to accept from any other state or territory of the *United States*, and use, any powers or privileges applicable to the carrying of persons and property by railway or steamboat in said state or territory;" has the power, for the purpose of carrying passengers and freight in connection with its own railroad and business, to enter into an agreement with the proprietors of steamboats running by way of the Great Lakes between the eastern terminus and Buffalo in the State of *New York*, by which it guarantees that the gross earnings of each boat for two years shall amount to a certain sum.

But in *Colman v. Eastern Counties R. Co.*, 10 Beav. 1, the directors of a railway company were restrained by

Banks may guaranty the payment of securities, which in the ordinary course of their business they have assigned or conveyed to other persons.¹

injunction from carrying out an agreement by which, for the purpose of increasing its traffic, they proposed to guaranty certain profits to, and to secure the capital of, a steam-packet company, to ply between a port near one end of the railway in *England* and certain foreign ports; and Lord Langdale, M. R., said: "To look upon a railway company in the light of a common partnership, and as subject to no greater vigilance than common partnerships are, would, I think, be greatly to mistake the functions which they perform, and the powers which they exercise of interference, not only with the public, but with the private rights of all individuals in this realm. We are to look upon these powers as given to them in consideration of a benefit which, notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole, will be obtained by the public. But it being the interest of the public to protect the private rights of all individuals, and to defend them from all liabilities beyond those necessarily occasioned by the powers given by the several acts, those powers must always be carefully looked to; and I am clearly of opinion that the powers which are given by an act of Parliament, like that now in question, extend no farther than is expressly stated in the act, or is necessarily and properly required for carrying into effect the undertaking and works which the act has expressly sanctioned.

"Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made; but I apprehend that it has nowhere been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted that railway companies have no right to enter into new trades or business not pointed out by their acts; but it has been contended that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided that the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the

shareholders. There is, however, no authority for anything of that kind. It has been stated that these things, to a small extent, have frequently been done since the establishment of railways; but unless the acts so done can be proved to be in conformity with the powers given by the special acts of Parliament, under which those acts are done, they furnish no authority whatever." 10 Beav. 14, 15. And after full consideration of the case, he summed up his opinion thus: "To pledge the funds of this company for the purpose of supporting another company engaged in a hazardous speculation is a thing which, according to the terms of this act of Parliament, they have not a right to do. They have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the act of Parliament, and they have no power of doing anything beyond it."

In *Davis v. Old Colony R. Co.*, 131 Mass. 258; 41 Am. Rep. 221, it was held that it is beyond the powers of a railroad corporation chartered by the legislature, or of a corporation organized under the St. of 1870, ch. 224, for the manufacture and sale of musical instruments, to guaranty the payment of expenses of a musical festival; and no action can be obtained against either corporation upon such a guaranty, although it was made with the reasonable belief that the holding of the proposed festival would be of great pecuniary benefit to the corporation by increasing its proper business, and the festival has been held and expenses incurred in reliance upon the guaranty.

1. *Banks*.—In *Peoples' Bank v. National Bank*, 101 U. S. 181, Picket made a promissory note to his own order, and then indorsed it to the order of the Peoples' Bank, and then delivered it to a National Bank. The latter negotiated it to the Peoples' Bank, and applied the proceeds to the cancellation of a prior debt of Picket. One of the directors and vice-president of a National Bank, guarantied at the time of the transaction, the payment of the note at maturity by an indorsement thereon to that effect in the name and on behalf of the bank. The note

6. Surety Companies.—During recent years companies have been incorporated for the purpose of guarantying bonds, and for the purpose of furnishing a surety for persons holding positions of public and private trust. The validity of such companies has been judicially recognized;¹ and it has been held that one of such companies is a sufficient surety, although a statute may require two sureties.²

7. Married Women.—Unless authorized by statute, a married woman cannot enter into the contract of suretyship. At common law such a contract is absolutely void, and equity will not enforce it against the wife's separate estate, if it appears that she has not been benefited by the contract.³ In some states a married woman is positively forbidden to enter into such a contract.⁴ Where a married woman is given by statute an unlimited right

was protested, and the Peoples' Bank brought an action against the National Bank. The court held that the bank was not prohibited by law from guarantying the payment of the note. The court, by Swayne, J., said: "The National Bank Act (Rev. Stat. 999, § 5136) gives to every bank created under it the right 'to exercise by its board of directors, or duly authorized agents, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt, by receiving deposits,' etc. Nothing in the act explains or qualifies the terms italicised. To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named. Undoubtedly a bank might indorse, 'waiving demand and notice,' and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created by such an indorsement. We see no reason to doubt that, under the circumstances of this case, it was competent for the defendant to give the guaranty here in question." See also *Peoples' Bank v. Manufacturers' Nat. Bank*, 21 Alb. L. J. 276.

A bank may guaranty the payment of bonds pledged by its debtor to a third person as collateral security for money with which the debtor pays the bank. *Talman v. Rochester City Bank*, 18 Barb. (N. Y.) 123.

The directors of a joint stock bank, the deed of settlement of which gave them extensive powers to carry on the business of bankers and to act in such

manner as might appear to them best calculated to promote the interest of the bank, have, when the formation of another company is of importance to the bank, power to guarantee the payment of interest on debentures of that company issued for the purpose of forming it. *In re West of England Bank*, 14 Ch. Div. 317.

But a bank cannot become a mere surety for another upon a contract in which it has no interest. *Farmers', etc., Bank v. Butchers', etc., Bank*, 16 N. Y. 125; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309.

1. *Cramer v. Tittle*, 72 Cal. 12; *Bick v. Reese*, 52 Hun 125.

2. *Hurd v. Hannibal, etc., R. Co.*, 33 Hun (N. Y.) 109; *Travis v. Travis*, 48 Hun (N. Y.) 343.

3. In *Yale v. Dederer*, 22 N. Y. 450; 78 Am. Dec. 216, it was held that where a married woman signed a promissory note as mere surety for her husband, though it was her intention to charge her separate estate, such intention did not take effect. On the same principle she is not liable on a guardian's bond as surety. *Gosman v. Cruger*, 69 N. Y. 87; 25 Am. Rep. 141. See also *Bennett v. Watson*, 3 M. & S. 1; *Phillips v. Wicks*, 45 How. Pr. (N. Y.) 477; *Hansee v. DeWitt*, 63 Barb. (N. Y.) 53; *Doyle v. Kelly*, 75 Ill. 574; *Perkins v. Elliott*, 23 N. J. Eq. 526; *Athol Mach., etc., Co. v. Fuller*, 107 Mass. 437; *Willard v. Eastham*, 15 Gray (Mass.) 328; 77 Am. Dec. 366.

4. *Georgia Code*, § 1783; *Saulsbury v. Weaver*, 59 Ga. 254; *Beatie v. Calhoun*, 73 Ga. 269; *Sweazy v. Kammer*, 51 Iowa 642; *West v. Laraway*, 28 Mich. 464; *Dodge v. Kinzy*, 101 Ind. 102;

to contract, she may enter into the contract of suretyship;¹ but where such a right to contract is limited simply to matters relating to her separate estate, she cannot bind her separate estate on a contract of suretyship, unless the intent so to do is clearly expressed in the instrument.²

8. By Persons Under Duress.—Where the contract of suretyship is executed under duress, the surety will not be bound.³ The cases are conflicting as to whether the duress of the principal alone will relieve the surety.⁴

9. Non-residents.—Although a statute may provide that non-residents shall not be accepted as sureties on official bonds, yet if a non-resident becomes such a surety he cannot claim that he is not liable.⁵

IV. CONSIDERATION—**1. General Principles.**—Contracts of suretyship, like all other contracts, must be based upon a valid consideration. If such contracts are made without consideration, they are absolutely void. The consideration may be either some benefit or advantage to the principal or surety, or some disadvantage to the creditor;⁶

Brown v. Will, 103 Ind. 71; *Cupp v. Campbell*, 103 Ind. 213.

1. *Low v. Anderson*, 41 Iowa 476; *Mayo v. Hutchinson*, 57 Me. 546; *Hart v. Gregsby*, 14 Bush (Ky.) 542.

2. *Gosman v. Cruger*, 69 N. Y. 87; 25 Am. Rep. 141; *Com. Exchange Ins. Co. v. Babcock*, 42 N. Y. 613; 1 Am. Rep. 601; *Hier v. Staples*, 51 N. Y. 136; *Low v. Anderson*, 41 Iowa 476.

3. *Small v. Currie*, 2 Drew. 102; *Ingersoll v. Roe*, 65 Barb. (N. Y.) 346.

4. In *Hazard v. Griswold*, 21 Fed. Rep. 178, the court by Gray, J., said: "This plea does not set forth facts enough to make out a defense. Duress at common law, where no statute is violated, is a personal defense, which can only be set up by the person subjected to the duress, and duress to the principal will not avoid the obligation of a surety; at least, unless the surety, at the time of executing the obligation, is ignorant of the circumstances which render it voidable by the principal," citing *Thompson v. Lockwood*, 15 Johns. (N. Y.) 256; *Fisher v. Shattuck*, 17 Pick. (Mass.) 252; *Robinson v. Gould*, 11 Cush. (Mass.) 55; *Bowman v. Hiller*, 130 Mass. 153; *Harris v. Carmody*, 131 Mass. 51; 41 Am. Rep. 188; *Griffith v. Sitgreaves*, 90 Pa. St. 161. See also *Thompson v. Buckhannon*, 2 J. J. Marsh. (Ky.) 416; *Tucker v. State*, 72 Ind. 242; *Oak v. Dustin*, 79 Me. 23.

In some cases it has been held that the duress of the principal is a complete defense to the surety. *Hawes v. Marchant*, 1 Curt. (U. S.) 136; *Owens v. Mynatt*, 1 Heisk. (Tenn.) 675.

In *Patterson v. Gibson*, 81 Ga. 802, it was held that a bond executed under duress of the principal is void as to the surety also, if it appears that the surety has acted without knowledge of the duress. In such a case knowledge of the fact of an imprisonment which constituted the duress does not necessarily involve knowledge of its legality, and a plea of want of knowledge is good.

5. *State v. Flinn*, 77 Ala. 100; *School Directors v. Brown*, 33 La. Ann. 383. Where such a statute exists, and the domicile of a proposed surety is doubtful, he may be rejected. *Ex parte Buckley*, 53 Ala. 42.

6. *Gourdin v. Trenholm*, 25 S. Car. 362; *Boyd v. Bell*, 69 Tex. 735; *Barnes v. Vankeuren* (Neb. 1891), 47 N. W. Rep. 848; *Dunbar v. Fleisher*, 137 Pa. St. 85; *La Fayette Mut. Bldg. Assoc. v. Kleinhoffer*, 40 Mo. App. 388; *Gregory v. Glead*, 33 Vt. 405; *Taylor v. Wightman*, 51 Iowa 411; *Wills v. Ross*, 77 Ind. 1; 40 Am. Rep. 279; *Starr v. Earle*, 43 Ind. 478; *French v. French*, 2 M. & G. 644; 40 E. C. L. 555; *Aldridge v. Turner*, 1 Gill & J. (Md.) 427; *Tenney v. Prince*, 4 Pick. (Mass.) 385; 16 Am. Dec. 347; *Clark v. Small*, 6 Yerg. (Tenn.) 418; *Cowles v.*

Pick, 55 Conn. 251; *Briggs v. Latham*, 36 Kan. 205; *Barney v. Forbes*, 118 N. Y. 580; *Bailey v. Freeman*, 4 Johns. (N. Y.) 280; *Stoppani v. Richard*, 1 Hilt. (N. Y.) 509; *Munson v. Adams*, 89 Ill. 450; *Worden v. Salter*, 90 Ill. 160; *Lamb v. Briggs*, 22 Neb. 138; *Grisby v. Shwarz*, 82 Cal. 278; *Freeman v. Freeman*, 2 Bulst. 269; *Bailey v. Croft*, 4 Taunt. 611; *Robertson v. Findley*, 31 Mo. 384; *Gay v. Mott*, 43 Ga. 252; *Arnot v. Erie R. Co.*, 67 N. Y. 315; *Chanter v. Reardon*, 32 Mich. 162; *Hubbard v. Hart*, 71 Iowa 668; *Ingels v. Sutliff*, 36 Kan. 444; *Milmine v. Bass*, 29 Fed. Rep. 632; *Post v. Losey*, 111 Ind. 74; *Boyd v. Bell*, 69 Tex. 735; *Donaldson v. Neidlinger*, 2 N. Y. Sup. 737; *Manchester v. Van Brunt*, 19 N. Y. Supp. 685; *Owens v. Togue* (Ind. 1892), 29 N. E. Rep. 784; *Scott v. Fisher* (N. Car. 1892), 14 S. E. Rep. 799; *Lafayette Mut. Bldg. Assoc. v. Kleinhoffer*, 40 Mo. App. 388; *Wood v. Tunnecliff*, 74 N. Y. 48; *Beaker v. Da Cunha*, 58 Hun (N. Y.) 609; *Saunders v. Wakefield*, 4 B. & Ald. 595.

In *Cobb v. Page*, 17 Pa. St. 469, the court held that to render a person liable on his own verbal promise to pay the debt of another, the agreement between the parties must be founded on a sufficient consideration; and that, where forbearance is set up, there must be agreements to pay and to forbear, and that each agreement must be in consideration of the other, followed by actual forbearance on the part of the creditor after the making of the promise to forbear.

Examples.—In *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 29; 5 Am. Dec. 317, Johnson applied to Leonard for goods on credit, and Leonard refused to let him have them without security. Johnson then drew a promissory note for the amount under which Vredenburg wrote: "I guaranty the above," and the goods were thereupon delivered. The court held that this was a collateral undertaking of Vredenburg, but that there was no necessity for any distinct consideration to pass directly between Leonard and Vredenburg, since it was all one entire transaction, and the delivery of the goods to Johnson supported the promise of Vredenburg.

In *Dunbar v. Fleisher*, 137 Pa. St. 85, a bridge contractor sublet the stonework upon a written agreement by which two-thirds of the work, when finished, would be paid for in

full. The price of the remaining third was to be paid in advance, should the subcontractors give "security for the money for the balance of the work to be done—that is, after the two-thirds is done." The two-thirds were satisfactorily done, and paid for, and the contractor, as an advancement for the remainder, then gave the subcontractors an order on the county commissioners, which he assured them would be paid. Defendant, by a paper which recited this order, and the amount to become due at the completion of the bridge, became their surety "for the faithful performance of said mason work to said bridge as per contract with" the contractor. The court held that the security was only for the last third of the work, and, the commissioners having refused to pay the order, the consideration failed, and the undertaking was of no effect.

In *Hetherington v. Hixon*, 46 Ala. 297, a married woman became surety on the note of her husband, but without consideration. After the death of her husband, she gave a renewal note and subsequently a new note and a mortgage to secure it. The only consideration for the last note was the renewal note signed after her husband's death. The court held that there was no consideration, and that she was not liable.

The surrender of a note is a sufficient consideration of a guaranty of a note to take the place of the old note.

Churchill v. Bradley, 58 Vt. 403; 56 Am. Rep. 563; *Brewster v. Baker*, 97 Ind. 260; *Erie Co. Sav. Bank v. Coit*, 104 N. Y. 532.

Where a principal and surety join in the execution of a deed of trust, the consideration of the principal is a sufficient consideration to bind the surety. *Henderson v. Rice*, 1 Coldw. (Tenn.) 223.

Where the daughter of a debtor, to save a surety on her father's note harmless, executes a mortgage to him, and he becomes insolvent, the mortgaged property cannot be subjected either by him or the creditor to the payment of the note, though judgment is rendered against the surety thereon. *Macklin v. Northern Bank*, 83 Ky. 314.

One of the grantors, after maturity of certain bonds, indorsed upon those taken up by his co-grantor an acknowledgment that the indorser was

but the consideration itself must not be opposed to public policy.¹

2. **Executory Consideration to Principal.**—Where the contract of suretyship is made contemporaneously with the contract between the principal and creditor, the consideration moving from the creditor to the principal is the consideration of the contract of suretyship;² and where the promise of the surety is the induce-

liable to his co-grantor for a proportionate amount thereof, and that his mortgage was security therefor. It appeared that his co-grantor had not paid his proportion of the bonds when he died, his estate being insolvent. The holders of the bonds bearing such indorsement claimed a prior lien on the land mortgaged by the indorser, which claim was resisted by the holders of the bonds on which there was no such indorsement. *Held*, that the acknowledgment was without consideration, and not enforceable against the existing creditors of the grantor. *Gourdin v. Trenholm*, 25 S. Car. 362.

Where an attorney receives a claim to collect, and contemporaneously guaranties its collection, there is sufficient consideration to support the guaranty. *Gregory v. Gleed*, 33 Vt. 405. See also *Newlin Wagon Co. v. Diers*, 10 Neb. 284.

The agreement between a holder of a mortgage note and an attorney-at-law, that the latter shall foreclose the mortgage, receive for his fee the commission stipulated in the act of mortgage, and warrant his client that he will receive from the sale of the property the full amount of his debt, is a valid and binding contract of suretyship, with a sufficient consideration. *Aller v. Hornor*, 33 La. Ann. 242.

The liability of a surety on a promissory note is a sufficient consideration for his subsequent written guaranty of its payment, whether at the date of the guaranty the right of action on the note is or is not barred by the Statute of Limitations. *Miles v. Linnell*, 97 Mass. 298.

In *La Fayette Mut. Bldg. Assoc. v. Kleinhoffer*, 40 Mo. App. 388, it was held that after a building contract has been entered into, an agreement by a third party, binding himself as security for the performance of the contract by the contractor, without any new consideration, is valid.

But a surety who signs a note after

its delivery to the payee, is not bound, unless there is a new consideration for his promise. *Barnes v. Vankeuren* (Neb. 1891), 47 N. W. Rep. 848.

1. Thus where the consideration is that the principal shall not be prosecuted for embezzlement, the contract is void. *Rouse v. Glissman*, 29 Ill. App. 321; and the same is the case where the consideration is the illegal use of public funds. *Board of Education v. Thompson*, 33 Ohio St. 321.

A plea of illegality of consideration—*e. g.*, the abduction of a person—is a good bar to an action upon a bond for the payment of money; but if the principal delivers the money to the surety, and he promises to pay it over to the obligees, such promise is a distinct contract and new undertaking on the part of the surety, and binds him as effectually as though he were a stranger to the illegal contract. *Barber v. Parker*, 23 Ark. 390.

2. In *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 29; 5 Am. Dec. 317, the court, by Kent, C. J., said: "If we admit the origin of the contract to be such as the plaintiff offered to show, there was no necessity for, nor was there in fact any consideration passing directly between the plaintiff and defendant, and, of course, none was to be proved. It was all one original and entire transaction, and the sale and delivery of the goods to Johnson supported the promise of the defendant, as well as the promise to Johnson. If the contract between Johnson and the plaintiff had been executed and perfectly past, before the defendant was applied to, so that his promise could not connect itself with the original communication, then the case would have been very different, and the undertaking of the defendant would have required a distinct consideration. A mere naked promise to pay the already existing debt of another, without any consideration, is void; but in the present case (as the plaintiff offered to show) the promise was made

at the time of the original negotiation between the plaintiff and Johnson. It was incorporated with that contract, and became an essential branch of it. The whole was one single bargain, and the want of consideration, as between the plaintiff and defendant, cannot be alleged. If there was a consideration for the entire agreement (and Johnson's note purporting to be given for value received, was evidence of it), that consideration was the aliment for the defendant's promise. This is the amount of the doctrine in *Kirby v. Coles*, Cro. Eliz. 137, and it is alluded to in *Tomlinson v. Gill*, Amb. 330, and *Williams v. Leper*, 3 Burr. 1866, and to this extent I can understand the observation of Lord Eldon, 14 Ves. 190, when he observes, that 'the undertaking of one man for the debt of another does not require a consideration moving between them.' In *Wain v. Warlters*, 5 East 10, the promise was not made at the time, nor did it form a part of the original contract between the creditor and the third person. It was made long after the debt had been created, and, therefore, in that case, the promise required something more to support it than the mere fact of the liability of the person for whom the defendant assumed. That fact alone would have left the promise a nude pact. It required, at least, the consideration of forbearance, or some other consideration, arising out of, and founded upon, the original liability. The same remark applies to *Sears v. Brink*, 3 Johns. (N. Y.) 310. But if the promise to pay the debt of another be founded on a new and distinct consideration, independent of the debt, and one moving between the parties to the new promise, it is not a case within the statute. It is considered in the light of an original promise."

In *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 29; 5 Am. Dec. 317, the court, by Kent, C. J., divided the cases involving questions of consideration in contract of suretyship as follows: "1. Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. Here, as we have already seen, is not, nor need be, any other consideration than that moving between the creditor and original debtor. 2. Cases in which the collateral undertaking is subsequent to

the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. Here must be some further consideration shown, having an immediate respect to such liability, for the consideration for the original debt will not attach to this subsequent promise. The case of *Fish v. Hutchinson*, 2 Wils. 94, of *Charter v. Beckett*, 7 T. R. 201, and of *Wain v. Warlters*, 5 East 10, are samples of this class of cases. 3. A third class of cases, and to which I have already alluded, is when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties."

Where a principal and surety join in the execution of a deed of trust, the consideration of the principal's contract is a sufficient consideration for the contract of the surety. *Henderson v. Rice*, 1 Coldw. (Tenn.) 223.

Mutual promises by persons competent to contract, to submit to arbitration claims and demands which are the subjects of arbitration, are a good consideration each for the other; a submission, therefore, being obligatory, a guaranty of performance of the award, executed concurrently with the submission, is binding also. *Wood v. Tunnicliff*, 74 N. Y. 38.

Where a guaranty is made on a promissory note before it is delivered by the maker to the payee, no proof of a distinct consideration is necessary in order to charge the grantor; and in an action against the latter, when the guaranty is without date, and there is no direct proof of the time when it was made, it may be left to the jury to find that it was simultaneous with the note itself. *Bickford v. Gibbs*, 8 Cush. (Mass.) 154. As to the general rule that no new consideration is necessary to support a guaranty of a note given at the time of the execution of the note, see *Rich v. Hathaway*, 18 Ill. 548; *Underwood v. Hossack*, 38 Ill. 208; *Sneily v. Johnston*, 1 W. & S. (Pa.) 307; *Joslyn v. Collinson*, 26 Ill. 61; *Parkhurst v. Vail*, 73 Ill. 343; *Savage v. Fox*, 60 N. H. 17; *Clopton v. Hall*, 51 Miss. 482; *Brewster v. Selenee*, 8 N. Y. 207; *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 29; 5 Am. Dec. 317; *Wren v. Pearce*, 4 Smed. & M. (Miss.) 91; *Green v. Thornton*, 4 Jones (N. Car.) 230.

ment to the creditor to enter into the original contract, such a promise will be a sufficient consideration for the contract of suretyship when it is finally completed.¹

3. Executed Consideration to Principal.—Where the original contract has been completed, and the consideration has passed from the creditor to the principal, a contract of suretyship subsequently made is without consideration, except in cases where the original contract between the creditor and principal was made in reliance upon the prior promise of the surety;² and it seems also

A consideration running to the principal alone and already fully executed, is an insufficient basis for the surety's contract. *Martin v. Stubbings*, 20 Ill. App. 381.

1. In *Paul v. Stackhouse*, 38 Pa. St. 302, a person loaned money to another upon the promised security of a third person, taking a note from the borrower, payable in one year, which, three days after the year expired, was signed by the surety; it was held that, though a moral obligation alone was insufficient to support the contract of suretyship, yet, the money having been loaned at the request of the surety, the consideration for his promise, though passed, was continuing and valuable, and that his signature to the note was a completion and full execution of the promise upon that consideration.

In *Williams v. Perkins*, 21 Ark. 18, a person signed an undertaking, and at the time it was agreed between the principal and creditor that certain other persons should sign it as sureties. The paper was subsequently delivered to the creditor, and he afterwards presented it to the sureties, who signed it. The court, by Compton, J., held that the sureties were bound, and said: "If the debt or obligation of the principal debtor is already incurred previous to the undertaking of the surety, then there must be a new and distinct consideration to sustain the promise of the surety. But if the obligation of the principal debtor be founded upon a good consideration, and at the time it is incurred or before that time, the promise of the surety is made, and enters into the inducement for giving the credit, then the consideration for which the principal debt is created is considered as a valid consideration also for the undertaking of the surety. . . . Although the signatures of the principal obligors were procured at one time and those of the

sureties afterwards, nevertheless, in contemplation of law, their promises were contemporaneous and formed a part of one and the same general transaction, and the same consideration which supports the promise of the one also supports that of the other." See also *McNaught v. McClaughey*, 42 N. Y. 22; 1 Am. Rep. 487; *Moies v. Bird*, 11 Mass. 436; 6 Am. Dec. 179; *Standley v. Miles*, 36 Miss. 434; *Wheelright v. Moore*, 1 Hall (N. Y.) 201; *Simmons v. Keating*, 2 Stark. 426.

2. In *Paul v. Stackhouse*, 38 Pa. St. 302, the court, by Woodward, J., said: "It is true, as a general rule, that the consideration which binds a surety must be executory; but where the thing was done at the instance or request of the surety, a past consideration binds him. Pitman, in his excellent little treatise on Principal and Surety, p. 57, Law Library, vol. 40, states the rule in regard to past considerations, by the instance of the old case of *Hunt v. Bate*, 3 Dyer 272, where A's servant was arrested in London for a trespass, and J S, who was well acquainted with the master, bailed the servant, and afterwards A, for his friendship, promised to save him harmless, and J S was compelled to pay the condemnation money, it was held that an action did not lie upon A's promise, because the bailing, which was the consideration, was past, and executed before. A consideration, therefore, says this writer, which is executed, is not sufficient to support a subsequent promise, unless, indeed, the act was done at the request of the party promising, for then the promise is not a naked one, but couples itself with the precedent request, and is therefore founded on a good consideration. Some of the cases he cites in support of the latter branch of the rule, do not sustain the propo-

that another exception should be made in cases where the contract between the creditor and principal was made at the request of the party who subsequently became the surety.¹

4. Agreement by Creditor to Forbear Towards Principal.—Where a creditor agrees to extend the time within which the principal is to perform his undertaking, such an extension of time or forbearance from suit will support a promise by a third person to perform the undertaking in case the principal fails to do so.² But

sition; but others do. It was said by Mr. Justice Wilmot, in 1765, in *Pillans v. Mierop*, 3 Burr. 1617, that it was then settled that where the act is done at the request of the person promising, it will be a sufficient foundation to graft the promise upon. He pronounced many of the old cases, and some of the modern ones that were inconsistent herewith, to be 'strange and absurd,' and declared that the rule as to the past consideration 'has been melting down into common sense of late times.' It is necessary to lay a precedent request in cases where the consideration was executed and by-gone at the time of the promise." *Lafayette, etc., Bldg. Assn. v. Kleinhoffer*, 40 Mo. App. 388; *Jaffray v. Brown*, 74 N. Y. 393; *Harwood v. Kiersted*, 20 Ill. 367; *Gardner v. King*, 2 Ired. (N. Car.) 297; *Jackson v. Jackson*, 7 Ala. 791; *Tomlinson v. Gell*, 6 S. & E. 564; 33 E. C. L. 145; *Clune v. Ford*, 55 Hun (N. Y.) 479; *Yale v. Edgerton*, 14 Minn. 194; *Williams v. Marshall*, 42 Barb. (N. Y.) 524; *Thorner v. Field*, 1 Bulstr. 120.

In *Pratt v. Hedden*, 121 Mass. 116, a promissory note, signed by a principal and surety, being due, the payee agreed to extend the note for one year, on the principal furnishing an additional surety. To obtain the extension, the principal requested a third person to put his name on the note, and told him that the payee had required him to furnish another surety on the note. The third person wrote his name on the back of the note, "Waiving right to demand a notice." *Held*, in an action by the surety, who had been obliged to pay the note against the third person for contribution, that it not being proved that the extension of the note was known to the defendant, the promise of the defendant was without consideration, and that the action could not be maintained.

In *Thomas v. Williams*, 10 B. & C.

664; 21 E. C. L. 143, a person being indebted to the plaintiff for half a year's rent, due on March 25, the defendant, in consideration that the plaintiff would not distrain, verbally promised to pay not only the rent due, but the rent that would become due at the Michaelmas following. The court held that the promise to pay the rent to become due in the future exceeded the consideration, and could not be sustained.

A surety who signs a note after its delivery to the payee is not bound, unless there is a new consideration for his promise. *Barnes v. Vankeuren* (Neb. 1891), 47 N. W. Rep. 848.

1. See also *Paul v. Stackhouse*, 38 Pa. St. 302; *Standley v. Miles*, 36 Miss. 434; *Moles v. Bird*, 11 Mass. 436; *McNaught v. McClaughey*, 42 N. Y. 22; *Standley v. Miles*, 36 Miss. 434; *Hargroves v. Cooke*, 15 Ga. 321. In *Union Bank v. Coster*, 3 N. Y. 202, the court, by Pratt, J., said: "A past consideration, unless done at the request of the promisor, is not sufficient to support any promise. But a promise to do an act in consideration of some act to be done by the promisee, implies a request, and a compliance on the part of the latter closes the contract and makes it binding."

In *Walker v. Sherman*, 11 Met. (Mass.) 170, in a suit by the payee against the acceptor of an order for the payment of a certain sum of goods, evidence is admissible and sufficient for the purpose of proving a consideration for the acceptance, that when the order was drawn, the drawer owed a debt to the payee, that the order was given in payment of that debt, and that it was accepted by the drawee, on request made by the drawer at the time when it was drawn, all the parties being present at the acceptance.

2. *Sage v. Wilcox*, 6 Conn. 81; *Hockenbury v. Meyers*, 34 N. J. L. 347; *Fuller v. Scott*, 8 Kan. 25; *McCelvy v. Noble*, 13 Rich. (S. Car.) 330; Under-

the promise to pay the debt of another, in consideration of forbearance, is not binding, unless accepted by the other party. Mere forbearance is not enough; it must be in pursuance of a mutual agreement, the consideration being promise for promise.¹

wood v. Hossack, 38 Ill. 208; Calkins v. Chandler, 36 Mich. 320; 24 Am. Rep. 593; Breed v. Hillhouse, 7 Conn. 523; Pulliam v. Withers, 8 Dana (Ky.) 98; 33 Am. Dec. 479; Dahlgren v. Hammel, 45 Wis. 466; Coffin v. Indiana Asbury University, 92 Ind. 337; Lee v. Wisner, 38 Mich. 82; Lonsdale v. Brown, 4 Wash. (U. S.) 148; Hess's Estate, 150 Pa. St. 346; Moore v. McKenney (Me.), 21 Atl. Rep. 749; Caldwell v. Heitschur, 9 W. & S. (Pa.) 51; Oldershaw v. King, 2 H. & N. 520; Davis v. Funston, 45 Up. Can. Q. B. 369; Wells v. Ross, 77 Ind. 1; Trickett v. Mandlee, Sid. 45; Elting v. Vanderlyn, 4 Johns. (N. Y.) 237; Smith v. Finch, 3 Ill. 321; Johnson v. Whitchcott, 1 Roll. Abr. 24; Worcester Sav. Bank v. Hill, 113 Mass. 25; Harris v. Venables, L. R., 7 Ex. 235.

In *Mapes v. Sidney*, 1 Cro. Jac. 683, it was held that *assumpsit* on a promise in consideration that the plaintiff would forbear *per magnum tempus* to sue another person on his bond is good. The report of the opinion was to the effect that the court held, "that the plaintiff should recover; for they all conceived that a consideration to forbear to sue a person for such a debt is a good consideration, and it shall be intended a total and absolute forbearance (as *Hutton and Winch* held); and that if the defendant paid it before upon this promise, and after the plaintiff sued for the debt, the plaintiff is chargeable in an action upon the case, for it is an implied promise in the plaintiff that he should forbear his suit totally; but yet when the plaintiff hath forborne a convenient time (when there is no time mentioned), if the defendant do not pay the debt according to his promise, the plaintiff may well sue him upon his promise, and he needs not tarry all his life. And here, when he shows that he forbear *per magnum tempus*—viz., such a day and year, that well agrees with the writ doth not appear, it shall be intended that he did forbear until the day of the writ; and so the action is well brought."

In *Elting v. Vanderlyn*, 4 Johns. (N. Y.) 239, the court, by Van Ness, J., said: "The consideration of forbear-

ance generally is sufficient, without setting forth a specific time."

In *Oldershaw v. King*, 2 H. & N. 520, the court, by Cockburn, C. J., said: "The consideration is not simply the forbearing to press for immediate payment, but also the future advances, which, though not stipulated for, were contemplated by the parties. But supposing that the sole consideration was the forbearing to press for immediate payment, I should not be prepared to assent to the doctrine laid down in *Semple v. Pink*, 1 Exch. 74. These are authorities for saying that an agreement to forbear for a short time, or a little time, is too indefinite to constitute a consideration for a contract; but I am not at all prepared to assent to the proposition that an agreement to forbear for a reasonable time would not be sufficient. I see no reason why the question as to what is a reasonable time should not be considered and determined with reference to the circumstances of the case by a jury." See also *Thomas v. Croft*, 2 Rich. (S. Car.) 113; 44 Am. Dec. 279; *Cowlet v. Rubank*, 1 Bush (Ky.) 477; *Wills v. Ross*, 77 Ind. 1; 40 Am. Rep. 279.

1. In *Shupe v. Galbraith*, 32 Pa. St. 10, it appeared in evidence, that the justice, before whom the judgment had been obtained by the plaintiff against Clifford, the principal informed the son of the latter, who was doing business for his father, that as the twenty days were about out, execution would issue against his father. That he, with the son, walked over to the house of the defendant, who lived near by; and on stating the matter to him, and that execution would issue unless bail was put in for a stay, the defendant agreed to become bail, which the justice afterwards entered on his docket without the presence of the defendant. It also appeared that he afterwards told the plaintiff that defendant had gone bail, and that he thought it was good, to which the plaintiff replied "that he thought so, too," and let it rest. The recognizance thus entered, being void as a recognizance, the plaintiff sought to hold

V. DELIVERY—1. Delivery Essential to Complete Contract.—The contract of suretyship is not complete until the instrument by which it is created is delivered. Thus, if the maker of a promissory note delivers the note to the payee, who subsequently returns it, and the maker then procures the signature of a surety, but does not return the note to the payee, the latter cannot sue the surety.¹

2. Conditional Delivery.—Where there is a conditional delivery to a co-obligor, and the instrument is apparently complete on its face, and the co-obligor delivers it to the obligee, the surety is

the defendant answerable as upon an agreement for forbearance, during the period for which the stay would have continued if regularly taken. The court, by Thompson, J., said: "It is well settled, that actual forbearance is not enough. It must be in pursuance of a mutual agreement, the consideration being promise for promise. Consequently, to make it effective, both parties must be bound. 4 Barr. 305. The evidence given of an agreement did not come up to this standard. It amounted to no more than an assent that the bail was sufficient, and, in fact, a forbearance. But the forbearance was only optional on the part of the plaintiff, and again, nothing that he said would have prevented him issuing execution the next day. And if he had issued, the execution could not have been set aside on account of any obligation that rested on him to proceed. This being so, he was in no sense bound, and, consequently, there was no consideration for the promise of the defendant. That there must be an acceptance of the proposition to be answerable in consideration of forbearance, and a binding agreement to forbear consequent thereupon, is settled in numerous cases in our books, amongst which may be cited *Clark v. Russell*, 3 Watts (Pa.) 213; 27 Am. Dec. 348; *Snyder v. Leibengood*, 4 Pa. St. 305, and *Johnston v. Fessler*, Watts 7 (Pa.) 48; 32 Am. Dec. 738. We think, therefore, that the court were right in their instruction that it was necessary to be shown that the plaintiff agreed to forbear in consideration of the promise of the defendant, and that this was communicated to him."

In *Mecorney v. Stanley*, 8 Cush. (Mass.) 85, it was held that mere forbearance to sue the maker of a note, without any agreement to that effect on the part of the holder, is not a suf-

ficient consideration for a guaranty of the note. To the same effect are *Breed v. Hillhouse*, 7 Conn. 523; *Crofts v. Beale*, 11 C. B. 172; 73 E. C. L. 171; *Sage v. Wilcox*, 6 Conn. 81; *Walker v. Sherman*, 11 Met. (Mass.) 170.

1. Chamberlain v. Hopps, 8 Vt. 94.

The contract of suretyship takes effect only from the date of the delivery of the instrument. Thus in *Com. v. Kendig*, 2 Pa. St. 448, an official bond was signed by the principal on Saturday and by the surety on Sunday, but was not delivered to the prothonotary until Monday, and the court held that the surety was liable, the contract dating from Monday, the day of the delivery, and not from Sunday the day of the execution. See also *Hall v. Parker*, 37 Mich. 590; 26 Am. Rep. 540; *State v. Young*, 23 Minn. 551; but see *Parker v. Pitts*, 73 Ind. 597; 38 Am. Rep. 155.

Delivery to one of several obligees is a delivery to all. In *Moss v. Riddle*, 5 Cranch (U. S.) 351, the court, by Marshall, C. J., said: "It is admitted by the counsel in this case, that a bond cannot be delivered to the obligee as an escrow. But it is contended that where there are several obligees constituting a co-partnership, it may be delivered as an escrow to one of the firm. The court, however, is of opinion that a delivery to one is a delivery to all. It can never be necessary to the validity of a bond that all the obligees should be convened together at the delivery."

Where a bond is delivered to the obligee or his agent, it cannot be shown by parol that it was delivered as an escrow. *Cocks v. Barker*, 49 N. Y. 107. But a bond may be delivered as an escrow by the surety to the principal obligor. *Pawling v. U. S.*, 4 Cranch (U. S.) 219. See to the same effect, *Ordinary v. Thatcher*, 41

bound.¹ Where, however, the delivery is made to the obligee

N. J. L. 403; 32 Am. Rep. 225; State Bank v. Evans, 15 N. J. L. 155.

1. In *Russell v. Freer*, 56 N. Y. 67, it appeared that M, plaintiff's intestate, held the office of collector of internal revenue. Proposing to appoint C as his deputy, he required security that C would pay over moneys collected, etc.; for this purpose a bond was prepared, which was executed by H and F and delivered to C. When they signed it, the name of J appeared as co-obligor in the bond, and they were told by C before signing that J would sign it also, and they signed with this expectation. The name of J was subsequently stricken out of the bond without their knowledge or consent, and it was delivered to M, who had no knowledge of the facts, and who thereupon appointed C deputy. In an action on the bond, held, that H and F having placed it in the power of C to deliver the bond as a valid and complete instrument, it having been so delivered, and M having incurred responsibility relying thereon, it was valid and binding.

In *Dair v. U. S.*, 16 Wall. (U. S.) 1, the court specially found that James Dair and William Davison signed the . . . writing obligatory upon the day of its date, as sureties, at the instance of Jonathan Dair, one of the principals, but that it was signed by them upon the condition that the writing obligatory was not to be delivered to the plaintiff until it should be executed by one Joseph Cloud as co-surety; that the writing obligatory, upon its signing by them upon the condition aforesaid, was placed in the hands of the principal, Jonathan Dair, who afterwards, without the performance of that condition, and without the consent of James Dair and William Davison, delivered the same to the plaintiff. And that when the bond was so delivered, it was in all respects regular upon its face, and that the plaintiff had no notice of its condition. The court held that the surety was bound.

In *Fowler v. Allen*, 32 S. Car. 229; it appeared that a surety signed two negotiable notes, complete in form, on condition that they should not be delivered to the payee until some judgments for which one of the notes was given should be marked "Satisfied." The payee had no notice of the condition, and the notes were delivered by

the principal without having the judgments marked "Satisfied." The court held that the surety was liable.

In *Wolf v. Driggs*, 44 N. J. Eq. 363, it was held that where two execute a joint and several bond, each has implied authority to act for the other; and where one allows the other to take the bond, after both have executed it, his possession of the bond gives him authority to make delivery of it and to receive the consideration from the obligee.

In *Campbell Printing Press, etc., Co. v. Powell*, 78 Tex. 53, it was held that the sureties are not bound on a note conditioned that it "is not to be delivered until signed by ten men of unqualified solvency," and accepted in good faith with the signatures of ten men believed by the payee to be solvent, but not so in fact.

If a bond is signed by a surety with a parol agreement that it shall not be delivered without the names of additional obligors thereto, the surety is not liable, if the bond, without his consent and without such additional names, is delivered to the obligee, with knowledge on his part of such agreement; but if the surety assents to the delivery of the bond, he is liable. *Garvin v. Mobley*, 1 Bush (Ky.) 48; *York, etc., Ins. Co. v. Brooks*, 51 Me. 506.

The sureties of a probate bond cannot escape liability because of a stipulation with the principal at the time of signing, that certain other signatures should be procured before filing the bond, there being nothing on the face of the bond to show such stipulation. *Washington Probate Court v. St. Clair*, 52 Vt. 24. See also *Singer Mfg. Co. v. Drummond*, 40 Hun (N. Y.) 260; *State v. Pepper*, 31 Ind. 76; *Webb v. Baird*, 27 Ind. 368; *State v. Garton*, 32 Ind. 1; 2 Am. Rep. 315; *Nash v. Fugate*, 24 Gratt. (Va.) 202; 18 Am. Rep. 649; *Butler v. U. S.*, 21 Wall. (U. S.) 274; *York, etc., Ins. Co. v. Brooks*, 51 Me. 506; *Readfield v. Shaver*, 50 Me. 36; 79 Am. Dec. 592; *Gwyn v. Patterson*, 72 N. Car. 189; *Graves v. Tucker*, 10 Smed. & M. (Miss.) 9; *Whitaker v. Crutcher*, 5 Bush (Ky.) 621; *Millett v. Parker*, 2 Metc. (Ky.) 608; *Hall v. Smith*, 14 Bush (Ky.) 604; *Carroll Co. v. Ruggles*, 69 Iowa 269; 58 Am. Rep. 223; *Micklewait v. Noel*, 69 Iowa 344; *Taylor Co. v. King*, 73 Iowa 153; *Cutler v. Roberts*, 7 Neb. 4; 29 Am. Rep.

by a stranger, the obligee is bound to inquire as to conditions annexed to the delivery.¹

371; *Probate Ct. v. St. Clair*, 52 Vt. 24; *Lewis v. Board of Com'rs*, 70 Ga. 486; *Clark v. Bryce*, 64 Ga. 486; *State v. Churchill*, 48 Ark. 426; *State v. Potter*, 63 Mo. 212; 21 Am. Rep. 440; *Wolff v. Schaeffer*, 74 Mo. 154; *Canal, etc., Co. v. Brown*, 4 La. Ann. 545; *Brown v. State*, 18 Tex. App. 326; *Guild v. Thomas*, 54 Ala. 414; 25 Am. Rep. 703; *Bugger v. Cresswell* (Pa. 1888), 12 Atl. Rep. 829; *Lee Co. v. Welsing*, 70 Iowa 198; *Evans v. Daughtry*, 84 Ala. 68; *Daughtry v. Stewart*, 84 Ala. 69; *Perkins v. Ament*, 2 Head (Tenn.) 110; *Smith v. Kirkland*, 81 Ala. 345; *Taylor Co. v. King*, 73 Iowa 153; *Fowler v. Allen*, 32 S. Car. 229; *Wright v. Lang*, 66 Ala. 389; *Bramley v. Wilds*, 9 Lea (Tenn.) 674; *Rhode v. McLean*, 101 Ill. 467; *White v. Duggan*, 140 Mass. 18; *Mowbray v. State*, 88 Ind. 324; *Nash v. Fugate*, 32 Gratt. (Va.) 595; *Clark v. Bryce*, 64 Ga. 486; *Wayne Agricultural Co. v. Cardwell*, 73 Ind. 555; *Read v. McLemore*, 34 Miss. 110; *Goff v. Bankston*, 35 Miss. 518; *Perry v. Patterson*, 5 Humph. (Tenn.) 134; *Smith v. Moberly*, 10 B. Mon. (Ky.) 266; *Deardorff v. Foresman*, 24 Ind. 481; *Blackwell v. State*, 26 Ind. 204; *Merriam v. Rockwood*, 47 N. H. 81; *Martin v. Stribling*, 1 Spears (S. Car.) 23.

In *Evans v. Daughtry*, 84 Ala. 68, a surety on a guardian's bond signed it conditionally, and left it with his principal, to be delivered only when other persons named had signed it as sureties. The principal delivered the bond without the additional signatures. Prompt measures were taken by the surety to avert any injury that might result from the improper use of his name. *Held*, that he was not liable on the bond.

In *Indiana*, it has been held, that where a surety signs a bond and intrusts it to the principal on condition that it shall also be signed by another whose name appears in the body of the bond as co-surety, a subsequent delivery of the bond, without such signature and after the erasure of the name of the co-surety from the body of the bond, will not render the surety who signed it liable thereon, as the fact that the name of such co-surety having been once inserted, was notice to the obligee that it was expected at the time it was placed there, that the

co-surety would execute the bond; and this fact, coupled with the erasure, was enough to put a prudent man on inquiry as to the circumstances of the erasure, and whether it was not expected by the sureties who executed the bond, that the surety whose name was erased would execute it also. *Allen v. Marney*, 65 Ind. 398; 32 Am. Rep. 73.

A person became surety on a note, with an understanding that another person was to sign as surety with him, but the other person refused to sign. The note was then given to the payee, who fully understood the circumstances. *Held*, that the payee could not recover on the note against the surety who did sign. *Hill v. Sweetser*, 5 N. H. 168; *Easter v. Minard*, 26 Ill. 494; *Bivins v. Helsley*, 4 Metc. (Ky.) 78.

Where several persons sign a bond as sureties, upon the representation that another person is to sign it as co-surety, and with the understanding that the principal is to take it, but not to deliver it until such person has executed it, the bond is invalid as to them if delivered before the other signature has been obtained. *People v. Bostwick*, 43 Barb. (N. Y.) 9.

In an action on a penal bond, it is a good defense that the defendant signed as surety, and intrusted it to his principal as an escrow, with authority to deliver it only on condition that certain other named persons also signed it as sureties, and that it was delivered without their signatures, in violation of this condition. *Smith v. Kirkland*, 81 Ala. 345.

1. *Nash v. Fugate*, 24 Gratt. (Va.) 202; 18 Am. Rep. 649; *Smith v. Moberly*, 10 B. Mon. (Ky.) 266; 52 Am. Dec. 543; *Millett v. Parker*, 2 Metc. (Ky.) 608; *Deardorff v. Foresman*, 24 Ind. 481; *Passumpsic Bank v. Goss*, 31 Vt. 315; *State v. Peck*, 53 Me. 284.

In *Gibbs v. Johnson*, 63 Mich. 671, it was held that one who signs a bond as surety and delivers it to another to obtain the signature of a third person before delivering it to the obligee, constitutes the person to whom he delivers it his agent, and is liable on the bond, though it is delivered without the signature of the third person.

In *Taylor Co. v. King*, 73 Iowa 153, an official bond was signed by defend-

3. Incomplete Instrument.—If the instrument creating the contract of suretyship is incomplete and imperfect on its face, and there has been a premature delivery of it, without fulfilling a condition required by the surety, the latter will not be bound.¹

ants as sureties, on condition that other signatures should be obtained. Defendants, after signing the bond, left it with their agents, to be delivered only after the procurement of such other signatures. The principal in the bond procured it from these agents and filed it as his bond, the county officers who took it having no knowledge of the facts, but possibly having knowledge of that which, if followed up, might have led to knowledge of the facts. *Held*, that defendants could not escape liability on the bond.

1. In *Cutler v. Roberts*, 7 Neb. 4; 29 Am. Rep. 371, the court, by Well, J., said: "Where a bond contains in the obligatory part the names of several persons as sureties, if a part sign the same with an understanding and on the condition that it is not to be delivered to the obligee until it is signed by all whose names appear in the obligatory part as sureties, it will not be valid as to those that do sign until the condition is complied with. If there is anything on the face of the bond, or in the attending circumstances, to apprise the obligee that the bond has been delivered by the sureties to the obligor to be delivered to the obligee only upon certain conditions which have not been complied with, the sureties may plead the failure to comply with the conditions as a defense in an action on the bond."

Sharp v. U. S., 4 Watts (Pa.) 21, 28 Am. Dec. 676, was the case of a bond given in pursuance of an act of Congress which required that it should be executed by two or more sureties. It was signed by one surety only. He had a right to suppose the bond would be executed in accordance with the act of Congress, and it was held that there could be no recovery against him alone.

In *Fertig v. Bucher*, 3 Pa. St. 308, the party who executed the bond expressly stipulated that it should not be delivered until twelve names had been obtained to it, and the agent of the obligee so promised; it was held that the bond remained in the hands of the agent as an escrow, and until the condition was performed there could not be a valid delivery of it.

In *Campbell Printing Press, etc., Co. v. Powell*, 78 Tex. 53, it was held that the sureties are not bound on a note conditioned that it "is not to be delivered until signed by ten men of unqualified solvency," and accepted in good faith with the signatures of ten men believed by the payee to be solvent, but not so in fact.

Where a bond is drawn to be signed by one person as principal and by another as surety, and the surety signs first, but on the express condition that the signature of the maker shall be obtained before the bond is delivered, the surety will not be bound until such signature is obtained. *Guild v. Thomas*, 54 Ala. 414; 25 Am. Rep. 703.

If the instrument is not signed by the principal, although in its body it purports to be so signed, the surety may show that he signed upon condition that the principal should sign. *Wild Cat Branch v. Ball*, 45 Ind. 213.

On the official bond of a probate judge, which purports to bind him as principal, but is signed by the sureties only, the latter are not liable, in the absence of evidence that they intended to be bound without the signature of their principal, though the bond is joint and several, and has indorsed on its note subscribed by the principal, in which he swears to perform all the duties of his office "as provided by the conditions of my official bond written within." *Board of Education v. Sweeney* (S. Dak. 1891), 48 N. W. Rep. 302.

See to the same effect *Penn. v. Hamlett*, 27 Gratt. (Va.) 337; *Ward v. Churn*, 18 Gratt. (Va.) 801; 98 Am. Dec. 749; *Hall v. Parker*, 37 Mich. 590; 26 Am. Rep. 540; *Hessell v. Johnson*, 63 Mich. 623; *State Bank v. Evans*, 15 N. J. L. 155; *Johnson v. Baker*, 4 B. & A. 440; 6 E. C. L. 551; *Hall v. Smith*, 14 Bush (Ky.) 604; *Fletcher v. Leight*, 4 Bush (Ky.) 303; *Allen v. Marney*, 65 Ind. 398; 32 Am. Rep. 73; *Markland Min., etc., Co. v. Kimmel*, 87 Ind. 560; *State v. Churchill*, 48 Ark. 426; *Simpson v. Bovard*, 74 Pa. St. 351; *Sidney Road Co. v. Holmes*, 16 Up. Can. Q. B. 268; *Fales v. Filley*, 2 Mo. App. 345; *People v. Stacy*, 74 Cal. 373; *Sturges v. Arceneaux*, 9

If a surety signs an instrument in which another person is also named as surety, but there is no stipulation that the instrument shall not be delivered until the other person shall have signed, the surety who has signed will be bound, although the second surety has not signed.¹

If the name of the surety does not appear in any part of the bond, but nevertheless he executes and delivers it, he is bound.²

La. Ann. 136; *Oldham v. Brown*, 28 Ohio St. 41.

1. In *Keyser v. Keen*, 17 Pa. St. 327, the bond was prepared for six persons to sign, but was executed by five only. It was found in possession of the obligee, and it was held that it was not to be implied that it was incomplete and not binding on those who executed it.

Grim v. Jackson Tp., 51 Pa. St. 219, was the cause of a joint and several bond prepared for signatures by four persons named, but signed by three only. The absence of the signature of the fourth was held not to be a defense against payment by the three. To the same effect are *Simpson v. Board*, 74 Pa. St. 354; *Warfel v. Frantz*, 76 Pa. St. 88; and *Keener v. Crago*, 81½ Pa. St. 166.

In *Whitaker v. Richards*, 134 Pa. St. 191, it was held that where a bond, which has been prepared with the members of a partnership named in it as sureties, is signed and delivered by one partner, with the expectation, but not with the condition, that the other partner will execute it, the partner so signing and delivering will be liable thereon.

A bond contained in its body the names of the principal and two sureties. The principal and one of the sureties signed the bond in the presence of the obligee, and the bond was then delivered to the obligee who had no notice of any condition. The court held that the surety who had signed the bond and seen it delivered to the obligee, could not be heard to say that he agreed to become liable only on condition that the other mentioned surety should sign. *Johnson v. Weatherwax*, 9 Kan. 75.

There are cases, however, which are to the contrary effect. Thus in *Ward v. Churn*, 18 Gratt. (Va.) 801; 98 Am. Dec. 749, the court said: "The bond purports to be the joint bond of all the parties. The presumption from the face of it is that the defendant intended to be bound along with the other parties by whom it was executed

and not severally." See also *Wooden v. Durfee*, 46 Mich. 424; *Fletcher v. Leight*, 4 Bush (Ky.) 303; *State Bank v. Evans*, 15 N. J. L. 155; *State v. Churchill*, 48 Ark. 426; *Hall v. Smith*, 14 Bush (Ky.) 604.

As to the effect of forging names of prior sureties, see *State v. Pepper*, 31 Ind. 76; *English v. Dycus* (Ky. 1887), 5 S. W. Rep. 44; *Lombard v. Mayberry*, 24 Neb. 674.

2. In *Danker v. Atwood*, 119 Mass. 146, a bond purporting in its body to be executed by Samuel Snow, "as principal and as sureties," and signed by the principal and James S. Atwood, was held good against Atwood as surety. The court, by Gray, C. J., said: "The bond was duly executed by the principal, and it does not appear that Atwood, at the time of executing it, understood that it was to be executed by any other person as surety." See also *Joyner v. Cooper*, 2 Bailey (S. Car.) 199; *Neil v. Morgan*, 28 Ill. 524; *San Roman v. Watson*, 54 Tex. 254; *Gorman v. State*, 38 Tex. 112; 19 Am. Rep. 29; *Bartley v. Yates*, 2 Hen. & M. (Va.) 398; *Valentine v. Christie*, 1 Rob. (La.) 298; *Holden v. Tanner*, 6 La. Ann. 74; *Potter v. State*, 23 Ind. 550; *Partridge v. Jones*, 38 Ohio St. 375; *Hodgkin v. Holland*, 34 Ark. 203; *Holmes v. State*, 17 Neb. 73; *Stewart v. Carter*, 4 Neb. 564; *Griffin v. Wallace*, 66 Ind. 410; *McLain v. Simington*, 37 Ohio St. 484; *Affeld v. People*, 12 Ill. App. 502; *State v. Parsons*, 89 N. Car. 230; *Hodgkin v. Holland*, 34 Ark. 203; *Building Assoc. v. Cummings*, 45 Ohio St. 664.

In *Parks v. Brinkerhoff*, 2 Hill (N. Y.) 663, a promissory note which purported in the body of it to have been given for value received, and to bind the Fishkill Iron Company alone, was signed by two of its officers as such, together with several others in their individual names. Held, in an action against the latter, that their signatures indicated an intent to be responsible as sureties, and that they might be treated by the holder as joint and sev-

If the principal is named in the body of the instrument, but he does not sign it, it has been held in some cases that the surety is not liable;¹ but in other cases, the contrary rule has been laid

eral makers with the company. The court, by Cowen, J., said: "The note sufficiently expresses a consideration, but purports on its face to bind the company alone. It is then signed by the president and agent, whose names are followed by the signatures of the defendants in the place where we should look for those names, had they been expressly mentioned as sureties. Had the names been endorsed in blank, inasmuch as the note was probably not negotiable, the plaintiff might, I think, have written an absolute guaranty over the indorsement, which would have subjected the defendants in that form as joint and several makers with the company. The names being placed at the foot, import the same thing even more clearly. No other purpose can possibly be imagined. They do not declare themselves agents or witnesses. They must have meant to be makers or nothing. *Ut res magis valeat quam pereat*, the instrument should enure as the parties intended it should. If it were ambiguous, it is by no means clear that it might not be made available by extrinsic evidence. But it is not; the import is, we promise jointly with the company."

But in *Blackmer v. Davis*, 128 Mass. 538, it was held that if a contract in writing purporting to be between two persons, and containing mutual and dependent stipulations to be by them severally performed, is signed by them, and also by a third person, in such manner as not to indicate the capacity in which he is a party to the contract, no action can be maintained thereon by one of the parties named in the body of the contract against him and the other party jointly; and parol evidence is inadmissible to show that he signed it intending to be bound, and as surety for the other defendant.

1. In *Bean v. Parker*, 17 Mass. 591, the court, by Parker, J., said: "We think it essential to a bail-bond that the party arrested should be a principal: it is recited that he is; and the instrument is complete and valid without his signature. The remedy of the sureties against the principal would wholly fail or be much embarrassed, if such an instrument as this should be held binding. Suppose they wish to arrest

the principal in some distant place, or in some other state, what evidence would they carry with them that they were his bail? There is nothing to estop him from denying the fact, nor any proof that it was true. In a suit against him, they would be unable to prove that he was ever arrested, or had ever given bond, except by the return of the officer, and that would not prove that they became bail, but only that bail was taken."

In *Goodyear Dental Vulcanite Co. v. Bacon*, 151 Mass. 460, which was an action against a surety on an instrument alleged to be a bond, purporting to be signed by the principal and under seal, but unsigned by him and unsealed, the defendant testified that he relied on the principal's signing the instrument, and did not consent to a delivery without it, nor understand that he was to be bound unless the principal signed it. The court held, that a finding was warranted that the surety was not liable.

In *Russell v. Annable*, 109 Mass. 72; 12 Am. Rep. 665, it was held that a bond given for the purpose of obtaining a dissolution of an attachment of partnership property, and executed in the name of the firm by only one of two partners named as principals therein, cannot be enforced against a surety without evidence of the assent of the other partner to its execution.

In *Johnston v. Kimball*, 39 Mich. 187, it was held that sureties are not liable on an official bond, where the principal has not signed, although he was named in the bond as the primary debtor.

In *Scheek v. School Trustees*, 16 Ill. App. 49, under a statute requiring a town treasurer to execute to the trustees a bond with sureties to be approved by the trustees, a bond signed by the sureties, but not by the treasurer, and accepted by the trustees, it was held that the sureties were not liable.

In *Swope v. Forney*, 17 Ind. 385, A and B reduced to writing a contract for the purchase and sale of sheep; it was signed by A, and by two others as his sureties. Held, that if the sureties signed upon the consideration that B should also execute the writing, they

down, and sureties have been held liable, although the principal has not signed the obligation.¹

4. Filling Blanks.—Where a blank is left for the name of the surety, but the surety signs and delivers the bond, and his name is filled in afterwards, the surety is bound. The same rule applies where blanks have been left in notes or bonds, for dates, amounts, or the names of payees.²

had a right to insist upon his so doing, or to claim the benefit of his failure.

See also *Wood v. Washburn*, 2 Pick. (Mass.) 24; *Bunn v. Jetmore*, 70 Mo. 228; 35 Am. Rep. 425; *State v. Austin*, 35 Minn. 51; *People v. Hartley*, 21 Cal. 585; 82 Am. Dec. 758; *Hall v. Parker*, 39 Mich. 287.

1. In *Parker v. Bradley*, 2 Hill (N. Y.) 584, in the body of an instrument, a principal and several sureties were named as parties, but it was signed only by the latter, and there was nothing in the nature of it to prevent its operating without the signature of the principal. The court held that the execution must be deemed *prima facie* complete.

In *Loew v. Stocker*, 68 Pa. St. 226, a joint and several bond of indemnity for selling under an execution was given to a sheriff, but was not executed by the principal. The court held that a recovery could be had against one of several sureties who had signed the bond.

In *Stewart v. Behm*, 2 Watts (Pa.) 356, it was held that where one of a firm signed the firm name to a note under seal, the supposition of a surety who signed the same note that both parties would be bound will not excuse him from his liability on it.

See also *State v. Peyton*, 32 Mo. App. 522; *Tillson v. State*, 29 Kan. 452; *State v. Bowman*, 10 Ohio 445; *Johnson v. Johnson*, 31 Ohio St. 131; *Harnsberger v. Yancey*, 33 Gratt. (Va.) 527; *Hall v. Parker*, 39 Mich. 287; *Adams v. Kellogg*, 63 Mich. 105; *Cahill's Appeal*, 48 Mich. 616; *School Trustees v. Sheik*, 119 Ill. 579; *Williams v. Marshall*, 42 Barb. (N. Y.) 524; *Bollman v. Pasewalk*, 22 Neb. 761.

Where the bond of a county treasurer recites that he and his sureties "are each severally held and firmly bound" and do bind themselves "severally and firmly by these presents," the failure of the treasurer to execute the bond does not render it

void, and the sureties are liable. *Douglas Co. v. Bardo*, 79 Wis. 641.

2. *Carson v. Hill*, 1 McMull. (S. Car.) 76; *Violett v. Patton*, 5 Cranch (U. S.) 142; *Chalaron v. McFarlane*, 9 La. 227; *Russell v. Langstott*, 2 Dougl. 514; *South Berwick v. Huntress*, 53 Me. 89; 87 Am. Dec. 535; *Chicago v. Gage*, 95 Ill. 593; 35 Am. Rep. 182; *Collis v. Emmett*, 1 H. Bl. 313; *Bartlett v. Board of Education*, 59 Ill. 364; *Neil v. Morgan*, 28 Ill. 524; *Barden v. Southerland*, 70 N. Car. 528; *Joyner v. Cooper*, 2 Bailey (S. Car.) 199; *State v. Young*, 23 Minn. 551; *Scheid v. Leibshultz*, 51 Ind. 38; *Rich v. Starbuck*, 51 Ind. 87; *Gillaspie v. Kelley*, 41 Ind. 158; 13 Am. Rep. 318; *Potter v. State*, 23 Ind. 550; *Danker v. Atwood*, 119 Mass. 146; *Angle v. Northwestern Mut. L. Ins. Co.*, 92 U. S. 330; *Abbott v. Rose*, 62 Me. 194; 16 Am. Rep. 427; *Redlich v. Doll*, 54 N. Y. 234; 13 Am. Rep. 573; *Schryver v. Hawkes*, 22 Ohio St. 308.

In *Fullerton v. Sturges*, 4 Ohio St. 529, the sureties signed a note leaving the amount blank, and delivered it to the principal. The principal filled the blank with a larger sum than the sureties had agreed to become liable for, and delivered it to the creditor, who had no notice of the original agreement. The court held that the sureties were liable.

In *White v. Duggan*, 140 Mass. 18; 54 Am. Dec. 437, it was held that a person who executes as surety a probate bond in blank, and entrusts it to his principal to be filled in and delivered to the obligee, is bound by the instrument as delivered, although the principal, before delivery, inserts in the bond a larger penal sum than that agreed upon between him and the surety, if the obligee has no notice, from the face of the bond or otherwise, of the unauthorized act of the principal.

In *Angle v. Northwestern Mut. Ins. Co.*, 92 U. S. 330, the court, by Clifford, J., said: "Negotiable instruments are frequently delivered for use with

VI. ESTOPPEL OF SURETY.—Where a person who is really a surety signs an obligation expressly as principal, he will be estopped from subsequently asserting that he is only a surety. Thus, where a surety adds the word "principal" to his name, evidence that he is in fact a surety will not be admitted in a suit on the obligation.¹

blanks not filled; and, in respect to such instruments, it is held, that where a party to such an instrument intrusts it to the custody of another for use, with blanks not filled up, whether it be to accommodate the person to whom it was intrusted or to be used for the benefit of the signer of the same, such negotiable instrument carries on its face an implied authority to fill up the blanks necessary to perfect the same; and the rule is, that, as between such party and innocent third parties, the person to whom the instrument was so intrusted must be deemed the agent of the party who committed the instrument to his custody, in filling the blanks necessary to perfect the instrument." See also *Montague v. Perkins*, 22 Eng. L. & Eq. 516; *Pauling v. U. S.*, 4 Cranch (U. S.) 219; *Sharp v. U. S.*, 4 Watts (Pa.) 21; 28 Am. Dec. 676; *Cawley v. People*, 95 Ill. 249; *Gary v. State*, 11 Tex. App. 527; *Cutler v. Roberts*, 7 Neb. 4; 29 Am. Rep. 371; *Allen v. Marney*, 65 Ind. 398; 32 Am. Rep. 73; *Markland Min., etc., Co. v. Kimmel*, 87 Ind. 560; *Wild Cat Branch v. Ball*, 45 Ind. 213.

In *Gary v. State*, 11 Tex. App. 527, a surety signed and delivered to a principal a blank bond to be filled up with the penal sum of \$300; the principal filled up the bond with the sum of \$1,000. The court held that the surety was liable to the extent of \$1,000.

In *People v. Stacy* (Cal.), 16 Pac. Rep. 192, one surety had signed the bond and the other had not. No sum was stated in the body of the bond.

There were no conditions or stipulations by the sureties requiring other signatures or limiting their liability. *Held*, that the bond was valid as against the signers.

But a different rule was laid down in *Rhea v. Gibson*, 10 Gratt. (Va.) 215, where a paper intended for a bond was signed in blank as to the sum by a party as surety, and the blank was afterwards filled up in his absence, and without his knowledge or authority. In this case it was held that it was not his bond.

As to erasures of sureties' names, see *Rhoads v. Frederick*, 8 Watts (Pa.) 448; *Bracken Co. v. Donan*, 80 Ky. 388.

1. Signing as Principal.—In *Sprigg v. Bank of Mount Pleasant*, 10 Pet. (U. S.) 265, the court, by Thompson, J., said: "When one who is in reality only surety, is willing to place himself in the situation of a principal, by expressly declaring upon his contract that he binds himself as such, there cannot be any hardship in holding him to the character in which he assumes to place himself. As to that particular contract, he undertakes as a partner with the debtor; and has no more right to disclaim the character of the principal than the creditor would have to treat him as principal if he had sent out in the obligation that he was only surety." See also *Picot v. Signiago*, 22 Mo. 587; *McMillen v. Parkell*, 64 Mo. 286. In *Rees v. Barington*, 2 Ves. Jr. 542, it was held that when two are bound jointly and severally in a bond, they both appear as principals, and the surety cannot aver that he is bound as surety.

In *Waterville Bank v. Redington*, 52 Me. 466, three persons signed a joint and several note. The first person added to his name the word "principal." The other two added to their names the word "sureties." The court held that the use of the word "principal" estopped the person to whose name it was added from asserting that he was in fact a surety. In *Derry Bank v. Baldwin*, 41 N. H. 434, the note began as follows: "We severally and jointly, all as principals, promise to pay." The court held that all of the parties were estopped from showing that they were sureties. To the same effect is *Clermont Bank v. Wood*, 10 Vt. 582; *Menaugh v. Chandler*, 89 Ind. 94.

All parties to sealed instruments are principals, unless the contrary appear on the face of the instrument; and they cannot by plea change their character. Therefore, they cannot at law show, in defense to an action on a

Sureties are also estopped from denying the recitals contained in the obligation which they have executed.¹ A surety on a judicial bond is estopped from denying the jurisdiction of the

sealed instrument, that they are but sureties, and a discharge by the creditors giving time to the principal. *Willis v. Ives*, 1 Smed. & M. (Miss.) 307.

1. **Examples.**—Thus the sureties on a liquor bond are estopped to deny the recital therein that the principal, at the time of its execution, was professing to carry on the business of selling liquor. *Brockway v. Petted*, 79 Mich. 620.

Town authorities issued a liquor license, taking a bond to secure the payment of the tax (*North Carolina Priv. L.* 1847, ch. 203, L. 1883, ch. 35). The court held that the licensee and his sureties, having given a bond on a legal consideration, were estopped to deny that the authorities had power to take such a bond. *Hendersonville v. Price*, 96 N. Car. 423.

In *Bruce v. U. S.*, 17 How. (U. S.) 437, the bond upon which the suit was brought recited that the principal was appointed an Indian agent, and the court held that the obligors in the bond were therefore estopped from denying it.

In *Lee v. Clark*, 1 Hill (N. Y.) 56, it was held that the recital in the bond of a contract, that the contract had been executed by B, was conclusive and estopped the obligees from denying that B had executed the contract.

In *Decker v. Judson*, 16 N. Y. 439, the plaintiffs in replevin were required by the court, as a condition of the postponement of a trial, to renew their sureties on the bond to the sheriff, given on the institution of the suit. As a compliance with this order they procured Judson to sign the bond beneath the name of the other obligors, without the knowledge or consent of the previous sureties. The defendants in the replevin, having obtained judgment brought an action upon the bond in which judgment was rendered in their favor against Judson, but against them in favor of the original sureties. The court held, upon appeal by Judson, that his execution of the bond estopped him from denying the recitals in it which imported that it was executed upon the institution of the replevin suit, and taken by the sheriff at a time when it was lawful and proper to take the same.

In *Cocks v. Barker*, 49 N. Y. 107, the court held that a recital in a bond given by one copartner to another, upon dissolution of the copartnership, setting forth as the consideration therefor the transfer and delivery by the obligee to his former partner of the assets of the firm, is a substantive part of the agreement, and cannot be varied or contradicted by parol evidence.

In *Wendell v. Fleming*, 8 Gray (Mass.) 613, the constable of Wendell which voted that the taxes should "on the 1st of October pass into the hands of the constable for collection," gave a bond of that date to the town, reciting that he had been chosen "collector of taxes," and obliging him to pay over to the town treasurer all the taxes which he should be legally required to collect by the assessors. The court held that the bond was valid, and estopped him and his sureties to deny the legality of his appointment and the sufficiency of his warrant, in an action on the bond to recover money received by him for taxes and not accounted for.

In *Taylor v. State*, 51 Miss. 79, it was held that if a person is illegally appointed to an office, but executes a bond for the faithful performance of his duties, in the form and with the conditions required by law for official bonds, and takes the oath of office and assumes the duties of his office, both he and his sureties will be estopped from setting up as a defense and proving the illegality of his appointment, and that the bond was not required by law. See also *State v. Cooper*, 53 Miss. 615.

The parties to the action may waive the formalities of the statutory proceedings, and in such case the sureties to the undertaking are bound by the waiver and are estopped from questioning the recitals in the undertaking. In *Coleman v. Bean*, 1 Abb. App. Dec. (N. Y.) 394, in an action against the sureties upon an undertaking purporting to have been given to procure the discharge of an attachment, it was held that it was not essential to its validity that an attachment shall be actually issued, or that the undertaking be delivered to the court or an officer, and that the recital was conclusive evidence of the waiver of the issue of an attachment.

In *Harrison v. Wilkin*, 69 N. Y. 412, it was held that where in pursuance of an arrangement between two parties, one of whom had in his possession personal property claimed by the other, an action was brought by the former in the form of an action to recover possession of the property, and an undertaking was given, entitled in the action, reciting that plaintiff claimed delivery of the property, and undertaking to prosecute the action and to return the property, if return should be adjudged, etc., that the sureties to the undertaking were estopped, in an action thereon, from questioning the recital, although they had no knowledge that the defendants in the replevin suit were not in possession of the property, or that the statutory proceedings were not to be had, or the undertaking used to obtain delivery.

In debt on the official bond of a bank treasurer, the principal or his sureties cannot deny the fact stated in the bond that the principal was, at the time of giving the bond, the treasurer; and, the election being for an indefinite period, and no limit set to which the bond is to run, it continues in force during the treasurer's incumbency, or until he is re-elected; although in the meantime the charter of the bank had expired and been extended. *Hall v. Brackett*, 62 N. H. 509.

Amount in Bond Conclusive.—Where a particular sum is mentioned in a bond, the surety is estopped from asserting that the amount is incorrect. In *Washington Ice Co. v. Webster*, 125 U. S. 426, the plaintiff in a replevin suit for ice, gave a bond, with sureties, to the defendant, in the penalty of \$30,000, conditioned to prosecute the suit to final judgment, and pay such damages and costs as the defendant should recover against them, "and also return and restore the same goods and chattels in like order and condition as when taken, in case such shall be the final judgment." The ice was stated in the bond to be of the value of \$15,000. In the suit there was a judgment for a return of the ice to the defendant, and for an amount of damages ascertained by the jury by allowing interest from the time the ice was taken, and also allowing the expenses of the defendant in preparing to remove the ice. The damages were paid, but the ice was not returned. In a suit on the bond, the court held that it was not competent for the obligors in the bond to

show that the ice was of less value than the amount stated in the writ of replevin and the bond.

Due Appointment of Principal.—In general, the sureties on the bonds of administrators, guardians, committees, agents, officers, etc., are estopped from denying the due appointment of their principals. *Gray v. State*, 78 Ind. 68; 41 Am. Rep. 545; *Phenix Ins. Co. v. Findley*, 59 Iowa 591; *Jones v. Gallatin Co.*, 78 Ky. 491; *Norris v. State*, 22 Ark. 524; *Cutler v. Dickinson*, 8 Pick. (Mass.) 386; *Shroyer v. Richmond*, 16 Ohio St. 455; *Williamson v. Woodman*, 73 Me. 163; *Mayor, etc., Hoboken v. Harrison*, 30 N. J. L. 73; *Middleton v. State*, 120 Ind. 166; *Norton v. Miller*, 25 Ark. 108; *Harbaugh v. Albertson*, 102 Ind. 69; *Pannill v. Calloway*, 78 Va. 387; *Driscoll v. Blake*, 9 Ir. Ch. Rep. 356; *Paducah v. Cully*, 9 Bush (Ky.) 323; *Franklin v. Depriest*, 13 Gratt. (Va.) 257; *People v. Jenkins*, 17 Cal. 500; *Seiple v. Elizabeth*, 27 N. J. L. 407; *Fridge v. State*, 3 Gill & J. (Md.) 103; 20 Am. Dec. 463; *State v. Mills*, 82 Ind. 126; *Bassett v. Crafts*, 129 Mass. 513; *Collins v. Mitchell*, 5 Fla. 364; *Johnston v. Smith*, 25 Hun (N. Y.) 171; *White v. Weatherbee*, 126 Mass. 450; *People v. Huson*, 78 Cal. 154; *Williamson v. Woodman*, 73 Me. 163; *Kelly v. State*, 25 Ohio St. 567; *Burnett v. Henderson*, 21 Tex. 588; *Board of School Directors v. Judice*, 2 So. Rep. 792.

But see *Thomas v. Burrus*, 23 Miss. 550; 57 Am. Dec. 154; *Tinsley v. Kirby*, 17 S. Car. 1; *Tucker v. State*, 11 Md. 322; *Hudson v. Winslow*, 35 N. J. L. 437.

For other cases illustrating the estoppel of sureties by recitals in the bond, see *Neel v. Harding*, 2 Metc. (Ky.) 247; *Montieth v. Com.*, 15 Gratt. (Va.) 172; *Nash v. Fugate*, 24 Gratt. (Va.) 202; 18 Am. Rep. 649; *Cordle v. Burch*, 10 Gratt. (Va.) 480; *Cecil v. Early*, 10 Gratt. (Va.) 198; *Duchamp v. Nicholson*, 14 Martin N. S. (La.) 672; *Borden v. Houston*, 2 Tex. 594; *May v. May*, 19 Fla. 373; *State v. Lewis*, 73 N. Car. 138; 21 Am. Rep. 461; *Otto v. Jackson*, 35 Ill. 349; *Apperson v. Gogin*, 3 Ill. App. 48; *Johnston v. Patterson*, 124 Pa. St. 398; *Willis v. Rivers*, 80 Ga. 556; *Bowers v. Cobb*, 31 Fed. Rep. 678; *Long v. Crosson*, 119 Ind. 3; *Snyder v. Chick*, 112 Ind. 293; *Steele v. Tutwiler*, 57 Ala. 113; *Nevin v. Fouché*, 77 Ga. 47.

Collateral Facts.—Sureties are some-

court in which the bond was entered.¹ A surety on a bond given by a corporation is estopped not only from denying the existence of the corporation,² but also the corporate authority to make the bond.³

VII. RIGHTS OF SURETY AFTER JUDGMENT.—A surety is entitled to the same rights after judgment has been rendered against him as before, and any act on the part of the creditor which would have released the surety before judgment, will equally release him afterwards.⁴

times estopped from denying certain collateral facts. Thus a surety on a bond for alimony may not deny that the woman for whose benefit the bond was entered is the wife of the principal. *Com'rs of Charities v. O'Rourke*, 34 Hun (N. Y.) 349. Sureties for purchase-money with notice of defects in title, are estopped from setting up such defects as a defense to a suit for the purchase-money. *Ellis v. Adderton*, 88 N. Car. 482. See also *Grier v. Wallace*, 7 S. Car. 182, where the surety for the purchase-money of slaves, attempted to set up as a defense that they were unsound.

1. *Pannill v. Calloway*, 78 Va. 387; *Harbaugh v. Albertson*, 102 Ind. 69; *Franklin v. Depriest*, 13 Gratt. (Va.) 257. But see *Dickenson v. State*, 20 Neb. 72.

2. *Father Mathew, etc., Soc. v. Fitzwilliams*, 84 Mo. 406; *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16.

3. In *Remsen v. Graves*, 41 N. Y. 471, where a cemetery association organized under the general act, executed to the defendant a bond for money loaned by him to them, which he subsequently assigned to the plaintiff, endorsing thereon a guaranty to the plaintiff of the payment thereof. The court held, in an action on the guaranty, that the defendant would not be permitted to set up that the association was not authorized to issue such bond, or that the same was not a binding or valid obligation when issued.

In *Simons v. Steele*, 36 N. H. 73, the guarantors of a contract executed by a railroad company, were estopped from denying that the president of the company had authority to sign the contract.

In *Wayne v. Commercial Nat. Bank*, 52 Pa. St. 343, a teller of a bank who had authority to issue due-bills for the bank for a special purpose, issued them to raise money for himself. It was held that the sureties of the teller

could not set up a want of power in the bank to issue the due-bills.

See also *Indianapolis v. Skeen*, 17 Ind. 628; *Wilson v. Monticello*, 85 Ind. 10; *Denison v. Gibson*, 24 Mich. 187.

4. In *Com. v. Miller*, 8 S. & R. (Pa.) 452, the court, by Gibson, J., said: "But it is said, the distinction between principal and surety ceases after judgment has been obtained on the original surety, and as to subsequent transactions, equity views them with equal favor. If that be so, I am ignorant of any authority that bears it out; and on the ground of reason, it certainly cannot be supported. The distinction is carried throughout."

In *Bangs v. Strong*, 4 N. Y. 415, the court, by Pratt, J., said: "The recovery of a judgment against the surety does not merge or destroy his character as such, or the relation which he sustains to his principal. Its only effect is to change the form of the security as between him and the debtor. Merging the contract between the creditor and the principal debtor or surety cannot affect the relation between the principal and surety. This relation is not necessarily created by the contract to which the creditor is a party, but may be created even without his knowledge."

In *Manufacturers, etc., Bank v. Bank of Pennsylvania*, 7 W. & S. (Pa.) 335; 42 Am. Dec. 240, it was held that separate judgments against a principal and surety do not extinguish the relation between them. Hence if, after judgment, the creditors agree for a sufficient consideration to give time to the principal, the surety will be thereby discharged.

In *Carpenter v. King*, 9 Met. (Mass.) 511; 43 Am. Dec. 405, the court, by Shaw, C. J., held, that when two persons jointly sign an obligation for the payment of money, one of them may show, even after judgment, that he was

VIII. STATUTE OF FRAUDS.—The relation of the Statute of Frauds to the subject of guaranty and suretyship is treated under the title FRAUDS, STATUTE OF, vol. 8, p. 657.

IX. SCOPE OF THE CONTRACT—1. Construed Strictly in Favor of Surety.—The contract of suretyship is always strictly construed in favor of the surety, and it cannot be extended by implication beyond the clear and absolute terms of the undertaking. The surety is entitled to stand upon the very terms of his contract, and presumptions and equities are not allowed to change or alter the legal obligation.¹

surety for the other. In the course of his opinion he said: "Nor do we think that any change in this respect is made in the rights of the parties by the judgment. The proof offered does not contradict the judgment. The original cause of action as between the parties, is merged by a judgment, because the judgment itself is a security of a higher nature. But when it becomes necessary to inquire and ascertain on what contract a judgment was rendered, it may be done. *Wyman v. Mitchell*, 1 Cow. (N. Y.) 316. There is the same reason for admitting evidence *aliunde*, to show the relation of parties who are joint debtors in a judgment, as in a contract. *Prima facie*, they are equally, as well as jointly, liable. Take the common case of a bond, where, on the face of it, one is principal and the other surety, yet the judgment is joint. By the record, apparently, both are principal debtors. If the grounds of the judgment could not be inquired into, so as to rebut the presumption of an equal liability, the surety, in case of paying the judgment, would have no remedy over against his principal for money paid; and in case the principal should pay it, he would have an action against his own surety for contribution. If it can be inquired into, to adjust the relations of the debtors to each other, it can be to determine the relation of the creditor to each debtor, where the fact becomes material to the respective rights. Suppose the creditor himself holds collateral security of the principal; it has often been decided that the surety is entitled to the benefit of it, and if the creditor voluntarily surrenders it, he discharges the surety wholly or *pro tanto*. *Hayes v. Ward*, 4 Johns. Ch. (N. Y.) 123; 8 Am. Dec. 554. Would not this principle apply, as well after a joint judgment against the debtors as before? And yet it would involve the necessity of an

inquiry into the judgment, to show that it was rendered on a contract in which one was principal and the other surety. The judgment is technically a security of a higher nature, but it is a security for the same debt or duty as the contract on which it is founded. *Davis v. Maynard*, 9 Mass. 242. So if a judgment be rendered on several demands, for some of which a third person is liable, but not for all, the fact may be shown by evidence *aliunde*. *Stedman v. Eveleth*, 6 Met. (Mass.) 114."

See also in general, *Storms v. Thorn*, 3 Barb. (N. Y.) 314; *La Farge v. Herter*, 11 Barb. (N. Y.) 159; *Bangs v. Strong*, 7 Hill (N. Y.) 250; 42 Am. Dec. 64; *Delaplaine v. Hitchcock*, 4 Edw. Ch. (N. Y.) 321; *Blazer v. Bundy*, 15 Ohio St. 57; *Commercial Bank v. Western Reserve Bank*, 11 Ohio 444; 38 Am. Dec. 739; *Moss v. Pettingill*, 3 Minn. 217; *McCrary v. Coley*, 1 Ga. Dec. 104; *Crawford v. Gaulden*, 33 Ga. 173; *Brown v. Ayer*, 24 Ga. 288; *Curan v. Colbert*, 3 Ga. 239; 46 Am. Dec. 427; *Brown v. Riggins*, 3 Kelly (Ga.) 405; *Shelton v. Hurd*, 7 R. I. 403; *Carpenter v. Devon*, 6 Ala. 718; *Chambers v. Cochran*, 18 Iowa 159; *Smith v. Rice*, 27 Mo. 505; 72 Am. Dec. 281; *Rice v. Morton*, 19 Mo. 263; *Allison v. Thomas*, 29 La. Ann. 732; *Newell v. Hamer*, 4 How. (Miss.) 684; 35 Am. Dec. 415; *Curan v. Colbert*, 3 Ga. 239; *Davis v. Meckell*, 1 Freem. Ch. (Miss.) 548.

1. "Nothing can be clearer, both upon principle and authority, than the doctrine, that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligations, he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to

stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. And courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness." *Miller v. Stewart*, 9 Wheat. (U. S.) 680.

"The law is too well settled to admit of discussion that sureties are favorites of the law, and are not bound beyond the strict terms of the engagement; that their liability is not to be extended by implication beyond the terms of their contract, which contract is said to be *strictissimi juris*." *Lafayette v. James*, 92 Ind. 240; 47 Am. Rep. 140.

This principle of construction has even been recognized by statute. In the *California* Civil Code, § 2836, it is provided that "a surety cannot be held beyond the express terms of his contract."

"No far-fetched equities nor overstrained constructions are allowable as against sureties." *Ryan v. Williams*, 29 Kan. 487.

The following cases illustrate the proposition that a contract of suretyship must be strictly construed in favor of the surety: *Reed v. Cramb*, 22 Ill. App. 34; *State v. Hinsdale-Doyle Granite Co.*, 117 Ind. 476; *White Sewing Mach. Co. v. Hines*, 61 Mich. 423; *U. S. v. Boyd*, 15 Pet. (U. S.) 187; *McMicken v. Webb*, 6 How. (U. S.) 292; *Leggett v. Humphreys*, 21 How. (U. S.) 66; *Streeper v. Victor Sewing Mach. Co.*, 112 U. S. 676; *Chase v. McDonald*, 7 Har. & J. (Md.) 160; *Brooks v. Brook*, 12 Gill & J. (Md.) 306; 38 Am. Dec. 310; *Henderson v. Marvin*, 31 Barb. (N. Y.) 297; *Walsh v. Baillie*, 10 Johns. (N. Y.) 180; *Belloni v. Freeborn*, 63 N. Y. 383; *Ward v. Stahl*, 81 N. Y. 406; *Knowles v. Cuddeback*, 19 Hun (N. Y.) 590; *Gates v. McKee*, 13 N. Y. 232; 64 Am. Dec. 545; *Rochester City Bank v. Elwood*, 21 N. Y. 88; *Fairlie v. Lawson*, 5 Cow. (N. Y.) 424; *John Hancock Mut. L. Ins. Co. v. Lowenberg*, 14 N. Y. Wk. Dig. 326; *Jennery v. Olmstead*, 90 N. Y. 363; *Farmers', etc., Nat. Bank v. Lang*, 87 N. Y. 209; *Crist v. Burlingame*, 62 Barb. (N. Y.) 357; *McCluskey v. Cromwell*, 11 N. Y. 393; *Sheldon v. Sabin*, 4 Civ. Pro. Rep. (N. Y.) 4; *Mayor, etc., of N. Y. v. Kelly*, 17 N. Y. Wk. Dig. 525; *Petty v. Sherwood*, 17 N. Y. Wk. Dig. 82; *Dela-*

ware, etc., R. Co. v. Burkhard, 36 Hun (N. Y.) 57; *Merchants' Nat. Bank v. Hall*, 83 N. Y. 338; 38 Am. Rep. 434; *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273; *Davis v. Copeland*, 67 N. Y. 127; *Barns v. Barrow*, 61 N. Y. 39; *Pratt v. Matthews*, 24 Hun (N. Y.) 387; *People v. Vilas*, 36 N. Y. 460; 93 Am. Dec. 520; *Farmers', etc., Bank v. Evans*, 4 Barb. (N. Y.) 487; *Leeds v. Dunn*, 10 N. Y. 469; *Chicago, etc., R. Co. v. Higgins*, 58 Ill. 128; *Linch v. Litchfield*, 16 Ill. App. 612; *Field v. Rawlings*, 6 Ill. 581; *Vinyard v. Barnes*, 124 Ill. 346; *People v. Toomey*, 122 Ill. 308; *Burlington Ins. Co. v. Johnson*, 120 Ill. 622; *Dodgson v. Henderson*, 113 Ill. 360; *Ellis v. Bibb*, 2 Stew. (Ala.) 63; *Montgomery v. Hughes*, 65 Ala. 201; *Kimball Co. v. Baker*, 62 Wis. 526; *Raney v. Baron*, 1 Fla. 367; *Robinson v. Epping*, 24 Fla. 237; *Blair v. Perpetual Ins. Co.*, 10 Mo. 559; 47 Am. Dec. 129; *Shine v. Central Sav. Bank*, 70 Mo. 524; *Sedalia, etc., R. Co. v. Smith*, 27 Mo. App. 371; *Fisse v. Einstein*, 5 Mo. App. 78; *Allen v. Central Sav. Bank*, 4 Mo. App. 66; *Fisher v. Cutter*, 20 Mo. 206; *Manufacturers' Bank v. Cole*, 39 Me. 188; *Weller v. Henarie*, 15 Oregon 28; *Kastner v. Wenslanley*, 20 Up. Can. C. P. 101; *Frost v. Mixsell*, 38 N. J. Eq. 586; *Hoey v. Jarman*, 39 N. J. L. 523; *Missoula Co. v. McCormick*, 4 Mont. 115; *Bailey v. Larchar*, 5 R. I. 530; *Webster Co. v. Hutchinson*, 60 Iowa 721; *Noyes v. Granger*, 51 Iowa 227; *Mason City v. Reichard*, 50 Iowa 98; *State v. Orr*, 12 Lea (Tenn.) 725; *Whelen v. Boyd*, 114 Pa. St. 228; *Hutchinson v. Woodwell*, 107 Pa. St. 509; *Mercer Co. v. Coovert*, 6 W. & S. (Pa.) 70; *Irwin v. Kilburn*, 104 Ind. 113; *Weir Plow Co. v. Walmsley*, 110 Ind. 242; *Markland Min., etc., Co. v. Kimmel*, 87 Ind. 560; *Wills v. Ross*, 77 Ind. 1; 40 Am. Rep. 279; *Henrie v. Buck*, 39 Kan. 381; *Ryan v. Williams*, 29 Kan. 487; *Edwards v. Ellis*, 27 Kan. 344; *Hays v. Closen*, 20 Kan. 120; *Packard v. Herrington*, 41 Kan. 469; *First Nat. Bank v. Gerke*, 68 Md. 449; *Chase v. McDonald*, 7 Har. & J. (Md.) 160; *Burson v. Andes*, 83 Va. 445; *Lee v. Hastings*, 13 Neb. 508; *White v. Reed*, 15 Conn. 457; *Gunn v. Geary*, 44 Mich. 615; *Bishop v. Freeman*, 42 Mich. 533; *State v. Churchill*, 48 Ark. 426; *Victor Sewing Mach. Co. v. Crockwell*, 3 Utah 152; *Tomlinson v. Simpson*, 33 Minn. 443; *Lang v. Pike*, 27 Ohio St. 498; *Law v. East India*

While equity will do nothing to extend the liabilities of sureties beyond the clear intent and import of their contract, yet if their liability cannot be enforced against them at law by reason of any fraud, accident, or mistake, equity will enforce the contract according to its obvious intent.¹

2. Past Defaults.—A surety is not liable for the past defaults of his principal, unless made so by the express terms of the contract.²

Co., 4 Ves. 824; *Mayer v. Isaac*, 6 M. & W. 605; *Wood v. Priestner*, L. R., 2 Exch. 66; *Hargreave v. Smee*, 6 Bing. 244; 19 E. C. L. 69; *Mason v. Pritchard*, 12 East 227; *Glyn v. Hertel*, 8 Taunt. 208; *Evans v. Whyte*, 5 Bing. 485; 15 E. C. L. 514; *Warre v. Calvert*, 7 A. & E. 143; 34 E. C. L. 58; *Carkin v. Savory*, 14 Gray (Mass.) 528; *Rice v. Filene*, 6 Allen (Mass.) 230; *Dunlop v. Gordon*, 10 La. Ann. 243; *Ryan v. Morton*, 65 Tex. 258.

1. *Brooks v. Brooks*, 12 Gill & J. (Md.) 306.

2. In *Morrell v. Cowan*, 6 Ch. Div. 151, the wife of a retail dealer, who was possessed of separate estate, in order to obtain credit for her husband from a wholesale merchant with whom he dealt, gave the latter a written guaranty as follows: "In consideration of your having at my request agreed to supply and furnish goods to C" [her husband], "I do hereby guaranty to you the sum of 500 pounds. This guaranty is to continue in force for the period of six years and no longer." The court held that the guaranty was limited to goods actually supplied to the husband after it was given.

A contractor for carrying the mails sublet the contract to plaintiff; and afterwards, on receiving a quarterly payment, absconded, without paying plaintiff his last quarterly dues. The contractor's bondsmen proposed to the Post Office Department that they be allowed to fulfill the contract, and received, as an answer, from the Department: "An order has been issued this date to recognize your services on said route, and pay for the same from" the date up to which the contractor had drawn pay. The bondsmen hired plaintiff to continue to carry the mails, which he did for about a year longer. Held, that the bondsmen were not liable for plaintiff's dues with which the contractor absconded. *Gillespie v. Lake*, 85 Cal. 402.

Where a tax collector elected for two terms, gives a bond for each term

with different sureties, and the taxes collected during the second term under the second bond are applied, with the knowledge of the receiving officers, to the payment of a default during the first term, the sureties on the second bond cannot be held liable. *Metts v. State*, 68 Miss. 126.

See to the same effect, *State v. Jones*, 89 Mo. 470; *Delaware, etc., R. Co. v. Burkard*, 114 N. Y. 197; *Chaffe v. Taliaferro*, 58 Miss. 544; *Wood v. Chambers*, 40 Up. Can. Q. B. 1; *Johnson v. Fisher*, 4 Colo. 242; *Brooks v. Baker*, 9 Daly (N. Y.) 398; *Haley v. Petty*, 42 Ark. 392; *State v. Churchill*, 48 Ark. 426; *Coons v. People*, 76 Ill. 383; *Stern v. People*, 96 Ill. 475; *Potter v. Board of Trustees*, 11 Ill. App. 280; *Dickens v. State*, 7 Blackf. (Ind.) 358; *Rogers v. State*, 99 Ind. 218; *Webster Co. v. Hutchinson*, 60 Iowa 721; *Colyer v. Higgins*, 1 Duv. (Ky.) 6; 85 Am. Dec. 601; *Rochester v. Randall*, 105 Mass. 295; 8 Am. Rep. 519; *Scarborough v. Parker*, 53 Me. 252; *Paw Paw v. Eggleston*, 25 Mich. 36; *Detroit v. Weber*, 29 Mich. 24; *Pine Co. v. Willard*, 39 Minn. 125; *Montgomery v. Governor*, 7 How. (Miss.) 68; *Marney v. State*, 13 Mo. 7; *State v. Alsip*, 91 Mo. 172; *Missoula Co. v. McCormick*, 4 Mont. 115; *Van Sickle v. Buffalo Co.*, 13 Neb. 103; 42 Am. Rep. 753; *Jeffers v. Johnson*, 18 N. J. L. 382; *Bissell v. Saxton*, 66 N. Y. 55; 77 N. Y. 191; *Board of Education v. Fonda*, 77 N. Y. 350; *Thomson v. MacGregor*, 81 N. Y. 502; *Kellum v. Clark*, 97 N. Y. 390; *Fitts v. Hawkins*, 2 Hawks (N. Car.) 394; *Governor v. Lee*, 4 Dev. & B. (N. Car.) 457; *Richardson v. Smith*, 2 Jones (N. Car.) 8; *State v. Galbraith*, 65 N. Car. 409; *State v. Orr*, 12 Lea (Tenn.) 725; *State v. Polk*, 14 Lea (Tenn.) 1; *Myers v. U. S.*, 1 McLean (U. S.) 493; *Crawn v. Com.*, 84 Va. 282; *Vivian v. Otis*, 24 Wis. 518; 1 Am. Rep. 199; *State v. Banks* (Md. 1892), 24 Atl. Rep. 415.

On a similar principle, a bond

3. Liability Limited to a Particular Period.—Where the instrument recites that the duty to be performed by the principal shall be performed within a specified period of time, the surety will only be liable for the period thus specified. Thus, if a bond recites that the principal shall execute an office for the term of six months, and is conditioned for his good behavior during all the time that he shall continue in office, the surety is only liable for a default happening within the six months.¹

conditioned that the principal shall faithfully perform the duties of the office of bookkeeper, "to which he has been appointed," and shall faithfully account for "all moneys which may come into his hands as the agent, employé, or officer," of his employer, does not bind the surety for the principal's default as cashier, an office to which he was subsequently appointed. *American Dist. Tel. Co. v. Lennig*, 139 Pa. St. 594.

A contract of suretyship may have a retrospective operation, where it appears from the instrument that such was the intention of the parties. *Abrams v. Pomeroy*, 13 Ill. 133.

1. In the leading case of *Lord Arlington v. Merricke*, 2 Saund. 411, decided in 1672, the bond was conditioned for the due performance by Thomas Jenkins of the duties of deputy postmaster "for and during all the time that he, the said Thomas Jenkins, shall continue deputy postmaster." The bond recited that Jenkins was to execute the said office from "the twenty-fourth day of June next coming for the term of six months following." A default occurred two years after Jenkins was appointed. Chief Justice Hale decided that "the words 'during all the time' shall be intended, but only during the said six months recited in the condition."

In *Liverpool Waterworks v. Atkinson*, 6 East 507, the court held that the condition of a bond, reciting that the defendant had agreed with the plaintiffs to collect their revenues "from time to time for twelve months;" and afterwards stipulating that, "at all times thereafter during the continuance of such employment, and for so long as he should continue to be employed," he would justly account and obey orders, etc., confines the obligation to the period of twelve months mentioned in the recital.

In *Peppin v. Cooper*, 2 B. & Ald. 431, a bond was conditioned that the

principal should "from time to time, and at all times, so long as he should continue to hold said office or employment," faithfully perform his duties as a clerk. The surety pleaded to a suit on the bond, that the employment was only for a year, and that there had been no default within that time. A replication was filed, that by consent of all parties the employment had been continued for a longer time. *Held*, that the replication was bad.

Where a tax collector carries a balance due from him to the state over to the succeeding year, when he enters on a second term, with new sureties, and there is a deficit for such year, it will be considered a deficit for the preceding year, to the extent of such balance; but where the accounts are balanced for such succeeding year, and the collector's private funds are used to the amount of the balance brought forward, the sureties on his bond for the first term are not liable for any deficit that may thereafter occur. *Newcomer v. State*, 77 Tex. 286.

In *Chelmsford v. Demarest*, 7 Gray (Mass.) 1, it was held that the sureties on the bond of the treasurer of a manufacturing corporation, who, by the *Massachusetts Rev. Sts.*, ch. 38, § 4, is to be "chosen annually" and "hold his office until another is chosen and qualified in his stead," are bound only for the year for which he was chosen, and for such further time as is reasonably sufficient for the election and qualification of his successor, and no longer.

In *Kiton v. Julian*, 4 E. & B. 854; 82 E. C. L. 853, a bond from a deputy to the sheriff, was conditioned for the faithful performance of the principal's duty as deputy "during his continuance in office," without specifying the length of time. The court held that the sureties were liable for the transactions of one year only, the term of the sheriff being limited to that time.

Where a tax collector is short at the end of his first term, but succeeds himself and gives another bond, with the same sureties, and one of such sureties advances money to settle up the deficit of the first term, and takes tax receipts for taxes during the second term as security, so that a deficit arises during that term, the sureties are liable for the deficit so credited, unless they show that the moneys were improperly diverted before the second bond was executed. *Arbuckle v. State*, 81 Tex. 191.

In *Bigelow v. Bridge*, 8 Mass. 275, the court said: "The bond in this case appears to have been given to the plaintiff, as clerk of the peace for this county, pursuant to the provisions of the statute of 1785, ch. 76, § 1. But the choice of the county treasurer being by that statute annual, it is apparent that the bond required by it was intended for the protection of the public, so long only as the person chosen should continue in office in virtue of such election. A new bond should have been regularly taken for each several year, for which the defendant was elected. If this bond were valid against the defendant to cover the deficit of his last official year, it would be equally valid against his sureties; but they could never contemplate their contract as binding them thus indefinitely."

In *Flores v. Howth*, 5 Tex. 329, a statute provided that the period of administration on estates should be one year, but if the estate was not settled at that time the judge might extend it a year. The court held that the sureties on a bond of an administrator, given at the commencement of an administration, were only liable for one year.

A town sergeant was appointed in 1879. On each occasion he gave a bond for the faithful performance of his duties, and for paying over and for accounting for all moneys which came to his hands by virtue of his office. There was a balance against him for taxes collected in 1877. In 1881, he surrendered certain vouchers for payments he had made, and a portion of the credits to which this entitled him was applied by the town in settlement of the balance against him for 1877. Held, that the sureties on the bond given in 1879 could not object to this application of the credit without first

proving that the money, with which the vouchers were paid, came to the sergeant's hands during his second term, and that this was known to the town when it made the application. *Grafton v. Reed*, 34 W. Va. 172.

In a suit against the bondsman of the treasurer of a lodge, it appeared that the treasurer's term expired March 26, 1886, when he held \$748.23 of the lodge's fund. On that day he was re-elected, but, failing to qualify and give a new bond, another was elected, and on May 1 demanded the moneys, which demand was not complied with. The court held, that the surety was liable, without proof that the actual default occurred before the end of the original term. *Black v. Oblender*, 135 Pa. St. 526.

See also, in general, on this subject, *State v. Powell*, 40 La. Ann. 241; *Holt v. McLean*, 75 N. Car. 347; *Flores v. Howth*, 5 Fed. 329; *Com. v. Fairfax*, 4 Hen. & M. (Va.) 208; *South Carolina Soc. v. Johnson*, 1 McCord (S. Car.) 41; 10 Am. Dec. 644; *Railroad v. Murrell*, 11 Heisk. (Tenn.) 715; *Welch v. Seymour*, 28 Conn. 387; *Sparks v. Farmers' Bank*, 3 Del. Ch. 274; *Kingston Mut. Ins. Co. v. Clark*, 33 Barb. (N. Y.) 196; *Fresno Enterprise Co. v. Allen*, 67 Cal. 505; *Riddel v. School Dist. No. 72*, 15 Kan. 168; *Savings Bank v. Hunt*, 72 Mo. 597; *St. Louis Union Soc. v. Mitchell*, 26 Mo. App. 206; *Long v. Seay*, 72 Mo. 648; *Lionberger v. Krieger*, 13 Mo. App. 313; *State v. Kurtzeborn*, 78 Mo. 98; *Moss v. State*, 10 Mo. 338; 47 Am. Dec. 116; *Mutual Loan, etc., Assoc. v. Price*, 16 Fla. 204; *Urmston v. State*, 73 Ind. 175; *State v. Wayman*, 2 Gill & J. (Md.) 254; *Mayor v. Horn*, 2 Harr. (Del.) 190; *Com. v. Hughes*, 10 B. Mon. (Ky.) 160; *Norridgewock v. Hale*, 80 Me. 362; *Heuitt v. State*, 6 Har. & J. (Md.) 95; *Scott Co. v. Ring*, 29 Minn. 398; *Lauderdale Co. v. Alford*, 65 Miss. 63; *Dover v. Twombly*, 42 N. H. 59; *Mayor, etc., of Rahway v. Crowell*, 40 N. J. L. 207; *Kellum v. Clark*, 97 N. Y. 390; *Bissell v. Saxton*, 66 N. Y. 55; 77 N. Y. 191; *Board of Education v. Fonda*, 77 N. Y. 350; *Governor v. Coble*, 2 Dev. (N. Car.) 489; *Miller v. Davis*, Ired. (N. Car.) 198; *Thomas v. Summey*, 1 Jones (N. Car.) 554; *Richardson v. Smith*, 2 Jones (N. Car.) 8; *Holloman v. Langdon*, 7 Jones (N. Car.) 49; *State v. Galbraith*, 65 N. Car. 409; *Gregory v. Morisey*, 79 N. Car. 559; *State v.*

Although the liability of the surety is usually limited to defaults which may occur in the first term of the principal, yet the bond may be so worded as to cover defaults occurring in subsequent periods or terms.¹ In some cases the surety is

Crooks, 7 Ohio, pt. 2, 221; Com'rs of Public Accounts v. Greenwood, 1 Desaus. Eq. (S. Car.) 450; Atkins v. Baily, 9 Yerg. (Tenn.) 111; Yoakley v. King, 10 Lea (Tenn.) 67; U. S. v. Kirkpatrick, 9 Wheat. (U. S.) 720; U. S. v. Nicholl, 12 Wheat. (U. S.) 505; Sthresley v. U. S., 4 Cranch (U. S.) 169; U. S. v. January, 7 Cranch (U. S.) 572; U. S. v. Spencer, 2 McLean (U. S.) 265; Tyler v. Nelson, 14 Gratt. (Va.) 214; Potter v. School Trustees, 11 Ill. App. 280; State v. Churchill, 48 Ark. 426; State v. Alsup, 91 Mo. 472; Happe v. Johnson, 73 Cal. 265; Barry v. Screwmens Ben. Assoc., 67 Tex. 250; People v. Toomey, 122 Ill. 308; Carlon v. Dixon, 14 Oregon 293; Jordan v. La Vine, 15 Oregon 329; 15 Pac. Rep. 281; Humboldt Sav., etc., Soc. v. Wennerhold (Cal. 1889), 20 Pac. Rep. 553; Mutual Loan, etc., Assoc. v. Price, 19 Fla. 127; Hannibal Savings Bank v. Hunt, 72 Mo. 597; Raper v. Sangamon Lodge, 91 Ill. 518; Myers v. Farmer, 52 Iowa 20; Phillips v. Singer Mfg. Co., 88 Ill. 305; Finch v. State, 71 Tex. 52; Phillips v. Bossard, 35 Fed. Rep. 99; Newcomer v. State, 77 Tex. 286; Polk v. State, 77 Tex. 289; Black v. Oblender, 135 Pa. St. 526.

1. In *People's Bldg. Assoc. v. Wroth*, 43 N. J. L. 70, the office of the treasurer of a corporation was annual. His sureties executed a bond conditioned for his good behavior during his continuance in office, "whether of the present term for which he has been elected, or of any succeeding terms to or for which he may be elected." The court held that the liabilities of the sureties continued after the second term.

In *Oswald v. Mayor, etc., of Berwick-upon-Tweed*, 5 H. of L. Cas. 856, Murray was elected treasurer of the borough of Berwick for the year ending November 9, 1842, "if it should so long please the said council, but not otherwise." He gave bond with sureties for the due discharge of the duties of his office. The bond recited the election, and was conditioned for the due accounting by Murray for all such moneys, etc., "as I, the said Murray, shall or may recover, or receive, in virtue of my said appointment as treas-

urer as aforesaid, during the whole time of my continuing in the said office in consequence of the said election, or under any annual or other future election of the said council, to the said office." After this bond was given, an act of Parliament was passed, which directed that, instead of the treasurer being annually elected he should "hold his office during the pleasure of the council for the time being." Murray was re-elected after this act was passed, but did not give a new bond. The court held that the sureties continued liable under the original bond.

In *Daly v. Com.*, 75 Pa. St. 331, it appeared that the commission of an auctioneer did not necessarily expire at the end of one year, but under a statute might continue for at least three years without a renewal of his bond. Martin applied for appointment as auctioneer, and gave bond conditioned that he should perform all the duties of an auctioneer, "during the period he shall continue to act as auctioneer under the commission that may be granted him." He was afterwards commissioned for one year. The court held that the liability of the sureties did not expire in one year, but continued while he acted as auctioneer.

In *Augero v. Keen*, 1 M. & W. 390, a bond given to secure the faithful performance of the office of a collector of parochial rates (who was by act of Parliament to be appointed by trustees for a year, and then to be capable of re-election) was conditioned, that, from time to time, and at all times thereafter, during such time as he should continue in his said office, whether by virtue of his said appointment, or of any reappointment thereto, or of any such retainer or employment by or under the authority of the said trustees, or their successors, to be elected in the manner directed by the said act, he should use his best endeavors to collect the moneys received by means of the rates, in the then present or in any subsequent year," etc. *Held*, that the obligation of the bond was not confined to the year for which he was continuously reappointed.

Though the secretary of a saving society was chosen by the directors, the ten-

relieved from liability, where, during the continuance of the term, the circumstances of the employment or the conditions upon which the office is held, are changed.¹

4. Liability for Different and Additional Funds.—A surety is not liable for the misappropriation of a fund by the principal, unless the fund misappropriated is the very one designated by the contract.² But the surety is bound for the misappropriation of a

ure of his office did not depend on their official terms, which was one year; but as they were authorized by the by-laws to fix his term of office, and to summarily dismiss him, they could, by electing him once, without further action, continue him in office indefinitely, and during such continuance his sureties were liable. *Humboldt Sav., etc., Soc. v. Wennerhold*, 81 Cal. 528. See also *U. S. v. Truesdell*, 2 Bond (U. S.) 78; *Mayor of Birmingham v. Wright*, 16 Q. B. 63; *Jacobs v. Hill*, 2 Leigh (Va.) 393; *Dedham Bank v. Chickering*, 3 Pick. (Mass.) 335; *Worcester Bank v. Reed*, 9 Mass. 267; 6 Am. Dec. 65; *Louisiana State Bank v. Ledoux*, 3 La. Ann. 674; *Evans v. Earle*, 1 H. & G. 1; *Bank of British North America v. Cu villier*, 14 Moore Privy Council Cas. 187; *Milwaukee Co. v. Schandeln*, 70 Wis. 352; *Sparks v. Farmers' Bank*, 3 Del. Ch. 274; *U. S. v. Jameson*, 3 McCrary (U. S.) 620; 16 Fed. Rep. 331; *Fox v. McCord*, 54 Iowa 346; *Long v. Seay*, 72 Mo. 648; *Whitmire v. Langston*, 11 S. Car. 381.

1. Where the principal was re-employed at an increased salary, the surety was held not liable for a subsequent default. *Bamford v. Iles*, 3 Exch. 380; and it was so held where an officer was appointed to hold office during the pleasure of the governor, but by statute was given a fixed term. *Queen v. Hall*, 1 Up. Can. C. P. 406; where the charter of a bank to which a cashier's bond was given, was extended, *Thompson v. Young*, 2 Ohio 335; *Bank of Washington v. Barrington*, 2 P. & W. (Pa.) 127; where the service of the principal was not continuous, *Middlesex Mfg. Co. v. Lawrence*, 1 Allen (Mass.) 339; where a partnership doing a banking business was subsequently incorporated, *Dance v. Girdler*, 1 B. & P. N. R. 34; *Bensinger v. Wren*, 100 Pa. St. 500.

2. *State v. Estes*, 101 N. Car. 541; *Graeter v. DeWolf*, 112 Ind. 1; *Fraser v. Little*, 13 Mich. 195; 87 Am. Dec.

741; *Clark v. Bush*, 3 Cow. (N. Y.) 151; *Showles v. Freeman*, 81 Mo. 540.

Different Funds.—In *Leigh v. Taylor*, 7 B. & C. 491; 14 E. C. L. 93, the bond of an overseer of the poor provided that he should account for all such sums of moneys as should come into his hands by virtue of his office of overseer. The court held that his sureties were not liable for moneys which he borrowed without authority, and applied to parochial purposes, but for which he failed to account.

In *U. S. v. White*, 4 Wash. (U. S.) 414, it was held that the sureties on a bond for the conduct of an agent in paying invalid pensions are not answerable for his defaults with reference to the payment of navy and privateer pensions, although he is also agent for the payment of the latter pensions.

In *U. S. v. Morgan*, 28 Fed. Rep. 48, the court, by Brown, J., said: "The defendants in this action, who are the sureties in Mr. Morgan's bond for 'the faithful discharge of his duties,' are answerable only for his acts as a disbursing agent, as chief of the bureau of accounts in the Department of State. Besides performing this duty, Mr. Morgan, at the same time, by the direction of the Secretary of State, received moneys for the issuing of passports, to the amount of from eleven to fifteen hundred dollars per month. His acts in the latter capacity, it is conceded, were independent of his duties as disbursing clerk, and the sureties in his bond are in no way answerable for any misappropriation of the passport moneys."

The bond of the secretary of a savings society was conditioned that he should "during all the time he shall hold said office, well and truly serve said corporation as such secretary," and "well, truly, and honestly perform and discharge all his said duties as such officer, and do all things required of him by the by-laws of said corporation." The by-laws required him to keep on hand all the moneys, securities, or property, received by him on account

of the society, until the same were disposed of by direction of the board of directors, and that he should not use, loan, exchange nor otherwise dispose of the same. The court held that the sureties were not liable for moneys taken by the secretary from bags in the society's vault, which had been set aside for borrowers who had executed notes and mortgages for its payment, and who were being charged interest thereon by the society, there being no entries of the money as that of the society. *Humboldt Sav., etc., Soc. v. Wennerhold*, 81 Cal. 528.

The owner of a note pledged to secure, in part, advances to another person, provided the same do not exceed a certain sum over and above another sum, to be previously advanced, cannot be charged with a balance on further advances after the first one has been made. *Stewart v. Levis*, 42 La. Ann. 37.

The sureties on the bond of an insurance agent conditioned that he should account for all money that shall come into his hands as such, are not liable for moneys advanced by the company itself to the agent for the purpose of enabling him to carry on the business of the agency; such advances constituting a personal transaction between the company and the agent which the condition of the bond does not cover. *Burlington Ins. Co. v. Johnston*, 24 Ill. App. 565; *affirmed*, 120 Ill. 622.

The condition of a bond of an insurance agent was that he should faithfully discharge his duties as agent of the company, and deliver and pay over all property and money coming to his hands as such. The agreement for his appointment as agent provided that he might draw for his services at a specified rate per year, payable monthly, and at the expiration of the year any amount due him should be paid, and any amount overdrawn by him returned. *Held* that in the absence of express knowledge of this agreement, the surety on the bond was not liable for excess of advances for salary or commissions retained by the agent under the agreement. *John Hancock Mut. L. Ins. Co. v. Loewenberg*, 120 N. Y. 44.

The contract between an insurance company and its agent did not require it to advance money to him. It did so, however. *Held*, that the sureties on a bond conditioned for the faithful per-

formance of the contract were not liable for money so advanced him and not repaid. *Burlington Ins. Co. v. Johnston*, 120 Ill. 622.

Where a clerk of court is liable only for money coming to his hands "by virtue or color of his office," as by the former *North Carolina* law, the sureties on his official bond cannot be held for his default in the management of a receivership, the order of his appointment not naming him as clerk. *Syme v. Bunting*, 91 N. Car. 48.

Where a defaulting city treasurer had mixed together the moneys belonging to two separate funds, for only one of which his bondsmen were security, it will be presumed that he embezzled a *pro rata* proportion of each fund. *Britton v. Ft. Worth*, 78 Tex. 227.

In *Napier v. Bruce*, 8 C. & F. 470, it was held that money received by an agency, but not in pursuance of the particular agency, disclosed to the surety by the specified conditions in the bond, was not covered by the surety's obligation, "that during the whole time the said . . . (agent) shall continue to act as agent as aforesaid in consequence of the above-recited agreement, he shall well and truly account for and pay to us (the employers) all sums of money received by him on our account."

In *U. S. v. Cheeseman*, 3 Sawy. (U. S.) 424, it appeared that the assistant treasurer of the *United States* and treasurer of the branch mint at San Francisco gave a bond which provided that he should faithfully discharge the duties of his office and all "other duties as fiscal agents of the government which may be imposed by this or any other act." The act of 1864 provided that stamps might be furnished to assistant treasurers, and that a bond for the payment of the stamps might be required from them. The assistant treasurer at San Francisco obtained stamps for which he gave no new bond, and did not pay for them. The court held that the sureties on the general bond were not liable for the stamps.

The sureties of a trustee for the benefit of creditors are liable for his failure to pay over the amount allowed on a creditor's claim, which the trustee was employed as attorney to establish, if he was not also employed to collect the same, and made no separation of the fund in his hands. *Taylor v. State*, 73 Md. 208.

mere increase of the same fund.¹ He is not, however, liable for

In *Com. v. Toms*, 45 Pa. St. 408, it was held that the sureties in a bond given by the register of wills for the faithful execution of his duties and the payment of all moneys received for the use of the commonwealth, are not responsible for collateral inheritance taxes collected, but not paid over by him.

As against a surety, a contract cannot be carried beyond the strict letter of it, and it cannot be extended by equitable construction. But where one A mortgaged to B his part of certain property conveyed to him by C, which had been included in a mortgage made by C to B, and also other property, to secure B for his indorsement, held, that, as respects A, he, by express contract, made his property liable beyond the sum expressed in the original mortgage from C to B. *Chase v. McDonald*, 7 Har. & J. (Md.) 160.

See, to the same effect, *State v. White*, 10 Rich. (S. Car.) 442; *Nolley v. Callaway Co. Ct.*, 11 Mo. 447; *People v. Hilton*, 36 Fed. Rep. 172; *McKee v. Griffin*, 66 Ala. 211; *Branch v. Com.*, 2 Call (Va.) 510; *Smith v. Stapler*, 53 Ga. 300; *Saltenbury v. Loucks*, 8 La. Ann. 95; *People v. Pennock*, 60 N. Y. 421; *Sutherland v. Carr*, 85 N. Y. 105; *Linch v. Litchfield*, 16 Ill. App. 612; *Urmston v. State*, 73 Ind. 175; *San José v. Welch*, 65 Cal. 358; *Galbraith v. Duncombe*, 28 Grant's Ch. (N. C.) 27; *Keith v. Fenelon Falls Union Scholl*, 3 Ont. 194; *Attenstein v. Alpaugh*, 9 Neb. 237; *U. S. v. Cheeseman*, 3 Sawy. (U. S.) 424.

1. Increase of Fund.—Thus, where a treasurer of a municipality lends the municipal funds, as treasurer, the interest collected by him on the loans is part of the funds of the city, for any misappropriation of which his sureties are liable. *Hunt v. State*, 124 Ind. 306. See also *Wheeling v. Black*, 25 W. Va. 266; *Richmond Co. v. Wandel*, 6 Lans. (N. Y.) 33; *Comstock v. Gage*, 91 Ill. 328; *Chicago v. Gage*, 95 Ill. 593; 35 Am. Rep. 182.

In *People v. Backus*, 117 N. Y. 196, the defendants, officers of a bank, guaranteed the payment of all deposits of "certain moneys" of the state proposed to be deposited with the bank by the warden of the state prison. The laws of *New York* then in force required the warden of the state prison to deposit all moneys received by him

from any source of prison income in the bank. By a subsequent change made by statute in the labor system of the prison, the amount of money deposited in the bank by the warden was largely increased. *Held*, that the guaranty covered deposits made after such increase.

In *Curtis v. U. S.*, 100 U. S. 119, the *United States*, in an action against the sureties of a paymaster in the army, assigned as a breach of the conditions of his official bond, that he did not, when thereunto required, refund \$3,320.02, with interest. He rendered his account Nov. 30, 1865, when he left the service, and shortly thereafter died. On the subsequent adjustment of his account at the Treasury Department, that sum was found to be due at said date. No demand therefor was made of his personal representatives, and the sureties had no notice of the claim before the service of the writ in the action. The adjustment was the only evidence of the sum due. The court held that the *United States* was entitled to recover that sum, but with interest only from the date of such service.

Though the principal on a bond for a debt bearing interest must pay interest, the surety is bound to pay it only from default, if but a surety for the debt. *Dorsett v. Lambeth*, 6 La. Ann. 51.

Partial payments having been made by the sureties on a cashier's bond, they are to be applied by deducting them from the penalty of the bond, and allowing interest on the balance from the commencement of the suit; but interest is not allowed to sureties on the payments. *McGill v. Bank of United States*, 12 Wheat. (U. S.) 512.

A surety on a bond cannot be held liable for more than the penal sum named therein, with interest. *Westbrook v. Moore*, 59 Ga. 204.

See also *U. S. v. Poulson*, 30 Fed. Rep. 231; *Hunt v. State*, 24 N. E. Rep. 887; *Cassady v. Trustees of Schools*, 105 Ill. 561; *Hamilton v. Van Rensselaer*, 43 Barb. (N. Y.) 117; *McIntosh v. Likens*, 25 Iowa 555; *Bank of Brighton v. Smith*, 12 Allen (Mass.) 243.

A surety is liable for liquidated damages above the principal sum if the contract so provides. *Gridley v. Capen*, 72 Ill. 11; and for costs, Mayor, etc., of N. Y. *v. Ryan*, 9 Daly (N. Y.) 316; for a penalty, *Odd Fellows v. Morrison*, 42 Mich. 521; for commissioners

a greater sum than his principal.¹ A surety may, however, at the time he executes the instrument creating the contract, limit his liability as between himself and others who signed with him, to a specific sum, and in such case his liability will not extend beyond the sum set opposite to his name.²

and attorneys' fees, *First Nat. Bank v. Breese*, 39 Iowa 640.

Costs.—A general and indefinite suretyship extends to all the accessories of the principal obligation, and even to the costs of suit. *Scully v. Hawkins*, 14 La. Ann. 183.

An undertaking by parties to pay all costs and damages that may be awarded against the plaintiff, in an action wherein the defendant is arrested and imprisoned, includes as well costs incurred upon an application for a new trial as those incurred in the trial itself; and so, in an action for the penalty, the plaintiffs in the original suit having paid the costs of such application as well as those of the trial, the defendant's sureties were properly allowed credit therefor upon the amount of such penalty. *Furber v. McCarthy*, 12 N. Y. Supp. 794.

A surety in an undertaking "for the payment of such sum as from any cause may be adjudged against the plaintiff," is liable for the costs of the action. *Jordan v. La Vine*, 15 Oregon 329.

Sureties for the prosecution of a suit are bound for the costs accruing before, as well as after, the execution of the bond. *Wilson v. Hudspeth*, 3 Dev. (N. Car.) 57.

A person engaging as surety for a building contractor, will be liable for the costs of a suit to establish a mechanic's lien on the building, but not for costs incurred in the advertisement and sale of the property under the lien, it being the duty of the owner of the property, with respect to the rights of such surety, to pay off the lien, and avoid the incurrence of said expenses. *La Fayette Mut. Bldg. Assoc. v. Kleinhoffer*, 40 Mo. App. 388.

New York Code Civil Proc., § 559, providing for an undertaking with sureties to procure an order of arrest "that if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to the order of arrest, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of

the arrest, not exceeding" the sum of \$250, means that "all costs" and "all damages" shall be taken in conjunction; and, where costs have been paid to the extent of the sum specified in the undertaking, the sureties are not further liable for damages. *Sutorius v. Dunstan*, 13 N. Y. Supp. 601.

For other cases as to costs, see *Woolley v. Van Volkenburgh*, 16 Kan. 20; *Wright v. Sewall*, 9 Rob. (La.) 128; *Woodstock Bank v. Downer*, 27 Vt. 539; 65 Am. Dec. 210; *Stuckey v. Crosswell*, 12 Rich. (S. Car.) 273; *Mosher v. Hotchkiss*, 3 Abb. App. Dec. (N. Y.) 326.

1. In *U. S. v. Allsbury*, 4 Wall. (U. S.) 186, suit was begun against the principal and one surety, on a paymaster's official bond, and judgment for \$10,000 recovered. Afterwards suit was brought against another surety on the bond, and a greater recovery than \$10,000 claimed. The court held that, as the liability of the principal was fixed at \$10,000 by the first judgment, the surety in the last suit could not be held liable for more. The court, by Nelson, J., said: "It is unnecessary to refer to the authorities to show that the liability of the surety cannot exceed that of his principal; and that amount having been fixed by a judgment at law, it formed the rule to determine the sum to be recovered in this suit. The verdict and judgment were competent evidence on behalf of the surety for this purpose; indeed, the highest evidence of the fact."

A surety on a bond is never liable beyond the penalty of the bond. *Briggs v. Cramer*, 5 N. J. L. 498; *Clark v. Bush*, 3 Cow. (N. Y.) 151; *Fairlie v. Lawson*, 5 Cow. (N. Y.) 424; *Rayner v. Clark*, 7 Barb. (N. Y.) 581; *Delo v. Banks*, 101 Pa. St. 458; *Kemball v. Baker*, 62 Wis. 526; *Stull v. Lee*, 70 Iowa 31; *Lombard v. Mayberry*, 24 Neb. 674; *Ball v. Watertown F. Ins. Co.*, 44 Mich. 137.

Therefore, where a surety is sued on an appeal bond, he has a right to pay into court the amount of the penalty and costs, and have the proceedings stayed. *Oshiel v. De Graw*, 6 Cow. (N. Y.) 63.

2. *New Orleans v. Waggaman*, 31

5. Particular Business or Office.—Where a person is surety for the act of a principal engaged in a particular business, he will not be bound by any transaction of the principal in another business;¹ and the same rule applies where the principal acts in another office or capacity from that designated in the contract of suretyship,² or where his responsibilities in the same office are

La. Ann. 299; *Marcy v. Praeger*, 34 La. Ann. 54; *Floriat v. Handy*, 35 La. Ann. 816; *Vermillion Parish v. Brockshier*, 31 La. Ann. 736; *State v. Hampton*, 14 La. Ann. 690; *Thomas v. State*, 13 Tex. App. 496; *Fulton v. State*, 14 Tex. App. 32; *Mathena v. State*, 15 Tex. App. 460; *Cordray v. State*, 55 Tex. 140; *Westbrook v. Moore*, 59 Ga. 204; *Mayor, etc., of N. Y. v. Ryan*, 9 Daly (N. Y.) 316; *People v. Slocum*, 1 Idaho N. S. 62; *Houck v. Graham*, 123 Ind. 277; *Butte v. Cohen*, 9 Mont. 435; *Commerical Nat. Bank v. Gorham*, 11 R. I. 162; *Stetson v. City Bank*, 12 Ohio St. 577; *Doud v. Waller*, 48 Iowa 634; *Gay v. Hults*, 56 Mich. 153.

Where a party became surety for one-third of a debt, and another party became surety for two-thirds thereof, a part of which was subsequently discharged by the payment of a portion of a judgment recovered thereon, held that neither of the sureties could insist upon the application of the entire amount paid to the release of his liability. The amount so recovered and paid should be deducted from the entire debt, whereupon the sureties would be liable for the remainder, in the proportion of their liability upon the original debt. *Doud v. Waller*, 48 Iowa 634.

Where ten sureties bind themselves severally and not jointly in the sum of \$2,000 each on the bond of an officer, and the principal becomes a defaulter, each surety is liable for the full amount of \$2,000 so long as the unsatisfied defalcation of the principal exceeds that amount, although the defalcation does not amount to \$20,000. *Bank of Brighton v. Smith*, 12 Allen (Mass.) 243.

1. Sureties upon the bond of an agent for the sale of goods belonging to the obligee, are not bound by the acts of a partnership of which such agent subsequently becomes a member, conducting the same business with the consent of the obligee. *White Sewing Mach. Co. v. Hines*, 61 Mich. 423.

The sureties of a contractor are not liable to the creditors of a sub-contractor. *Faurote v. State*, 110 Ind. 463.

2. In *National, etc., Banking Assoc. v. Conkling*, 90 N. Y. 116, suit was brought against the sureties of a bank bookkeeper. The bond was conditioned for the faithful performance of the duties "of such bookkeeper as aforesaid, or whilst engaged in any other office, duty or employment, relative to the business thereof." The court, by Earl, J., said: "The recital in the conditions of the bond shows that the principal had been appointed to the office of bookkeeper; that he had accepted that office and consented to perform the duties thereof. That was the office brought to the attention of the sureties, and which they had in mind when they executed the bond. The recital in such bonds, undertaking to express the precise intent of the parties, controls the condition or obligation which follows, and does not allow it any operation more extensive than the recital which is its key; and so it has been held in many cases. In *London Assur. Co. v. Bold*, 6 Q. B. 514; 51 E. C. L. 514, the court, by Wightman, J., said: 'In truth the recital is the proper key to the meaning of the condition.' In *Hassell v. Long*, 2 M. & S. 370, the court, by Ellenborough, C. J., said that the words of the recital of a bond afforded the best ground for gathering the meaning of the parties. In *Pearsall v. Summersett*, 4 Taunt. 593, it was held, as expressed in the head note, that the extent of the condition of the indemnity bond may be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplate. See *Peppin v. Cooper*, 2 B. & Ald. 431; *Barker v. Parker*, 1 T. R. 287; *Liverpool Waterworks Co. v. Atkinson*, 6 East 507; *Tradesmen's Bank v. Woodward*, Anth. N. P. (N. Y.) 300. Here the sureties undertook for the fidelity of their principal only while he was bookkeeper; but if while bookkeeper the duties of any other office, trust, or employment relating to the business of the bank were assigned to him, their obligation was also to extend to the discharge of

those duties. While bookkeeper he might temporarily act as teller, or discharge the duties of any other officer during his temporary illness or absence, or he might discharge any other special duty assigned to him, and while he was thus engaged the bank was to have the protection of the bond. There are no words binding the sureties in case of the appointment of their principal to any other office. They might have been willing to be bound for him while he was bookkeeper, or temporarily assigned to the discharge of other duties, but yet not willing to be bound if he should be appointed teller or cashier, and as such, placed in the possession or control of all the funds of the bank. This is a case where the general words subsequently used must be controlled and limited by the recital. A surety is never to be implicated beyond his specific engagement, and his liability is always *strictissimi juris*, and must not be extended by construction. His contract must be construed by the same rules which are used in the construction of other contracts. The extent of his obligation must be determined from the language used, read in the light of circumstances surrounding the transaction. But when the intention of the parties has thus been ascertained, then the courts carefully guard the right of the surety, and protect him against a liability not strictly within the precise terms of his contract."

The surety in a bond for the fidelity of a bank cashier "as long as he shall remain in the service of said bank," "under the present election or any subsequent election," is not liable for defaults occurring after the directors have ceased to re-elect annually according to act *Pennsylvania* March 29, 1851, and merely permit the cashier to hold over, without re-election. *Shackamaxon Bank v. Yard*, 8 Pa. Co. Ct. Rep. 239.

In *Bonar v. MacDonald*, 3 H. L. Cas. 226, a clerk in a bank, upon having his salary raised, agreed to become liable for one-fourth of the discounts. *Held*, that the surety of the clerk was not liable for anything occurring after the change in the terms of the clerk's employment.

Where an assistant bookkeeper is made note teller of a bank, his sureties are discharged. *First Nat. Bank v. Gerke*, 68 Md. 449.

Where, in an action on a bond given for the faithful performance of

duties as bookkeeper by one who afterwards became cashier, it appears that the first fraudulent entry in the books appeared after the principal was appointed cashier, and had assumed the duties of the office, and it does not appear whether he continued to act as bookkeeper also, it is a question for the jury whether the embezzlement was committed as bookkeeper or cashier. *American Dist. Tel. Co. v. Lennig*, 139 Pa. St. 594.

In *Gass v. Stinson*, 2 Sumn. (U. S.) 453, the defendant Stinson, being warden of the state prison of *New Hampshire*, appointed James as agent for the sale of granite for the said prison, with power to sell the granite and collect the moneys arising from the sales. Gass was the surety of James. *Held*, that a change in the relation between Stinson and James from that of the agency in the sale of granite to third persons, to that of a conditional purchase, or sale and return, would amount to a discharge of the surety.

In *Boston Hat Mfg. Co. v. Messenger*, 2 Pick. (Mass.) 223, A, B, C gave a bond conditioned that A as agent of a hat manufacturing company, should faithfully discharge the duties of that office during his continuance therein, and account and surrender whatever funds, stock or money he should have in his hands, whenever thereto requested. When the bond was given, A had charge of a store belonging to the company, and his duty was to deliver hats to the proprietors, keep accounts with them, receive their promissory notes and deliver them to the treasurer of the company, and to sell to other persons, for which services he received a commission, he guarantying debts of sales by retail. In 1816, the company voted that the store should be given up; that a contract should be made with some person to dispose of the hats in future, in such way as should best promote the interest of the concern, and that the imperfect hats in the store should be sold by auction. A then agreed to deliver the hats in cases from his own store, and he was to be supplied at wholesale prices with hats for retailing on his own account, and was to keep the books and accounts with the company. It was held that the acts of A under this new agreement were not covered by the bond.

Where a bond was given, condi-

increased.¹ But sureties are not relieved because other duties were imposed upon the principal, unless loss resulted from the performance of the other duties.²

tioned for the faithful performance of the duties of the office of deputy collector of direct taxes for eight certain townships, and the instrument of the appointment, referred to in the bond, was afterwards altered, so as to extend to another township, without the consent of the sureties, held, that the surety was discharged from his responsibility for moneys subsequently collected by his principal. *Miller v. Stewart*, 9 Wheat. (U. S.) 680.

A surety for the agent of an insurance company, not authorized to engage in banking, is not liable for an embezzlement by the agent, committed while conducting the banking operations of the corporation. *Blair v. Perpetual Ins. Co.*, 10 Mo. 559.

L executed a bond faithfully to do duty as ticket agent at a certain station, but the railroad being overflowed, the receiver discontinued L's salary, and sent him to another parish to superintend a skiff line. *Held*, that L's sureties were not liable for a loss caused by L's misconduct in the last position. *Green v. Locke*, 31 La. Ann. 656.

See also *Ludlow v. Simond*, 2 Cal. Cas. (N. Y.) 1; 2 Am. Dec. 291; *Crist v. Burlingame*, 62 Barb. (N. Y.) 351; *McCluskey v. Cromwell*, 11 N. Y. 593; *Gates v. McKee*, 13 N. Y. 232; 64 Am. Dec. 545; *Rochester City Bank v. Elwood*, 21 N. Y. 88; *Pybus v. Gibb*, 38 Eng. L. & Eq. 57; *Skillett v. Fletcher*, L. R., 2 C. P. 469; *Bank of Upper Canada v. Covert*, 5 Up. Can. K. B. O. S. 541; *Home Sav. Bank v. Traube*, 75 Mo. 199; 42 Am. Rep. 402; *Fond du Lac Harrow Co. v. Bowles*, 54 Wis. 425; *White Sewing Mach. Co. v. Mullins*, 41 Mich. 339; *Singer Mfg. Co. v. Hibbs*, 21 Mo. App. 574; *Grocers' Bank v. Kingman*, 16 Gray (Mass.) 473; *Lionberger v. Krieger*, 88 Mo. 160; *Milwaukee Co. v. Schandeln* (Wis.), 35 N. W. Rep. 337; *Bensinger v. Wren*, 100 Pa. St. 500; *Jennery v. Olmstead*, 90 N. Y. 363; *Manufacturers' Bank v. Dickerson*, 41 N. J. L. 448; *Rapier v. La. Equit. L. Ins. Co.*, 56 Miss. 100; *Equitable L. Assur. Soc. v. Coats*, 44 Mich. 260; *Noyes v. Granger*, 51 Iowa 227; *Collier v. Southern Express Co.*, 32 Gratt. (Va.) 718.

1. In *Grocers' Bank v. Kingman*, 16 Gray (Mass.) 474, it was held, that the sureties on a cashier's bond, in which they undertake to save the bank harmless from every loss that may arise from the cashier's mistakes, as well as from the losses arising from his fraud, inattention or negligence in the performance of his duties, are exonerated, by an increase of the capital stock of the bank after the making of the bond, from liability for acts of the cashier after the additional capital has been paid it. But see *Morris Canal, etc., Co. v. Van Vorst*, 21 N. J. L. 100.

In *Bartlett v. Attorney Gen'l, Park*, 277, a bond given as security for a collector of customs was held not to extend to a new duty laid on certain articles after the bond was given; and it was decided that the collector's sureties were not liable for his default in not paying the duties received by him on those articles.

2. In *Home Sav. Bank v. Traube*, 75 Mo. 199; 42 Am. Rep. 402, an action was brought against sureties of the bookkeeper of a bank. The bank also employed the bookkeeper as teller. The case was referred to a referee who found "that the ordinary duties of bookkeeper of a bank do not require him to handle or have charge of any money, and that the ordinary duties of a teller of a bank require him to handle all the money—in other words, that as a bookkeeper he handled no money of plaintiff, while as teller he handled it all; and that as teller he was afforded opportunities and exposed to the temptations to take and appropriate to himself the moneys of plaintiff, which were not afforded him as bookkeeper; but that his latter employment did afford him facilities for hiding his defalcations as teller by false entries in the books. I find also that the duties of a bank's teller are much more responsible, and a larger bond is required of him than in case of the bookkeeper. The losses sustained by the plaintiff by reason of the errors and misconduct of the principal, consist of losses by his act as bookkeeper, and losses by his act as bookkeeper and teller." The loss for which suit was brought resulted from the failure of the bookkeeper to enter upon the books certain

6. Liability for Rent.—Where a lease contains a provision that the lessee may at his option hold over for another year upon the same terms and conditions, the surety is liable not only for the rent which has accrued for the first year, but also for any rent which may accrue upon the tenant's holding over.¹

sums of money properly paid out by him as teller, and duly entered on the teller's books, the bank thus paying these sums the second time. The court held that the sureties were liable.

In *Mayor, etc., of N. Y. v. Kelley*, 98 N. Y. 467, an action was brought against a surety of the bookkeeper in the department of docks in the city of New York. The bookkeeper was required, in addition to his work at the books, to assist the treasurer in receiving and depositing the funds of the department. He embezzled by means of false entries or omissions to make entries. It appeared that the additional duties required of him did not hinder his faithful performance of the duties of bookkeeper. The court held that the question of damages was for the jury.

In *Detroit Sav. Bank v. Ziegler*, 49 Mich. 157; 43 Am. Rep. 456, suit was brought against the sureties of the receiving teller of a bank. It appeared that during the temporary absence of the general teller, the receiving teller was appointed by the cashier to perform his duties. While so employed he embezzled funds of the bank which came into his hands. The court held that his sureties were liable, though the money did not come into his possession as receiving teller.

In *Fourth Nat. Bank v. Spinney*, 120 N. Y. 560, the sureties on a bond conditioned for the faithful performance of the principal's duties as bookkeeper, "or if he shall be appointed to any other office, duty, or employment, he shall also faithfully perform" the duties of that position, are liable for his defalcation as cashier's clerk, to which position he was promoted from bookkeeper.

A bank having no officer known as "teller," appointed a clerk, the designation of his employment being left blank in his bond and in the resolution appointing him. While employed as clerk, teller or bookkeeper, as his employment might happen to be called, he made false entries in the books, and became a defaulter to a large amount. *Held*, that the sureties

on his bond were liable, although they claimed that the appointment was to the position of teller and that the bond was given to secure the performance of the appointee's duties as such. *Vogele's Appeal* (Pa. 1888), 15 Atl. Rep. 878.

The bookkeeper of a bank gave a bond with sureties conditioned for the faithful discharge of his duties "as such clerk, or in whatever capacity he may serve said bank," and for the faithful application of money to come into his hands or under his control "as such clerk." *Held*, that this bond covered defalcations committed after the bookkeeper had been made teller. *Union Dime Sav. Inst. v. Neppert*, 3 N. Y. Supp. 797; *Union Dime Sav. Inst. v. Feltz*, 4 N. Y. Supp. 607.

In an action against the sureties upon a bond, given to a bank, and conditioned for the faithful discharge by C of "all his duties as clerk of said bank," and against the misappropriation of any of the funds of the bank "which may come under the care or control of said C as clerk," the evidence showed that C, during the whole term of his employment, performed the duty, to some extent, usually performed by a teller, of paying and receiving money over the counter of the bank. It was found as a fact that "the duties as clerk," contemplated in the bond, did not mean merely the duties of the bookkeeper, but that they embraced the duty of receiving and paying out money at the counter of the bank. *Held*, that the defendants were not entitled to a ruling, as a matter of law; that there had been such a change in the duties of the clerk as to discharge them from liability. *Rollstone Nat. Bank v. Carleton*, 136 Mass. 226. See also *U. S. v. Boyd*, 15 Pet. (U. S.) 187; *Paw Paw v. Eggleston*, 25 Mich. 36; *Detroit v. Weber*, 29 Mich. 24; *Johnston v. Kimball Tp.*, 39 Mich. 187; 33 Am. Rep. 372; *Bullock v. Taylor*, 39 Mich. 137; 33 Am. Rep. 356; *State v. Cutting*, 2 Ohio St. 1; *McCluskey v. Cromwell*, 11 N. Y. 593; *Urmston v. State*, 73 Ind. 173.

1. In *Rice v. Loomis*, 139 Mass. 302,

If the demised premises are destroyed by fire, the surety is not relieved from the payment of the rent.¹

A person who signs as surety for one of the parties to an intended lease, will not be bound, if the lease itself is invalid.²

A judgment against a tenant is admissible in evidence in an action against the surety.³

The fact that the lessor named in a lease first proceeds against the lessee and collects a portion of the rent, does not change the legal character of the obligation assumed by the lessee's surety for the performance of the conditions thereof.⁴

Where a lease stipulates that the lessee will take possession at a certain time, return the premises in good order, and pay the rent, a surety, who guaranties "a compliance with the above stipulations," will be liable for the rent.⁵

a lease of a house was executed, the lessee "to hold for the term of one year" from a certain date, paying a certain rent *per annum*. The lessee covenanted to pay the rent in equal monthly installments in advance, on the first day of each month, during the tenancy, "and to pay the rent as above stated during the term, and also the rent as above stated for such further time as the lessee may hold the same." On the back of the lease was a writing, by which the signer guarantied to the lessor the payments of the rent stipulated in the lease. The court held, that if the lessee held over after the expiration of the year, and failed to pay rent for such further time, the grantor was liable.

In *Dufau v. Wright*, 25 Wend. (N. Y.) 636, it was held that when premises are demised for one year, with the privilege to the tenant to continue in possession four years longer at the same rent, the guaranty of a third person for the payment of the rent would continue during the possession of the premises by the tenant.

In *Coe v. Cassidy*, 72 N. Y. 133, it was held that a surety for a tenant is not released as to rents subsequently accruing, because of a release or an extension of the time of payment of rent due.

In *Deblois v. Earle*, 7 R. I. 26, a lessor agreed with the lessee for a renewal, at his option, at the end of the term. The surety agreed "that in case the said lessee shall neglect or refuse to pay the aforesaid rent in the manner aforesaid, I will pay the same within ten days thereafter," and was held liable for the rent the second term.

Even if the lease is defective, if the

lessee occupies the premises, the surety is liable. *Clark v. Gordon*, 121 Mass. 330; *Brewer v. Thorp*, 35 Ala. 9; *Dodge v. Burdell*, 13 Conn. 170; *White v. Walker*, 31 Ill. 422; *Voltz v. Harris*, 40 Ill. 155; *Bing v. Tyler*, 79 Ill. 248; *Kyle v. Proctor*, 7 Bush (Ky.) 493; *Penn v. Collins*, 5 Rob. (La.) 213; *Vinal v. Richardson*, 13 Allen (Mass.) 521; *Brewer v. Knapp*, 1 Pick. (Mass.) 332; *Prior v. Kiso*, 81 Mo. 241; *Farrar v. Kramer*, 5 Mo. App. 167; *Craig v. Parker*, 40 N. Y. 181; *Schufeldt v. Gustin*, 2 E. D. Smith (N. Y.) 57; *Ogden v. Rowe*, 3 E. D. Smith (N. Y.) 312; *Rugles v. Holden*, 3 Wend. (N. Y.) 216; *Turner v. Hohenthal*, 4 Jones & Spencer (N. Y.) 79; *Ellis v. McCormick*, 1 Hilt. (N. Y.) 313; *Coe v. Vogdes*, 71 Pa. St. 383; *Pleasanton's Appeal*, 75 Pa. St. 344; *Deblois v. Earle*, 7 R. I. 26; *Miller v. Stewart*, 9 Wheat. (U. S.) 680; *Taylor v. Wilkin*, L.R., 3 Exch. 303; *Holme v. Brunskill*, L. R., 3 Q. B. Div. 495.

For other cases illustrating the liability of sureties for rent, see *Decker v. Gaylord*, 8 Hun (N. Y.) 110; *Morrow v. Brady*, 12 R. I. 130; *Carbart v. Ryder*, 11 Daly (N. Y.) 101; *Potter v. Groubeck*, 117 Ill. 404; *McAlester v. Landers*, 70 Cal. 79; *Gadsden v. Quackenbush*, 9 Rich. (S. Car.) 222; *Palmer v. Purdy*, 83 N. Y. 144.

1. *Kingsbury v. Westfall*, 61 N. Y. 356.

2. *Cooney v. Biggerstaff* (Pa. 1886), 7 Atl. Rep. 156.

3. *Strong v. Giltinan*, 7 Phila. (Pa.) 176.

4. *Scott v. Swain* (Pa. 1887), 8 Atl. Rep. 24.

5. *Holden v. Tanner*, 6 La. Ann.

74.

7. Individual and Partnership Debts.—Where a surety binds himself to pay the debts of another, he is not liable for the debts of a firm of which the principal is a member,¹ and conversely,

1. In *Parham Sewing Mach. Co. v. Brock*, 113 Mass. 194, it was held that the sureties upon a bond conditioned that the principal should pay for all purchases made by him from the obligee were not liable for purchases made from the obligee by a partnership of which the principal had subsequently become a member. The court, by Endicott, J., said: "This was a material change in the conduct of the agency and the liability of the sureties. A new person was introduced, having equal powers with Delano to purchase machines and manage the business. While they might be willing to be sureties for Delano, and may have been influenced to do so from personal or family considerations, or from confidence in his integrity and business capacity, it does not follow that they can be bound, or have consented to be bound, for the acts of any one whom Delano may have taken into partnership. They have had no contract to that effect, there is no evidence of their consent to the change, and they are exonerated from liability for the purchases of the plaintiff's agent after the change."

In *Montefiore v. Lloyd*, 15 C. B. N. S. 203; 109 E. C. L. 202, the defendant executed a bond as surety to an insurance company for the fidelity of Lloyd, who was appointed an agent of the company at Adelaide, and who was about to, and afterwards did, enter into partnership (as merchants) with Fox, also an agent of the company at that place. The condition of the bond was that, if Lloyd, his heirs, executors, etc., should well and truly pay and account for all moneys received by him, the obligation should be void. *Held*, that the defendant was not responsible under this bond for moneys received by the firm of Lloyd & Fox, notwithstanding he was aware at the time he signed the bond that Lloyd was about to become partner with Fox. The court held, also, that the surrounding or "co-existing" circumstances were admissible for the purpose of explaining what might be ambiguous in the condition.

In the somewhat similar case of *London Assm. Co. v. Bold*, 6 Q. B. 514; 51 E. C. L. 514, Denman, C. J., said: "When a party makes himself surety for the conduct, not of A and B, but of A, the

stronger proof you give that he knew the relation in which A and B stood to each other, the stronger you make the inference arising from his mentioning only A. Suppose the condition recited that the two were joint agents, and then spoke only of the conduct of one, would not that be a strong proof that the suretyship was intended to apply only to the separate acts of that one?" In the same case Williams, J., said: "Engaging for the good conduct of one man, and engaging for the good conduct of two are essentially different engagements, both in ordinary understanding and in legal effect." See also *Bell v. Norwood*, 7 La. 95; *White Sewing Mach. Co. v. Hines*, 61 Mich. 423; *Connecticut Mut. L. Ins. Co. v. Scott*, 81 Ky. 540.

Where, however, the course of dealing between the creditor and the debtor is not changed by the latter's taking a partner, the liability of the surety is not affected. Thus in *Palmer v. Bagg*, 56 N. Y. 523, defendant executed a bond of indemnity conditioned that one F, who had been appointed by plaintiffs, their general agent to sell sewing machines, should account for and pay over the proceeds of sales, etc. F, after his appointment, took a partner. Plaintiffs knew of the existence of the firm and the machines were delivered at its place of business, but were all delivered on the order of F, and charged to his individual account. In an action upon the bond, the court held that the agency's means employed by F in disposing of the machines did not change his relation with his principals, so long as the latter confined their dealings to him; that the delivery of the goods at the place of business of the firm was not sufficient to establish that they changed, or intended to change, such relations; and that defendant was liable.

In *Kuhn v. Abat*, 2 Martin (La.) N. S. 168, an auctioneer who had given bonds, conducted his business in his own name and that of a partner. The court held that the sureties on the bond were liable. The court, by Mathews, J., said: "The obligation which he and his sureties contracted in consequence of the privilege granted to him by the government, ought not to be impaired by the circumstance of his hav-

a surety for a firm is not liable for the individual debts of one of the partners.¹

8. Surety in Favor of a Partnership.—A contract of suretyship entered into in favor of a partnership, continues only so long as the partnership continues, and if one of the partners withdraws or dies, the sureties are not liable for any debts subsequently contracted.²

ing conducted the affairs of his office with the aid of a partner in profits, any more than they would be if he had acted by the assistance of a hired clerk. His situation in relation to his partner did not concern the public who applied to him as an auctioneer." See also *Hayden v. Hill*, 52 Vt. 259; *Roberts v. Griswold*, 35 Vt. 496; 84 Am. Dec. 641.

1. In *Bill v. Barker*, 16 Gray (Mass.) 62, the defendant agreed to become responsible for the price of certain books, provided that a firm to which they were sold should fail to pay. Subsequently an arrangement was made between the firm and the creditor, by which, before payment for the books, one of the partners went out of business, and the other gave his individual note payable to the creditor. The court held that the surety was discharged, on the ground that the whole course of dealing between the parties had changed. See also *State v. Boon*, 44 Mo. 254; *Cremer v. Higginson*, 1 Mason (U. S.) 323.

2. Thus in *Holland v. Teed*, 7 Hare 50, under a guaranty given to a banking-house, consisting of several partners, for the repayment of such bills, drawn upon them by one of their customers, as the bank might honor and any advances they might make to the same customer, within a certain time, the court held that the guaranty ceased upon the death of one of the partners in the bank, before the expiration of the time to which the guaranty was expressed to extend. In this case it was also held, that bills accepted before the death of the partner and payable afterwards, were within the guaranty.

In *Pemberton v. Oakes*, 4 Russ. 154, A, B and C carried on a business in copartnership, which was to expire on February 19, 1807, under articles which empowered A, in case of his death during the term, to bequeath his share of the trade in favor of his wife or children. S, a customer of the bank, and a surety, covenanted that they, or one of them, would pay to A, B and C, the

survivors or survivor of them, etc., all sums, which, on, before, or until the 11th of February, 1807, should become due from the customer to A, B and C, the survivors or survivor of them, etc. A died having bequeathed his share of the concern to his executors, in trust for his children; the business continued to be carried on under the same firm as before; and his executors interfered in the management, and shared in the profits. At the time of A's death, the balance due from S to the bank was upward of 14,000 pounds; after that time S continued his dealings with the bank in the same manner as previously, paying in more than 14,000 pounds within a few weeks after A's death, but drawing out during the same period, a large sum; and these subsequent dealings were contained in the same account current with the preceding dealings. Some years afterwards, S became insolvent, being indebted to the bank in a balance of 19,000 pounds and upwards. The court held, that the surety's covenant did not extend to cover sums advanced to the customer by the bank after A's death.

In *University of Cambridge v. Baldwin*, 5 M. & W. 579, the action was debt on bond against a surety. The condition of the bond recited, that the chancellor, masters, and scholars of the University of Cambridge had appointed B, C and J their agents for the sale of books printed at their press in the university, and that the defendant had offered to enter into a bond with them as a surety; and it was conditioned, that if the said B, C and J and the survivors and survivor of them, and such other person and persons as should or might at any time or times thereafter, in partnership with them or any or either of them, act as agent or agents of the said chancellor, etc., or their successors, for the sale of books as aforesaid, did and should duly account to the said chancellor, etc., and their successors, for all books delivered or sent to them, or any or either of them for sale as aforesaid, and should pay all

On the same principle the liability of a surety who has entered into a contract of suretyship in favor of an individual, ceases when the individual takes a partner.¹

moneys which should become payable to the said chancellor, etc., in respect of such sale, then the obligation to be void, etc. The court held that by the retirement of J from the partnership of B, C and J, the defendant, as their surety, was discharged from all further liability on this bond.

See, to the same effect, *McCloskey v. Wingfried*, 29 La. Ann. 141; *Hawkins v. New Orleans Print, etc., Co.*, 29 La. Ann. 134; *Barclay v. Lucas*, 3 Dougl. 321; *Metcalf v. Bruin*, 12 East 400; *Spiers v. Houston*, 4 Bligh N. S. 515; *Dry v. Davy*, 2 P. & D. 249; *Backhouse v. Hail*, 6 B. & S. 507; 118 E. C. L. 507; *Manhattan Gas Light Co. v. Ely*, 39 Barb. (N. Y.) 174; *Gargan v. School Dist. No. 15*, 4 Colo. 53; *MacKay v. Dodge*, 5 Ala. 388; *Barker v. Parker*, 1 T. R. 287.

In a few cases and under special circumstances it has been held that a change in partnership would not affect the liability of the surety to the partnership. Thus, in *Pease v. Hirst*, 10 B. & C. 122; 21 E. C. L. 38, A, wishing to obtain credit with his bankers, prevailed upon three persons to join him in a promissory note, whereby they jointly and severally promised to pay the bankers or order 300 pounds. The bankers gave A credit in his pass book for 300 pounds on account of the note, and charged him with interest for the same yearly. Upon two of the partners retiring from the banking-house, a balance was struck between the old and new firm, and the promissory note was delivered to the new firm, but not indorsed to them. A at one time had in the hands of his bankers a balance exceeding the amount of the note. He paid interest to the banking-house annually. The court held that the note being payable to the five members of the banking-house or order, and being evidently intended to be a continuing security, the makers were liable upon it, notwithstanding a change in the members of the banking-house. The court, by Bayley, J., said: "It seems to me that plaintiffs are entitled to retain their verdict. One objection is, that this being a note in which three of the four defendants joined as sureties to a banking-house (in which the plaintiffs and Harrison were partners), the liability of

the defendants had ceased by the subsequent change in the firm. But a surety bond or instrument may be so framed as to comprehend future as well as present partners. Here by the form of the instrument none of the parties have placed themselves in the condition of sureties. They appear on the face of the instrument to be principals, and not to have confined their liability to the then existing partners in the banking-house, for the note is made payable to them or order. It was evidently intended that it should continue from time to time to be an available security to such persons as afterwards constituted the members of the house."

In *Eastern Union R. Co. v. Cochran*, 9 Exch. 197, the defendant, as surety, executed a bond, conditioned for the faithful service of a clerk to a railway company. Whilst the service continued, that company and another railway company were dissolved, and united into one company, by a statute, which provided that all bonds, etc., made or entered into with, in favor of, or by the dissolved companies should "be and remain as good, valid and effectual in favor of and against and with reference to the new company, and might be proceeded on and enforced in the same manner, to all intents and purposes, as if the last-mentioned company had been a party to and executed the same, or had been named or referred to therein instead of the persons, company or party actually named therein respectively. The court held that the defendant was liable for breaches of the bond committed by the clerk after the union of the two companies.

1. In *Wright v. Russell*, 2 W. Bl. 934. De Grey, C. J., said: "The law is, that the surety shall not be bound beyond the scope of his engagement, as understood at the time he entered into it. Where there is the least difference between the condition and the breach assigned, the surety will not be bound. Here Wright takes a clerk, when sole, with security for his good behavior in his service. He then by his own act takes in a partner. From that moment the suretyship is at an end. If there is one, there may be twenty partners taken in. Is the surety liable if Baird diso-

9. Death of Surety.—The contract of suretyship is not ordinarily terminated by the death of the surety. Where the contract is a continuing one, and the default occurs after the death of the surety, his estate is liable for the loss.¹ But where the obligation is merely a joint one, and one of the joint obligors

beys the orders of any one of those partners? Is Baird to be subject to all the obligations that arise from this new service, and the surety answerable for all? Or can the surety be called upon to insure the money of all the partners? Certainly not. I will not say how far the bond may or may not be at an end even with respect to Wright's own proper money, but it certainly cannot extend to the money of other people, which is the case now before the court."

1. "When the engagement of a surety is a contract, and not a bare authority, it is not usually revoked by his death, and his estate remains liable." 1 Brandt on Suretyship and Guaranty, 197.

In *White v. Com.*, 39 Pa. St. 167, a trustee had been dismissed from his trust, and a decree had been entered against him for the amount of the trust fund. The surety had died after proceedings commenced against the trustees, but before the making of the decree. The court held, in an action on his bond against the executors of the surety, that the contract of suretyship survived against them.

In *Knotts v. Butler*, 10 Rich. Eq. (S. Car.) 143, an estate of a surety was held liable for a default four years after his death. The court, by Wardlaw, C. J., said: "What obstructs one from indemnifying against the consequences of an event which may not happen for more than four years after his death, more than giving his promissory note, which may not reach maturity for more than four years from his death? It is asked how long such a guaranty shall continue in force, and the answer is, until it be ended according to its terms."

In *Bradbury v. Morgan*, 1 H. & C. 249, the guaranty was as follows: "I request that you will give credit in the usual way of your business to Henry Jones Leigh; and in consideration of your doing so, I hereby engage to guaranty the regular payment of the running balance of his account with you, until I give you notice to the contrary, to the extent of one hundred pounds' sterling." The court held that the guaranty was not a bare authority, but a contract, and therefore the ex-

ecutor of the guarantor was liable for goods supplied after his death.

In *Miner v. Graham*, 24 Pa. St. 491, it was held that though in a mortgage by husband and wife of her estate for his debt, the wife is but a surety, her death does not discharge her estate from the lien of the mortgage.

In *Kernochan v. Murray*, 111 N. Y. 306, it was held that a guaranty by a partnership is not terminated by the death of the sole surviving member of the partnership.

In *Royal Ins. Co. v. Davis*, 40 Iowa 469, it was held that where a bond stipulated that the surety bound himself, his "heirs, executors and administrators," his liability was not terminated by his own death, but extended to his heirs and legal representatives.

In *Wood v. Fisk*, 4 Hun (N. Y.) 525, it was held that an action may be maintained against the estate of a deceased surety who was a party to an undertaking to stay proceedings upon a judgment during the pendency of an appeal.

In *Basken v. Andrews*, 6 N. Y. Supp. 441, it was held that the death of a surety on a note, after entry of judgment against all the makers, does not relieve his estate from the lien of the judgment.

See also *Mowbray v. State*, 88 Ind. 324; *Douglass v. Ferris*, 18 N. Y. S. 685; *Bank v. Yard (Pa.)*, 24 Atl. Rep. 635; *Home Nat. Bank v. Waterman (Ill.)*, 29 N. E. Rep. 503; *Voris v. State*, 47 Ind. 345; *Com. v. Wenrick*, 8 Watts (Pa.) 159; *Yard v. Lea*, 3 Yeates (Pa.) 344; *Moore v. Wallis*, 18 Ala. 458; *Hightower v. Moore*, 46 Ala. 387; 20 Am. Rep. 581; *Green v. Young*, 8 Me. 14; 22 Am. Dec. 218; *Menard v. Scudder*, 7 La. Ann. 385; *Hecht v. Weaver*, 34 Fed. Rep. 111; *Rapp v. Phoenix Ins. Co.*, 113 Ill. 390; 55 Am. Rep. 427; *Lloyds v. Harper*, 16 Ch. Div. 200. See *National Eagle Bank v. Hunt*, 16 R. I. 148; *Gargan v. School Dist.*, 4 Cal. 53; *Crosby v. Crafts*, 5 Hun (N. Y.) 327.

When Guaranty Revoked by Death.—

In some cases it has been held that the death of the guarantor revokes the

dies, the debt is extinguished against his representatives, and the surviving obligor is alone chargeable. In such a case the remedy at law against the estate of the joint obligor is completely lost;¹ but where it appears that the deceased obligor enjoyed part

guaranty. In *Hyland v. Habich*, 150 Mass. 112, it was held that a guaranty of the payment by another, of goods to be sold in the future, secured by a mortgage of land, is revoked by the death of the guarantor. In *England*, it is held that such a guaranty is terminated not by the death of the guarantor, but by notice of his death. *Harris v. Fawcett*, L. R., 15 Eq. 311; *Coulthart v. Clementson*, 5 Q. B. Div. 42; *Lloyds v. Harper*, 16 Ch. Div. 290. See also *Home Nat. Bank v. Waterman*, 30 Ill. App. 535.

1. The law on this subject is concisely stated by the court, by Davis, J., in *Pickersgill v. Lahens*, 15 Wall. (U. S.) 143, as follows: "It is very clear that the estate of Lafarge is discharged at law from the payment of the obligation in controversy, on the familiar principle that if one of two joint obligors die, the debt is extinguished against his representative, and the surviving obligor is alone chargeable. It is equally clear that in this class of cases, where the remedy at law is gone, as a general rule a court of equity will not afford relief, for it is not a principle of equity that every joint covenant shall be treated as if it were joint and several. The court will not vary the legal effect of the instrument by making it several as well as joint, unless it can see, either by independent testimony or from the nature of the transaction itself that the parties concerned intended to create a separate as well as joint liability. If through fraud, ignorance, or mistake, the joint obligation does not express the meaning of the parties, it will be reformed so as to conform to it. This has been done where there has been a previous equity which gives the obligee the right to a several indemnity from each of the obligors, as in the case of money lent to both of them. There a court of equity will enforce the obligation against the representatives of the deceased obligor, although the bond be joint and not several, on the ground that the lending to both creates a moral obligation in both to pay, and that the reasonable presumption is, the parties intended their contract to be joint and several, but through fraud, ignorance,

mistake, or want of skill, failed to accomplish their object.

"This presumption is never indulged in the case of a mere surety, whose duty is measured alone by the legal force of the bond, and who is under no moral obligation whatever to pay the obligee, independent of his covenant, and consequently there is nothing on which to found an equity for the interposition of a court of chancery. If the surety should die before his principal, his representatives cannot be sued at law; nor will they be charged in equity."

In *Wood v. Fisk*, 63 N. Y. 245; 20 Am. Rep. 528, it was held that upon the death of one of the two sureties in an appeal bond, his estate was discharged both in law and in equity, and the survivor alone was liable.

In *U. S. v. Price*, 9 How. (U. S.) 83, it was held that where there were joint and several bonds given for duties, and the *United States* had recovered a joint judgment against all the obligors, and then the surety died, it was not allowable for the *United States* to proceed in equity against the executor of the deceased surety for the purpose of holding the assets responsible.

In *Chard v. Hamilton*, 56 Hun (N. Y.) 259, the bond in suit was executed by E solely for the accommodation and benefit of C and H, his co-obligors, and the consideration of the bond was a balance of money due from C and H to the obligee, and all of these facts were known to the obligee at the time of the execution of the bond. This bond was executed before the enactment of *New York Code Civ. Proc.*, § 758, providing that the estate of a person jointly liable on a contract with others shall not be discharged by his death. The court held, that as E had no beneficial interest in the bond, or dealings leading up to it, and was a surety merely, to the knowledge of the obligee, and was unsecured by his principals, his estate was, by his death before the principal's, discharged of all liability in equity as well as in law.

See also *Weaver v. Shryock*, 6 S. & R. (Pa.) 262; *Kennedy v. Carpenter*, 2 Whart. (Pa.) 344; *Simpson v. Field*,

of the consideration, or that there was some moral obligation which bound all of the joint obligors, equity will interfere to enforce the obligation against the estate of the deceased surety.¹

10. Revocation by Notice.—In the absence of a stipulation in the contract, a surety or guarantor cannot relieve himself by notice of future liability for his principal.² If, however, the terms of the agreement amount to a mere offer to guaranty which are

2 Ch. Cas. 22; *McMillan v. Bull's Head Bank*, 32 Ind. 11; 2 Am. Rep. 323; *Pecker v. Julius*, 2 Browne (Pa.) 33; *Harrison v. Field*, 2 Wash. (Va.) 136; *Waters v. Riley*, 2 Har. & G. (Md.) 311; 18 Am. Dec. 302; *Central Sav. Bank v. Shine*, 48 Mo. 456; *Rawstone v. Parr*, 3 Russ. 424; *Risley v. Brown*, 67 N. Y. 160; *Harris v. Eldridge*, 5 Abb. N. Cas. (N. Y.) 278; *Barton v. Speis*, 5 Hun (N. Y.) 60; *Davis v. Van Buren*, 6 Daly (N. Y.) 391; *Griffin v. Grundy Co.*, 10 Iowa 226; *Dorsey v. Dorsey*, 2 Har. & J. (Md.) 480; *Bradley v. Burwell*, 3 Den. (N. Y.) 65; *Richardson v. Horton*, 6 Beav. 185; *Wilkinson v. Henderson*, 1 M. & K. 582; *Towne v. Ammidown*, 20 Pick. (Mass.) 535; *Dixon v. Vandenberg*, 35 N. J. Eq. 47; *State v. Thorn*, 28 Ind. 306; *Frierson v. Travis*, 39 Ala. 150; *Smith v. Everett*, 50 Miss. 575; *Cridler v. Curry*, 66 Barb. (N. Y.) 336; *Sumner v. Powell*, T. & R. 423; *Other v. Iveson*, 3 Drew. 177; *Jones v. Beach*, 2 De G. M. & G. 886; *Wilmer v. Currey*, 2 De G. & S. 347; *Getty v. Binns*, 49 N. Y. 385.

But see *Mays v. Cockrum*, 57 Tex. 352; *Glasscock v. Hamilton*, 62 Tex. 143; *Boyd v. Bell*, 69 Tex. 735; *Smith v. Martin*, 4 Desaus. Eq. (S. Car.) 148; *Susong v. Vaiden*, 10 S. Car. 247; 30 Am. Rep. 50.

1. In *Richardson v. Draper*, 87 N. Y. 337, the Nes Silicon Steel Company, incorporated in *New York*, of which company Wheeler was one of the principal promoters and organizers, and a large stockholder, proposed to the citizens of Sandusky, *Ohio*, that it would erect a rolling mill at that place, if they would donate the real estate and loan to it \$150,000 upon its bonds, secured by the guaranty of Wheeler and other stockholders. The proposition was accepted and complied with, and Wheeler with the other designated stockholders, executed a joint guaranty of the payment of the bonds. The company and the guarantors, including Wheeler, thereafter became insolvent, and the latter executed a general as-

signment for the benefit of creditors, and subsequently died before the bonds fell due. In an action brought to compel an accounting on the part of the assignees of Wheeler, and a distribution of the fund in their hands, the court held that the liability upon the guaranty was not extinguished by his death; that the guarantors did not act as mere sureties, but secured an individual benefit, and were under a moral obligation to pay; and so that there was a just foundation for a court of equity to intervene and save the obligation of the guaranty, and, therefore, that the holders of the bonds were entitled to share *pro rata* with the other creditors in the assigned estate.

In some states, under the statute law, the obligation of the surety survives his death, and his estate is bound. See *New York Code Civ. Proc.*, § 758; *McCoy v. Payne*, 68 Ind. 327; *Hudelson v. Armstrong*, 70 Ind. 99; *Redman v. Marvil*, 73 Ind. 593.

For other cases in which the estates of sureties were charged, see *Mundorff v. Wangler*, 44 N. Y. Supr. Ct. 495; *Powell v. Kettelle*, 6 Ill. 491; *Basken v. Andrews*, 53 Hun (N. Y.) 95; *Jones v. Degge*, 84 Va. 685.

2. In *Gordon v. Calvert*, 4 Ross. 581, Edwards being hired as a clerk to Calvert & Co., but not for any definite period, Gordon and Kent joined with him in a bond to secure his duly accounting for his assets; Gordon died, and his executrix gave a written notice to Calvert & Co. that she would no longer remain surety. Calvert & Co. communicated this notice to Edwards, and required and obtained from him the bond of another surety. Kent died, and also the new surety; and, four years and a half after the death of Gordon, Edwards died, when deficiencies were found in his accounts, subsequent to the notice. The court held that the executrix of Gordon had no equity to restrain Calvert & Co. from proceeding at law on the bond. See also *Calvert v. Gordon*, 3 M. & R. 124, where the court said that if the surety

only binding so far as they are acted upon, the guaranty may be revoked before it is accepted.¹ After default by the principal, the surety or guarantor may at once terminate the contract and

desired to have the right to terminate his suretyship by notice, he should have so specified in his contract. See *Williams v. Reynolds*, 11 La. 230; *Coe v. Vodges*, 71 Pa. St. 383.

1. In *Pleasanton's Appeal*, 75 Pa. St. 344, there was a lease for a year which either party might determine at the end of the term by giving a month's previous notice to the other. A surety for the lessee gave due notice to the lessor to collect the rent from the lessee and that he would not be bound beyond the end of the current year. The lessee held over. The surety died before the end of the succeeding year. The court held that his estate was not liable for rent during that year. The court, by Agnew, C. J., said: "In the present case if the surety had done nothing to prevent a renewal he could not escape his liability. But DeSilver gave more than half a year's notice not to renew the lease after the expiration of the current year. Before the end of the year, and while it was still in the power of the trustees to demand other sureties from the tenant, or to give notice to her to quit, De Silver died, and his estate necessarily went into administration. Clearly, after this explicit notice to collect the rent from the tenant, and not to renew the lease, and after the change in circumstances produced by the death of De Silver, it was inequitable in the trustees to continue the tenant for another year on the credit of the surety. Just the event happened which De Silver evidently had feared. Mrs. Anderson, the tenant, became unable to pay the rent. The trustees, as landlords, had no right in good conscience to continue the liability of the surety after his death, and when the law had taken charge of his estate for distribution among his own creditors and legal representatives. If they could do it for one year, they could do it so long as the tenant, though insolvent, might choose to remain, making the rent a charge on the estate of De Silver indefinitely to the prejudice of creditors and others."

In *Offord v. Davies*, 12 C. B. N. S. 748; 104 E. C. L. 748, it was held that a guaranty to secure moneys to be advanced to a third party on

discount, "for the space of twelve calendar months," is revocable within that time, *Erle, C. J.*, said: "This promise by itself creates no obligation. It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendants, or to the detriment of himself. But, until the condition has been at least in part fulfilled, the defendants have the power of revoking it. In the case of a simple guaranty for a proposed loan, the right of revocation before the proposal has been acted on did not appear to be disputed. Then, are the rights of the parties affected either by the promise being expressed to be for twelve months, or by the fact that some discounts had been made before that now in question, and repaid? We think not. The promise to repay for twelve months, creates no additional liability on the guarantor, but, on the contrary, fixes a limit in time beyond which his liability cannot extend. And with respect to other discounts, which had been repaid, we consider each discount as a separate transaction, creating a liability on the defendant till it is repaid, and, after repayment, leaving the promise to have the same operation that it had before any discount was made, and no more." See also *Agawam Bank v. Strever*, 18 N. Y. 513; *Jordan v. Dobbins*, 122 Mass. 168; 23 Am. Rep. 305; *Durham v. Bischof*, 47 Ind. 211.

The revocation should be clear and explicit. *Lanusse v. Barker*, 3 Wheat. (U. S.) 101.

It must also be exercised reasonably. *LaRose v. Logansport Nat. Bank*, 102 Ind. 332. In *Bostwick v. Van Voorhis*, 91 N. Y. 353, the surety of a bank cashier, notified the bank that he no longer wished to be the bondsman for the cashier. The court, by *Earl, J.*, in commenting upon this notice, said: "Whatever the effect of such a notice may be, it cannot operate instantaneously. The directors, after receiving it, must have a reasonable time to act, to give notice to the cashier and the other sureties, and to procure a new bond. If the effect of the notice is to be such as is now claimed on the part of the appellant—that is, if it discharged Haight, and in consequence

confine his liability to the damages for the injury already sustained.¹

11. Jurisdiction of Equity to Charge Surety.—In some cases where the liability of the surety cannot be enforced at law, equity will interfere to charge the surety with the obligation which in equity he is bound to perform.²

12. Revival of Liability of Surety by a New Promise.—Where for any reason a surety or guarantor is discharged from liability on his promise to pay the debt of another, and with full knowledge

thereof discharged all the other sureties—the instant it was communicated to the bank, it might be quite embarrassing and damaging to the bank. The cashier might be so situated that the directors could not immediately arrest his discharge of duty or his ability to bind the bank; and hence reasonable time, at least, must be given to the bank in such a case to act after receiving the notice."

1. *Hunt v. Roberts*, 45 N. Y. 691. So a surety, after default, may insist on certain precautions being taken in order that future default may be avoided. *Dwelling House Ins. Co. v. Johnston* (Mich. 1891), 51 N. W. Rep. 200; *Pacific Fire Ins. Co. v. Pacific Surety Co.* (Cal. 1892), 28 Pac. Rep. 842.

In *Emery v. Baltz*, 94 N. Y. 408, the court, by Finch, J., said: "A surety bound for the fidelity and honesty of his principal, and so for an indefinite and contingent liability, and not for a sum fixed, and certain to become due, may revoke and end his future liability in either of two cases, viz: first, where the guaranteed contract has no definite time to run; and, second, where it has such definite time, but the principal has so violated it and is so in default that the creditor may safely and lawfully terminate it on account of the breach." *Hunt v. Roberts*, 45 N. Y. 691; *McKecknie v. Ward*, 58 N. Y. 541; 17 Am. Rep. 281; *Burgess v. Eve*, L. R., 13 Eq. 450; *Phillips v. Foxall*, L. R., 7 Q. B. 666; *Sanderson v. Aston*, L. R., 8 Exch. 73. When the person employed commits an act of dishonesty, and is unfaithful to his trust, the employer may end the contract and the trust for his own protection, and what he may do, and ought to do for his own safety the surety may require to be done for his."

2. In *Percival v. McCoy*, 13 Fed. Rep. 379, it was held that equity has jurisdiction to reform an indemnity bond so as to make it conform to the

intentions of the parties. The court, by Love, J., said: "It seems to me that the proper remedy of the plaintiff, if he has any upon the facts disclosed, is by a bill in equity to reform the bond sued on, so as to conform it to the mutual intention of the parties. Even if there be a concurrent remedy at law, it is, at best an imperfect remedy; and equity is by no means ousted of its jurisdiction to reform a written instrument by the fact that a concurrent remedy exists at law. The remedy in equity, if the proper facts can be shown, is unquestionable and entirely adequate, while that which the plaintiff is now pursuing is, to say the least, dubious and imperfect."

In *Moser v. Libenguth*, 2 Rawle (Pa.) 428, it was held that a joint bond cannot, as against a surety, be shown to have been made so by mistake, instead of a joint and several bond, by evidence *dehors*, unless the evidence leave no doubt that a mistake, in point of fact, has been committed, and the instructions of the parties departed from.

In *Fielden v. Lahens*, 6 Blatchf. (U. S.) 524, it was held that equity will not hold a surety liable when he is discharged at law; and in the case of a joint obligation, and of the death of the surety, the remedy at law is gone, as it respects the legal representatives of the surety.

The act of *Tennessee* of 1835, ch. 20, expressly gives jurisdiction to the chancery court against sureties for the performance of covenants and collateral conditions, where it has jurisdiction against the principal; yet if the sureties cannot be embraced in the decree for relief, they may demur. *Hay v. Marshall*, 3 Humph. (Tenn.) 623.

See also *Pride v. Boyce*, Rice Eq. (S. Car.) 275; 33 Am. Dec. 78; *Kerney v. Kerney*, 6 Leigh (Va.) 478; *Gray v. Robinson*, 90 Ind. 527; *Olmsted v.*

of all the facts, makes a new promise to pay the debt, he will be liable.¹ And the same rule applies where the claim against the surety is barred by the Statute of Limitations, and the surety makes a new promise to pay the debt.²

Olmsted, 38 Conn. 309; Smith v. Allen, 1 N. J. Eq. 43; 21 Am. Dec. 33; Brooks v. Brooke, 12 Gill & J. (Md.) 306; 38 Am. Dec. 310; Berg v. Radcliff, 6 Johns. Ch. (N. Y.) 302.

1. In *Sigourney v. Wetherell*, 6 Met. (Mass.) 553, there was such laches on the part of the holder of a guarantied note as deprived him of any legal claims on the guaranty. The guarantor, however, on demand of the holder, paid him the interest due on the notes, knowing and protesting that he was not liable on his guaranty; it was held that he had waived the holder's laches, and continued to be liable to him on the guaranty. In *Hinds v. Ingham*, 31 Ill. 400, a new promise was held good after the surety had been relieved by an extension of time to the principal. In *Van Derveer v. Wright*, 6 Barb. (N. Y.) 547, it was, however, held, that a new consideration was necessary as well as a new promise.

Where there was no original liability on the part of the surety, owing to a mistake, it seems that there will be no liability on a new promise. *Welch v. Seymour*, 28 Conn. 387. For other cases on this subject, see *Ashford v. Robinson*, 8 Ired. (N. Car.) 114; *Damage v. Hutchins*, 23 Me. 565.

2. In *Zent v. Heart*, 8 Pa. St. 337, the court, by Gibson, C. J., sums up the law on this subject as it generally prevails as follows: "It was sometime undecided by the English courts how far a payment by a principal was, in contemplation of law, a payment by the surety in order to take the case out of the statute as to the latter. The decisions at length have settled that the payment by one is an acknowledgment by both, wherever it has been made during their joint responsibility—in other words, before it has been severed by the death of one of them. *Burleigh v. Stott*, 8 B. & C. 36; 15 E. C. L. 151, was the case of an action on a joint and several promissory note, brought against the administrator of one of the makers who was a mere surety; to which the defendant pleaded that the cause of action had not accrued within six years; but the plaintiff gave evidence of payment within that period, being the interest; and as it was made before the joint liability

was severed by his death, the plaintiff was allowed to recover. The court went on the ground that the act of one joint contractor is the act of the other, if performed while their responsibility remained the same as it was at first; and on this principle was decided *Slater v. Lawson*, 1 B. & Ald. 396; 20 E. C. L. 409, in which the facts were exactly the same as the preceding, except that the payment was made after the death of the principal by his executrix; and Lord Tenterden, giving judgment, said that when the joint liability has been severed by the death of one of the parties, nothing can be done by his personal representative to arrest the progress of the statute as to the other. On the same principle in *Atkins v. Tredgold*, 2 B. & C. 23; 9 E. C. L. 12, in which a payment by a surviving contractor, was not allowed to take the case out of the statute as to the representative of the other. In the preceding cases, the party to be charged by the acknowledgment or discharged by the statute, was a surety; but there is no apparent reason why the rule should not be applied to the case of principal contractors. Perhaps *Whitcomb v. Whiting*, 2 Dougl. 628, and *Wood v. Braddick*, 1 Taunt. 104, go that far, but it is very clear that a payment under a responsibility which was exclusively several from the first, would stop the statute only as to the payor, and not as to a debtor who happened to be bound for the same debt only by a separate instrument. Now, though the payment here was made by the principal, yet the note on which suit is brought, is joint as well as several, and the makers are still alive; so that the case is in all respects the same as *Burleigh v. Stott*, 8 B. & C. 36; 15 E. C. L. 151, except that the action there was brought against the administrator of the surety, and here it is brought against the surety himself, in full life—a difference which is wholly immaterial."

The case of *Heart's Appeal*, 8 Pa. St. 337, was overruled as far as Pennsylvania is concerned by the later case of *Coleman v. Fobes*, 22 Pa. St. 156; 60 Am. Dec. 75; but the rule as laid down by Chief Justice Gibson seems to pre-

13. Conflict of Laws.—The contract of suretyship is in general governed by the law of the place where the contract was made. Thus it has been determined that the right of a surety upon a promissory note to discharge his liability by notice to the creditor to pursue the principal debtor, is an incident of the contract of suretyship, and must be controlled by the law of the place of the contract.¹

14. When Surety Bound, Although Contract Not Binding on Principal.—Where a person becomes a surety for a person who is incapable in law of contracting, as a person *non compos mentis*, an infant, or a married woman, he is bound, although the principal is not.²

vail in most jurisdictions. See *Perham v. Raynall*, 9 Moore 566; *Pease v. Hirst*, 10 B. & C. 122; 21 E. C. L. 38; *Hunt v. Bridgham*, 2 Pick. (Mass.) 581; 13 Am. Dec. 458; *Craig v. Callaway Co. Ct.*, 12 Mo. 94; *Joslyn v. Smith*, 13 Vt. 353; *Whitaker v. Rice*, 9 Minn. 13; 86 Am. Dec. 78; *Caldwell v. Sigourney*, 19 Conn. 37; *Clark v. Sigourney*, 17 Conn. 511; *Russell v. LaRoque*, 11 Ala. 352; *Governor v. Stonum*, 11 Ala. 679; *Perkins v. Barstow*, 6 R. I. 505; *Ratcliff v. Leunig*, 30 Ind. 289; *Wofford v. Unger*, 55 Tex. 480; see *Walters v. Kraft*, 23 S. Car. 578; 55 Am. Rep. 44; *Gibbons v. McCashland*, 1 B. & A. 690; *Wilson v. Marshall*, 15 Irish Com. Law Reports. 466.

Where upon a promissory note, payable on demand, signed by a principal and surety, with witnesses, payments were made by the principal from time to time for twenty years, during the last twelve of which he was reputed to be insolvent, and the holder always at his request allowed him further time, but not any fixed time, for making further payments, and the surety had received no notice, until just before the commencement of the suit, that the note had not been paid, the surety was nevertheless held liable. *Hunt v. Bridgham*, 2 Pick. (Mass.) 581; 13 Am. Dec. 458.

An acknowledgment that a note is due, or a promise to pay it, made within six years, by the principal in the note, is sufficient to take it out of the Statute of Limitations as against the surety. *Frye v. Barker*, 4 Pick. (Mass.) 382.

If the principal and guarantor are not joint debtors, the rule is different. In *Meade v. McDowell*, 5 Binn. (Pa.) 195, it was held, that if A guaranties to B the performance of any contract he may make with C, and six years elapse after the contract between B

and C, and before the bringing of suit against A upon his guaranty, no acknowledgment by C subsequent to the contract, can take the case out of the Statute of Limitations as to A.

1. In *Tenant v. Tenant*, 4 Pa. St. 478, a note was given in payment of certain articles purchased at an administrator's sale held in *West Virginia* and was delivered to the payee in that state. Two sureties joined in the note, one of whom lived in *West Virginia* and the other in *Pennsylvania*. The defense was that the sureties gave notice to the creditor that he must proceed against the principal for the collection of the note, or they would no longer be responsible. By the law of *West Virginia* such a notice, to be effective, was required to be in writing. In this case it was verbal only. The court held that the verbal notice was nugatory, and that the plaintiffs were entitled to recover.

In *Milliken v. Pratt*, 125 Mass. 374, a guaranty bearing date of *Portland, Maine*, was executed by a married woman, having her home in *Massachusetts*, as collateral security for the liability of her husband for goods sold by the plaintiffs to him, and was sent by her by mail to the plaintiffs at *Portland*. Such a guaranty by a married woman was valid in *Maine*, but not at that time valid under the laws of *Massachusetts*. The court held that the contract was to be treated as made and to be performed in *Maine*, and that it was valid. See also, in general, *Howard v. Fletcher*, 59 N. H. 151; *Frierson v. Williams*, 57 Miss. 451; *Long v. Templeman*, 24 La. Ann. 564.

2. In *Wiggins' Appeal*, 100 Pa. St. 155, a married woman, holding shares in a building association, borrowed money from the association and gave to secure the loan a mortgage on her

A surety, signing a partnership note, is bound, although the note was signed by a member of the firm without authority.¹

X. INDORSEER'S LIABILITY ON BILLS AND NOTES.—See **BILLS AND NOTES**, vol. 2, p. 313.

XI. RIGHTS OF SURETY AGAINST PRINCIPAL—1. **General Principles.**
—As soon as the contract of suretyship is entered into, the law

individual property, and her husband's bond conditioned for the payment of the sum borrowed, with interest, fines, premiums and monthly dues. Default being made by her in her payments of premiums and dues, judgment was entered against her husband on the bond. In an application by him to open the judgment, the court held, that though the wife was not liable by reason of her coverture, this fact constituted no defense on the part of the husband, who had become his wife's surety in view of her disability.

In *Winn v. Sandford*, 145 Mass. 302, it was held that the surety on a joint and several bond, executed to a husband by his wife as principal, cannot avail himself of the incapacity of the principal to contract with her husband. The court, Devens, J., said: "Where one becomes a surety for the performance of a promise made by a person incompetent to contract, his contract is not purely accessorial, nor is his liability necessarily ascertained by determining whether the principal can be made liable. Fraud, deceit in inducing the principal to make his promise, or illegality thereof, all of which would release the principal, release the surety, as these affect the character of the debt; but incapacity of the principal party promising to make a legal contract, if understood by the parties, is the very defense on the part of the principal against which the surety assures the promisee."

In *Kimball v. Newell*, 7 Hill (N. Y.) 116, A executed a covenant by which he undertook to become surety for the faithful performance of B's covenant to pay rent. Held, that A's covenant was valid, though the covenant of B was void for coverture.

In *Yale v. Wheelock*, 109 Mass. 502, the court said: "The defendant, Abigail A. Wheelock, was the wife of the principal, and executed the bond as his surety, without any consideration received by her, or any reference to her separate estate. Therefore, she is not liable. The defendant, Doane, executed the bond with his principal and

surety, and the co-surety is described in the bond as the wife of the principal. Thus he was informed of the facts and is liable."

In *Keen v. Young*, 34 Pa. St. 60, it was held that the promise to pay the debt of an infant is binding on the promisor.

See also, on this subject, *Adams v. Cuny*, 15 La. Ann. 485; *Whitworth v. Carter*, 43 Miss. 61; *State v. Watts*, 44 N. J. L. 126; *Foxworth v. Bullock*, 44 Miss. 457; *Hicks v. Randolph*, 59 Tenn. 352; *Board of School Directors v. Judice*, 39 La. Ann. 806; *Maggs v. Ames*, 4 Bing. 470; 15 E. C. L. 45; *White v. Cuyler*, 6 T. R. 176; *Smyley v. Head*, 2 Rich. (S. Car.) 590; 45 Am. Dec. 750; *Nabb v. Koontz*, 17 Md. 283; *Stillwell v. Bertrand*, 22 Ark. 375; *Lobaugh v. Thompson*, 74 Mo. 600; *Weed Sewing Mach. Co. v. Maxwell*, 63 Mo. 486; *Patterson v. Cave*, 61 Mo. 439; *Jones v. Crosthwaite*, 17 Iowa 393; *Lee v. Yandell*, 69 Tex. 34; *Davis v. Statts*, 43 Ind. 103; 13 Am. Rep. 382; *St. Albans Bank v. Dillon*, 30 Vt. 122; 73 Am. Dec. 295.

But where on the disaffirmance of the contract by the principal, the creditor receives back the consideration and is in no worse position than he was before, the surety is not liable. In *Baker v. Kennett*, 54 Mo. 82, the court, by *Wagner, J.*, said: "As a general proposition, it is undoubtedly correct that infancy does not protect the indorsers or sureties of an infant, or those who have jointly entered into his voidable undertaking. But the cases in which this principle has been decided are clearly distinguishable from the present one. Here the undertaking of the sureties goes to the whole consideration. . . . By the disaffirmance of the contract the plaintiff gets back his land, and the consideration which upheld the contract is extinguished. It would be a strange doctrine which would give him back his land and allow him to recover from the sureties the purchase-money also."

1. *Stewart v. Boehm*, 2 Watts (Pa.) 356.

raises an implied promise on the part of the principal to indemnify the surety against any loss to which he may be subjected by reason of the contract. The surety cannot recover from the principal, until the loss has been actually incurred, but the contract of indemnity dates back to the time of the contract of suretyship.¹ A surety may pay the debt before it becomes due, and after

1. In *Rice v. Southgate*, 16 Gray (Mass.) 142, the court, by Bigelow, C. J., said: "Upon well settled principles, it is clear that the contract of a principal with his surety to indemnify him for any payment which the latter may make to the creditor in consequence of the liability assumed, takes effect from the time when the surety becomes responsible for the debt of the principal. It is then that the law raises the implied contract or promise of indemnity. No new contract is made when the money is paid by the surety, but the payment relates back to the time when the contract was entered into by which the liability to pay was incurred. The payment only fixes the amount of damages for which the principal is liable under his original agreement to indemnify the surety." See also *Choteau v. Jones*, 11 Ill. 300; 50 Am. Dec. 460; *Kimmel v. Lowe*, 28 Minn. 265; *Barney v. Grover*, 28 Vt. 391; *Wilson v. Crawford*, 47 Iowa 469; *Martin v. Ellerbe*, 70 Ala. 326; *Riley v. Stallworth*, 56 Ala. 481; *Pigon v. French*, 1 Wash. (U. S.) 278; *Wesley Church v. Moore*, 10 Pa. St. 273; *Harper v. McVeigh*, 82 Va. 751; *Polhill v. Brown*, 84 Ga. 338; *Cotton v. Alexander*, 32 Kan. 339; *Walte v. Miller*, 47 Ind. 385; *Covey v. Neff*, 63 Ind. 391; *Stearns v. Irwin*, 62 Ind. 558; *Lee v. Wisner*, 38 Mich. 82; *Forest v. Shores*, 11 La. 416; *Hill's Estate*, 67 Cal. 238; *Dennison v. Soper*, 33 Iowa 183; *Blake v. Downey*, 51 Mo. 437; *Ingalls v. Dennett*, 6 Me. 79; *Harnsberger v. Yancy*, 33 Gratt. (Va.) 527; *Baker v. Martin*, 3 Barb. (N. Y.) 634; *Trustees of Schools v. Sheik*, 119 Ill. 579; 59 Am. Rep. 830; *Thomas v. Liebke*, 81 Mo. 675; *Gibbs v. Bryant*, 1 Pick. (Mass.) 118; *Appleton v. Bascom*, 3 Met. (Mass.) 169; *Powell v. Smith*, 8 Johns. (N. Y.) 249; *Ward v. Henry*, 5 Conn. 596; 13 Am. Dec. 119; *Miller v. Stout*, 5 Del. Ch. 259; *Zollickoffer v. Seth*, 44 Md. 359; *Barney v. Grover*, 28 Vt. 391; *Hatfield v. Merod*, 82 Ill. 113; *Morrow v. Morrow*, 2 Tenn. Ch. 549; *Ward v. Henry*, 5 Conn. 595; 13 Am. Dec. 119; *Collins v. Boyd*, 14 Ala.

505; *Sikes v. Quick*, 7 Jones (N. Car.) 19; *Reynolds v. Skelton*, 2 Tex. 516; *Landrum v. Brookshire*, 1 Stew. (Ala.) 252; *Pond v. Warner*, 2 Vt. 532; *Russell v. La Roque*, 11 Ala. 352; *Osgood v. Osgood*, 39 N. H. 209; *Child v. Powder Works*, 44 N. H. 354; *Williams v. Cheney*, 3 Gray (Mass.) 215; *Clark v. Oman*, 15 Gray (Mass.) 521; *Pope v. Davidson*, 5 J. J. Marsh. (Ky.) 400; *McDowell v. Crooke*, 10 La. Ann. 31; *Newell v. Hurlburt*, 2 Vt. 351; *Rucks v. Taylor*, 49 Miss. 552; *Thomas v. Beckman*, 1 B. Mon. (Ky.) 29; *Peters v. Barnhill*, 1 Hill (S. Car.) 234; *Landrum v. Brookshire*, 1 Stew. (Ala.) 252; *State v. Williams*, 2 Ind. 175; *Boove v. Wilson*, 1 Jones (N. Car.) 182; *Newby v. Hill*, 2 Metc. (Ky.) 530; *Moore v. Isley*, 2 Dev. & B. Eq. (N. Car.) 372; *Bonham v. Galloway*, 13 Ill. 68; *Shepard v. Ogden*, 3 Ill. 257; *Walker v. McKay*, 2 Metc. (Ky.) 294; *Hodges v. Armstrong*, 3 Dev. (N. Car.) 253; *Ponder v. Carter*, 12 Ired. (N. Car.) 242; *Green v. Williams*, 11 Ired. (N. Car.) 139; *Morrison v. Cassell*, 25 Ill. 368; *Martin v. Rice*, 16 Tex. 157; *Konitzky v. Meyer*, 49 N. Y. 571; *Warfield v. Watkins*, 30 Barb. (N. Y.) 395; *Campbell v. Maccomb*, 4 Johns. Ch. (N. Y.) 534; *Gates v. Renfro*, 7 La. Ann. 569; *Barmon v. Barnett*, 7 La. Ann. 105; *Hazleton v. Valentine*, 113 Mass. 470; *Hecox v. Citizens Ins. Co.*, 9 Bess. (U. S.) 421; *Teberg v. Swenson*, 32 Kan. 224; *Hook v. Richeson*, 115 Ill. 431; *Romine v. Romine*, 59 Ind. 346; *Wilson v. Ridgely*, 46 Md. 235; *Miller v. O'Kain*, 20 N. Y. Supr. Ct. 594; *Ogden v. Waller*, 24 Miss. 190; *Riley v. Stallworth*, 56 Ala. 481; *Davis v. Hoobes*, 33 Miss. 173; *Miller v. Howry*, 3 Pa. St. 374; *Cunningham v. Smith*, 1 Harp. Eq. (S. Car.) 90; *Lenoir v. Winn*, 4 Desaus. (S. Car.) 65; *Gallagher v. Davis*, 2 Yeates (Pa.) 548; *Reed v. Emory*, 1 S. & R. (Pa.) 339.

A surety is a creditor within the Statute of Frauds from the time of the signing of the obligation by which he is bound. *Loughridge v. Bowland*, 52 Miss. 546.

Where a bond of indemnity has been given, no promise of indemnity will be implied. In *Toussaint v. Martinant*, 2 T. R. 100, Buller, J., said: "Promises in law only exist where there is no express stipulation."

A surety cannot sue in the name of his obligee, but he must do so in his own name. *Coruth-Byrnes Hardware Co. v. Deere*, 53 Ark. 140.

Where the contract has been broken, the surety may pay the money without suit, and recover against his principal. In *Mauri v. Heffernan*, 13 Johns. (N. Y.) 58, the defendant entered into an obligation with the plaintiff, as his surety, at Caraccas, which not being performed, the plaintiff, the surety, was compelled by proceedings at law to pay the amount for his principal. In an action by the surety against the principal, the court held that a copy of the obligation (which, according to the laws of the Spanish colonies, was made before a notary, who kept the original and delivered copies to the parties), authenticated according to the laws of *Spain*, connected with evidence that the original could not be procured, and with proof of admissions, by the defendant, of its authenticity, and of the breach of the contract, was sufficient without producing the decree against the plaintiff and the original obligation, or a sworn copy of it.

The cause of action accrues to the surety at the time when the debt becomes due. *White v. Miller*, 47 Ind. 385; *Tillotson v. Rose*, 11 Met. (Mass.) 299.

An attachment by a surety against his principal, under *Kentucky Code Civ. Proc.*, §§ 661, 662, is invalid, unless an affidavit is filed that the principal ought to pay a stated sum which is justly due, and the attachment cannot be made effective as against an intervening assignment by filing an affidavit setting up other grounds for an attachment. *Meyer v. Ruff* (Ky. 1891), 16 S. W. Rep. 84.

No debt accrues against either a principal or sureties on a bond until a breach of it. *Leonard v. Ross*, 23 Kan. 292.

A surety paying the debt after his principal's default, may maintain an action against the latter for reimbursement, even though he made the payment upon a judgment against them both, and may enforce the judgment against his principal. *Kimmel v. Lowe*, 28 Minn. 265.

A surety cannot recover of his principal, on the suretyship, until he has paid some part of the debt of his principal. *Stearns v. Irwin*, 62 Ind. 558.

Payment by a surety has such reference back to the original undertaking, that it overrides all intermediate equities, such as those of the assignee of a claim against the surety, assigned by the principal before payment. *Barney v. Grover*, 28 Vt. 391.

No action against the principal accrues to the surety till maturity of the note and payment thereof by him. Payment after action brought will not suffice. *Dennison v. Soper*, 33 Iowa 183.

There can be no doubt of the right of a surety, after a debt has become due, to file a bill to compel the principal debtor to pay, whether the surety has himself been sued or not. *Whitridge v. Durkee*, 2 Md. Ch. 442.

Where a surety has paid the debt by conveying land, which is accepted in satisfaction, he may sue the principal for indemnity, in an action of assumpsit. *Bonny v. Seely*, 2 Wend. (N. Y.) 481; *Ainslie v. Wilson*, 7 Cow. (N. Y.) 662; *Randall v. Rich*, 11 Mass. 498.

If a stranger pays the debt and the surety reimburses the stranger, the surety may recover the amount from the principal. *Harper v. McVeigh*, 82 Va. 751.

If a surety pays a debt, he can maintain his action against that person alone whose legal liability is discharged, for the law does not imply a promise from other persons who may be benefited by the payment. *Tom v. Goodrich*, 2 Johns. (N. Y.) 213.

A surety who pays a debt, without notice to the principal not to pay it, has a right to make the payment, notwithstanding usury in the debt, and the principal is bound to repay the money. *Polhill v. Brown*, 84 Ga. 338.

A Surety May, by Express Contract, be Given a Right of Action Before Payment of the Debt.—In *Belloni v. Freeborn*, 63 N. Y. 382, a lease which recited that it was made between M as landlord, and W H B (one of defendants), and C B (plaintiff), composing the firm of W H B & Co., as tenants, was executed by the landlord and by W H B in the firm name and in his own name. The lease was for one year, from May 1, 1872. Plaintiff was not at that time or thereafter a member of the firm. Plaintiff signed the lease May 30, 1872,

maturity may recover from the principal the amount which he has been compelled to pay.¹ The surety may pay the debt in installments, and sue the principal for each installment that he

induced thereto by and in consideration of the delivery to him of a bond executed by defendants, conditioned that W H B should pay the rent, and to hold plaintiff "harmless from any and every liability for or on account of rent of the said premises for the year commencing May 1, 1872, and ending May 1, 1873." W H B paid the first quarter's rent, but failed to pay the residue. In an action upon the bond, held that the circumstances under which the bond was given were properly given in evidence to aid, if needed, in the interpretation of the instrument; that the liability referred to in the bond was the liability incurred simultaneously with its delivery (*i. e.*, for the year's rent), not simply a liability then existing, and the plaintiff's right of recovery was not limited to the actual damages sustained by him, but, as the bond was conditioned as well to pay the rent as to indemnify, that he was entitled to recover the whole amount of unpaid rent, although he had paid nothing thereon.

In *Jones v. Childs*, 8 Nev. 121, it was held that a surety might foreclose a mortgage which had been given to him for an indemnity, as soon as he was sued for the debt, and before he had paid it.

In *Loosemore v. Radford*, 9 M. & W. 657, the plaintiff and defendant being joint makers of a promissory note, the defendant as principal and the plaintiff as his surety, the defendant covenanted with the plaintiff to pay the amount to the payee of the note on a given day, but made default. The court held in an action on this covenant, that the plaintiff was entitled, though he had not paid the note, to recover the full amount of it by way of damages.

In *Woodbury v. Bowman*, 14 Me. 154; 31 Am. Dec. 40, a person contemplating suicide placed some cash and notes indorsed to a surety, in a bundle, and addressed the bundle to the surety with directions to indemnify himself and to pay the balance if any, to the principal's children. The surety received the property, and it was held that he might retain so much thereof as was necessary to secure him from loss, on the contract of the suretyship.

In *Powell v. Smith*, 8 Johns. (N. Y.) 249, the principal agreed to save the surety harmless from all loss and damage on account of the suretyship. The court held that the surety might, without paying the debt, recover damages for imprisonment which he had suffered on account of the debt.

In *Smith v. James*, 1 Miles (Pa.) 162, A indorsed two promissory notes (drawn by B) for the accommodation of B payable at different periods, and took from B a bond and warrant of attorney, the penalty being in double the amount of the two notes, and the condition being for the payment of a sum equal to the amount of the two notes at a time previous to the maturity of either of the notes. When the first note became due, it was protested for non-payment, whereupon A, having paid it, entered up judgment on the bond, and issued a *fiери facias* against B for the whole amount. The court held, that the execution was rightly issued, although the second note was not due. See also *Dorington v. Minnick*, 15 Neb. 397; *Bird v. Benton*, 2 Dev. (N. Car.) 179; *Tankersley v. Anderson*, 4 Desaus. Eq. (S. Car.) 44; *Rucks v. Taylor*, 49 Miss. 552.

If the surety for a debt pay the same before it is due, the payment will, after the debt has become due, but not before, be a legal set-off against a note of the surety payable to the principal and held by him. 1 *Brandt's Suretyship*, 342; *Jackson v. Adamson*, 7 Blackf. (Ind.) 597.

1. A surety who pays the debt of his principal may recover the same from the principal, though he paid the debt before maturity. *Ross v. Menefee*, 125 Ind. 432.

Craig v. Craig, 5 Rawle (Pa.) 98, the court, by Gibson, J., said: "As to the position taken, that payment before the bonds fell due would be essentially voluntary, it is proper to remark, that the principle was ruled differently in *Armstrong v. Gilchrist*, 2 Johns. Cas. (N. Y.) 429, where it was held that a guaranty of a note who had compromised and paid it for his own indemnity before it had become due, was entitled to recover. That a surety is to wait until payment is extorted from him, is not pretended; but it is said that pay-

has paid.¹ If the surety has not been requested by the principal to enter into the contract of suretyship, he cannot recover from the principal in case of loss.² Where a surety has paid the debt of the principal, the proper form of action to recover the indemnity, is *assumpsit* against the principal for money paid at his request.³ A surety on a bond given by one of several partners cannot recover from the partnership, although the bond was

ment before maturity is necessarily voluntary; and that eventual liability is not equivalent to a precedent request. There is no authority for that; and it seems not to be defensible on principle. Why may not a surety take measures of precaution against loss from a change in the circumstances of his principal, and accept terms of compromise before the day which may not be attainable after it. He may ultimately have to bear the burden of the debt, and may therefore provide for the contingency by reducing the weight of it. Nor is he bound to subject himself to the risk of an action by waiting until the creditor has a cause of action. He may, in short, consult his own safety and resort to any measure calculated to assure him of it, which does not involve a wanton sacrifice of the interest of his principal."

1. A surety, who has paid any part of a judgment rendered on the obligation may maintain against the judgment debtor an action, as upon an implied promise for the repayment of the money. *Wilson v. Crawford*, 47 Iowa 469; *Davies v. Humphires*, 6 M. & W. 152; *Hall v. Hall*, 10 Humph. (Tenn.) 352; *Bullock v. Campbell*, 9 Gill (Md.) 182; *Williams v. Williams*, 5 Ohio 444; *Pickett v. Bates*, 3 La. Ann. 627. But see *Jones v. Trimble*, 3 Rawle (Pa.) 388; where the court, by Huston, J., said: "I know of no case in which it has been decided that a surety as often as he pays a small part of a debt for his principal, can sue that principal, and I know of no case where it has been attempted."

2. *Carter v. Black*, 4 Dev. & B. (N. Car.) 425; *White v. White*, 30 Vt. 338.

Where a surety pays the debt of the principal, the law considers that the principal requested such payment, and he will be held liable therefor to the surety; but not so in cases where the surety was under no legal obligations to make such payment. *Kimble v. Cummins*, 3 Metc. (Ky.) 327.

As the obligation of a forthcoming bond, in *North Carolina*, is only that

the property shall be delivered to the officer, and not that the execution shall be satisfied, a surety on such bond, who pays the execution, without request of the principal, cannot recover. *Gray v. Bowles*, 1 Dev. & B. (N. Car.) 437.

A surety may, without the request of his principal, pay the debt of his principal before its maturity, and after but not before maturity, may sue his principal for the money thus paid. *White v. Miller*, 47 Ind. 385.

But the request may be implied. *Ricketson v. Giles*, 91 Ill. 154; *Snell v. Warner*, 63 Ill. 176; *Hall v. Smith*, 5 How. (U. S.) 96; *Hazleton v. Valentine*, 113 Mass. 472.

3. In *Frevert v. Henry*, 14 Nev. 191, it was held that where a surety pays the note of his principal and then has the note assigned to him, he cannot sue his principal on the note, but may maintain an action of implied *assumpsit* against him for the sum paid. But see *Tutt v. Thornton*, 57 Tex. 35, where it was held that payment of a note by a surety is not, as between himself and principal, an extinguishment of the same, and his right of action against the principal is upon the note and not on an implied *assumpsit*.

An action for money had and received will not lie for a surety who has paid a debt of his principal; but one for money laid out and expended will lie. *Ford v. Keith*, 1 Mass. 139.

A surety may maintain an action on the case, against his principal, for payment of the proper debt of the principal. *Bunce v. Bunce*, Kirby (Conn.) 137.

An administrator of a surety paying the debt may maintain an action, in his own name against the principal for indemnity, because the implied promise on the part of the principal is made to him personally and not to the deceased. *Mowry v. Adams*, 14 Mass. 327.

A surety who has replevied the debt may maintain *assumpsit* against his principal, though the money be not in fact paid; the replevy bond accepted

for a partnership debt. The surety must look to the partner alone, who executed the bond.¹ The death of the principal does not deprive the surety of his right to indemnity. He may recover the amount which he has been compelled to pay, from the estate of the principal.²

2. Payment by Note of Surety or by Judicial Process.—When a surety pays the debt of his principal by giving his own note therefor, and the note is accepted by the creditor as payment of the debt, the surety can sue the principal without waiting for the note to mature.³ Where the note is not negotiable, the surety cannot

merge the judgment. *Burns v. Parish*, 3 B. Mon. (Ky.) 8. See also *Powell v. Smith*, 8 Johns. (N. Y.) 249; *Hassinger v. Solms*, 5 S. & R. (Pa.) 8; *Gibbs v. Bryant*, 1 Pick. (Mass.) 118; *Ward v. Henry*, 5 Conn. 596; *Smith v. Sayward*, 5 Me. 504; *Lansdale v. Cox*, 7 T. B. Mon. (Ky.) 405; *Gray v. Bowls*, 1 Dev. & B. (N. Car.) 437; *Appleton v. Bascom*, 3 Met. (Mass.) 169; *Hulet v. Soullard*, 26 Vt. 295; *Holmes v. Weed*, 19 Barb. (N. Y.) 128; *Hill v. Wright*, 23 Ark. 530; *Crisfield v. State*, 55 Md. 192; *Hite v. Campbell*, 10 B. Mon. (Ky.) 80; *Buckner v. Morris*, 2 J. J. Marsh. (Ky.) 121; *Sanders v. Watson*, 14 Ala. 198.

1. If the surety of A, on a bond given for A and his partners, pay the amount, he can bring no action against the partners, but must look to A alone. *Tom v. Goodrich*, 2 Johns. (N. Y.) 213.

A surety on a custom-house bond given by one partner for goods of the partnership, who pays the bond, cannot recover the amount paid of the partnership. *Krafts v. Creighton*, 3 Rich. (S. Car.) 273.

A sealed note, executed in the name of "A & Co.," purports to bind only A; therefore a third person executing such note, as surety, supposing it to be the note of the firm, cannot complain that a fraud was committed on him, though the note was for the private debt of A. *Harter v. Moore*, 5 Blackf. (Ind.) 367.

In an action by a surety against the principal in a note to recover the amount paid by the plaintiff, a partnership in the transaction is a good defense. *Pollard v. Stanton*, 5 Ala. 451.

2. A surety, who has paid the demand, may maintain his bill against the executor and heirs of his principal, to subject first the personality, and then the real estate, to his claim. *Conley v. Boyle*, 6 T. B. Mon. (Ky.) 637.

A surety who has paid a debt of his principal, and afterwards obtained judgment against his executor, and had a *fi. fa.* returned "no property found," may maintain an action against the devisees. *Buckner v. Morris*, 7 J. J. Marsh. (Ky.) 648.

A surety upon a note made by two principals, having paid the same, may recover the amount so paid of the surviving principal after the death of the other. *Riddle v. Bowman*, 27 N. H. 236.

After the death of the principal, a judgment obtained against the sureties cannot be enforced by them as a claim against his estate until they have paid it. *Hill's Estate*, 67 Cal. 230.

A was a joint surety with B; B died, and administration was granted upon his estate, and more than two years thereafter suit was brought against the administratrix, who pleaded the act of 1789, and judgment was rendered in her favor. A was afterwards sued, and judgment was recovered against him as surety of B. *Held*, that he was thereupon entitled to judgment against the administratrix. *Marshall v. Hudson*, 9 Yerg. (Tenn.) 57.

A judgment against a principal and surety, paid by the surety after the principal's death, and marked for his use, will not in Pennsylvania, avail the surety in a suit for the whole amount of the judgment brought by the administrator of the principal upon notes given the principal in his lifetime, if it appear that the principal's estate is insolvent. *Poorman v. Goswiler*, 2 Watts (Pa.) 69.

3. *Boulware v. Robinson*, 8 Fed. 327; *Peters v. Barnhill*, 1 Hill (S. Car.) 237; *Doolittle v. Dwight*, 2 Met. (Mass.) 561; *Elwood v. Eiefendorf*, 5 Barb. (N. Y.) 398; *Bone v. Torry*, 16 Ark. 83; *Mims v. McDowell*, 4 Ga. 182; *Pearson v. Parker*, 3 N. H. 366; *White v. Miller*, 47 Ind. 385; *Hommell*

sue the principal until the note has been paid.¹ Where the property of the surety has been seized upon by judicial process to pay the principal's debt, the surety may proceed at once against the principal.²

3. To What Extent Principal is Liable to Surety—(a) COSTS AND EXPENSES.—A surety may call upon his principal for reimbursement not only for what he may have been obliged to pay in discharge of the obligation for which he was bound, but also for all

v. Gamewell, 5 Blackf. (Ind.) 5; *Sapp v. Aiken*, 68 Iowa 699; *Rizer v. Callen*, 27 Kan. 339; *Howe v. Buffalo*, etc., R. Co., 37 N. Y. 297; *Barclay v. Gooch*, 2 Esp. 571; *Chace v. Hinman*, 8 Wend. (N. Y.) 456; 24 Am. Dec. 39; *New York State Bank v. Fletcher*, 5 Wend. (N. Y.) 85; *Clark v. Penney*, 6 Cow. (N. Y.) 297; *Harden v. Branner*, 25 Iowa 364; *Hearne v. Keath*, 63 Mo. 84. But see *Stone v. Hammell*, 83 Cal. 547; *Romine v. Romine*, 59 Ind. 346. In *Lynch v. Hancock*, 14 S. Car. 66, it was held that the principal could not recover from the surety unless the note had been paid or it appeared that he had the means to pay it.

In *Witherby v. Mann*, 11 Johns. (N. Y.) 518, it was held by the supreme court of *New York* that where a negotiable note has been received expressly in satisfaction of a judgment, it is equivalent to payment and operates as an extinguishment of the judgment debt. The court, by Yates, J., said: "The mere giving a bond for the debt of another is no payment, and an action for money paid, laid out and expended for the use of a person for whose debt the obligation is given, will not lie. The money must actually be advanced, to sustain the action. *Cumming v. Hackley*, 8 Johns. (N. Y.) 202. But this principle has not been extended to all kinds of securities thus given. There are cases in which negotiable paper has been held equivalent to the payment of money to which it is in some measure analogous, as when the note has been negotiated, and is in the hands of an innocent indorsee. He, of course, would be protected; and, unless it was considered as a payment of the original debt, the drawer might be made to pay twice. So when the note has been accepted and paid in satisfaction of the debt. The note in this case, has not been negotiated, but has been accepted and received by the party in whose favor the judgment was obtained, in satisfaction of the debt,

which is sufficient to authorize the recovery. The decisions cited against this apply only to cases where the note or bill has not been accepted in satisfaction of the debt. In *Drake v. Mitchell*, 3 East 251, the distinction is stated. There one of three joint covenantors gave a bill of exchange for part of a debt secured by the covenant, on which bill judgment was recovered; the court said that such judgment was no bar to the action against the three, because the bill does not appear to have been received in satisfaction of the debt. In *Tobey v. Barber*, 5 Johns. (N. Y.) 68; 4 Am. Dec. 326, this court decided that a note is not a payment of a precedent debt, unless there is an express agreement to accept it in payment; and the same principle is laid down in *Johnson v. Weed*, 9 Johns. (N. Y.) 310; 6 Am. Dec. 279."

1. *Bennett v. Buchanan*, 3 Ind. 47; 44 Am. Dec. 738; *Romine v. Romine*, 59 Ind. 346; *Cumming v. Hackley*, 8 Johns. (N. Y.) 202; *Morrison v. Berkeley*, 7 S. & R. Pa. 238.

In *Pitzer v. Harmon*, 8 Blackf. (Ind.) 112, it was held that the discharge of a promissory note by a surety, by giving his own note not negotiable by the law merchant, and which he has not paid, does not authorize him to sue his principal for money paid.

2. *Lord v. Staples*, 23 N. H. 448; *Burns v. Parish*, 3 B. Mon. (Ky.) 8; *Bonney v. Seely*, 2 Wend. (N. Y.) 481.

An execution, which has been satisfied by a surety, will not be enforced against the principal, unless it appear, by satisfactory evidence, that the enforcement is for the benefit of such surety. *Clemens v. Prout*, 3 Stew. & P. (Ala.) 345.

A surety who has paid no part of the debt cannot object to the action of his co-sureties who have paid the debt in full, in obtaining judgment against the principal for the entire amount of the debt without joining him in the

reasonable costs and expenses incurred in consequence of such default.¹ But the principal is not liable for costs where the

recovery, and in afterwards remitting such judgment. *Jackson v. Murray* (Tex. 1890), 14 S. W. Rep. 235.

1. In *Hulett v. Soullard*, 26 Vt. 295, the court, by Redfield, C. J., said: "If, when a surety was sued upon the debt of his principal, and was unable to pay it, and the same went into judgment and was levied upon his land, he must lose all costs recovered, and the expenses of the levy, because he did not pay the principal's debt more promptly than the debtor himself, whose duty it was to do it, and save the surety all trouble, it would certainly afford a remarkable instance of absurd refinement, not to say refined absurdity; and if the debt may be recovered (by the surety of the principal) as money paid, so equally may the costs."

See also *Baker v. Martin*, 3 Barb. (N. Y.) 634; *Bonney v. Seely*, 2 Wend. (N. Y.) 481; *Bancroft v. Pearce*, 27 Vt. 668; *Downer v. Baxter*, 30 Vt. 467; *Whitworth v. Tilman*, 40 Miss. 76; *Feamster v. Withrow*, 12 W. Va. 611; *Hayden v. Cabot*, 17 Mass. 169; *Eaton v. Lambert*, 1 Neb. 399; *Hare v. Grant*, 77 N. Car. 203; *Burton v. Stewart*, 62 Barb. (N. Y.) 194. See *Vance v. Lancaster*, 3 Hayw. (Tenn.) 130; *Copp v. M'Dugall*, 9 Mass. 1; *Simpson v. Griffin*, 9 Johns. (N. Y.) 131; *Borland v. Curry*, 4 L. R. (Ir.) 273; *Kendrick v. Forney*, 22 Gratt. (Va.) 748.

In an action by a security on a promissory note, against his principal, and a co-security who is liable *in solido*, the plaintiff may recover the costs of the judgment and execution against himself on the note. Otherwise, if the action had been against the co-security alone. *Apgar v. Hiler*, 24 N. J. L. 812.

The indorsee of a note who has failed to satisfy a judgment recovered against the maker, can recover of the indorser only the amount of the judgment with legal interest from its rendition, and his costs in obtaining judgment. *Corgan v. Frew*, 39 Ill. 31.

A surety who has paid the amount of a bond for his principal is entitled to recover what he has advanced, together with all such reasonable expenses as he has been necessarily obliged to incur; but he cannot recover extraordinary expenses which might have been avoided by payment of the money, or indemnity for remote and unexpected

consequences. *Hayden v. Cabot*, 17 Mass. 169.

He is entitled to recover back costs of suit paid by him in consequence of the principal's delinquency. *Bonney v. Seely*, 2 Wend. (N. Y.) 481.

A surety who pays a judgment recovered against himself and his principal, may, in an action brought by him thereon against his principal, recover what he has actually paid to satisfy the same, with legal interest, and no more. *Eaton v. Lambert*, 1 Neb. 339.

A surety in a replevin bond, where another party agrees to pay him all damages and costs, for which he may be liable in that case, is entitled to be repaid the costs and damages incurred on the dissolution of an injunction obtained upon such replevin bond. *Hall v. Profater*, 2 J. J. Marsh. (Ky.) 130.

A surety may recover of his principal legal costs incurred in litigation instituted by the principal, and in which the surety was joined, when such costs have been paid by the surety. *Whitworth v. Tilman*, 40 Miss. 76.

Where a surety to a note is subjected to costs, in consequence of its non-payment by the principal, and there is an agreement in writing to save him harmless, he is entitled to recover such costs against the principal. *Bonney v. Seeley*, 2 Wend. (N. Y.) 481.

A surety who has paid money after he had been discharged by the acts of the creditor, will, in an action to recover it back, be allowed interest from the time it was paid. *Riggins v. Brown*, 12 Ga. 271.

Where a surety for the payment of a judgment is discharged by an extension of time given without his knowledge to the debtor, but is compelled, nevertheless, to pay the judgment in order to save his goods from forced sale, they having been seized to satisfy the judgment, he may recover back from the judgment creditor the amount thus paid, and the creditor can then maintain an action on the agreement for an extension. *Boling v. Young*, 38 Ohio St. 135.

The surety in a jail bond, paying a sum of money, and receiving a discharge, with the knowledge of the principals, may recover that amount, as well as counsel fees for defending a suit on the bond, even though judgment was entered up for its full amount

surety unnecessarily enters into litigation in order to prevent the creditor from recovering a just demand.¹

against the principals. *Bancroft v. Pearce*, 27 Vt. 668.

Where an agent, living in another state, becomes a surety on a bill of sale made by him with a citizen of such state for his principal, a citizen of *Kentucky*, and the agent of such surety is compelled to pay, on failure of title, the principal must indemnify his surety for whatever he has been compelled to pay, under the laws of such state. *Thomas v. Beckham*, 1 B. Mon. (Ky.) 29.

A surety on a promissory note may recover from any one of his principals the whole amount which he has been compelled to pay on the note, and the costs of the action brought by the payee to recover it. *Apgar v. Hiler*, 24 N. J. L. 812.

The sureties on an undertaking given to procure the principal's discharge from arrest may recover from him expenses necessarily incurred by them in procuring his rearrest after he has absconded, and may foreclose a mortgage given to reimburse them for such expenses. *Milk v. Waite*, 18 Abb. N. Cas. (N. Y.) 236.

Expenses incurred by the surety in compelling action by the creditor may be recovered against the principal. In *Thompson v. Taylor*, 72 N. Y. 32, Matteson, being an accommodation indorser upon the notes of Thompson, who had died insolvent, by giving security to the holders for their payment, obtained authority from them to commence actions in their names, for the purpose of collecting the notes out of the estate. In so doing he incurred necessary and reasonable costs and expenses over and above the costs allowed in the judgments. In an action to marshal and distribute the assets of the estate, held that Matteson was entitled to be allowed such costs and expenses. The court, by Rapallo, J., said: "In the present case the surety, instead of proceeding in equity to compel the creditors to prosecute, effected an arrangement with them, whereby he gave security for the payment of their demands, and obtained authority from them to take the necessary proceedings in their names to secure the property of the estate of the debtor, and its application to the payment of the debts for which he was surety; and instead of indemnifying the

creditors against the costs and expenses of such proceedings, he himself assumed and paid them in the first instance. By this means the same result was attained as would have been if the surety had, by proceeding in equity, compelled the creditors to proceed against those in possession of the estate of the debtor, and had indemnified the creditors against the expenses of such proceedings, and subsequently performed his contract of indemnity by paying them, the only difference being that he procured the creditors to do voluntarily what a court of equity would have compelled them to do, and thus saved to the estate of his principal the additional expense of proceeding in equity against the creditor."

In *Maine*, it has been held that the surety cannot recover the costs of a levy in the absence of an express agreement. *Emery v. Vinall*, 26 Me. 295. In *Wynn v. Brooke*, 5 Rawle (Pa.) 109, it was said that counsel fees could not be recovered from the principal. This was put on the ground that such an allowance would put it in the power of the surety to indulge an appetite for litigation at the expense of his principal, and that it would be particularly hard where the surety had not thought proper to give the principal notice of the suit, and of the defense. See also *Gieseke v. Johnson*, 115 Ind. 308; *Carpenter v. Minter*, 72 Tex. 370.

1. *Cranmer v. McSwords*, 26 W. Va. 412; *Thompson v. Taylor*, 72 N. Y. 32; *Wynn v. Brooke*, 5 Rawle (Pa.) 106; *Holmes v. Weed*, 24 Barb. (N. Y.) 546; *Redfield v. Haight*, 27 Conn. 31; *May v. May*, 19 Fla. 373.

In *Beckley v. Munson*, 22 Conn. 299, it was held that where the principal notifies the surety that there is no defense, but the latter still persists in defending the suit, no costs can be recovered from the principal. See also *Holmes v. Weed*, 24 Barb. (N. Y.) 546.

The principal in a bond is only bound to indemnify the surety for reasonable expenses, although the surety may have incurred extraordinary and remote ones. *Hayden v. Cabot*, 17 Mass. 169; *Wynn v. Brook*, 5 Rawle (Pa.) 106.

A principal is not liable to the surety for costs and expenses incurred in litigation by the surety, unless it is shown

b. CONSEQUENTIAL DAMAGES.—A surety cannot recover from his principal remote, indirect, or consequential damages arising out of the contract of suretyship.¹ Thus the principal is not liable for loss occasioned by the surety being imprisoned for the debt.²

c. PAYMENT OF USURY BY THE SURETY.—A surety who pays a debt without notice from the principal not to pay it, has a right

to have been undertaken with due notice to, and with the consent of, the principal, or with reasonable grounds of success, and with a view to protect the interests of the principal, or to have resulted beneficially to the principal's estate. *Whitworth v. Tilmán*, 40 Miss. 76.

If a surety pays a greater rate of interest than six per cent. *per annum* on the debt of his principal, after maturity of the debt and after the death of the latter, he cannot recover from the estate or personal representative of his principal any interest so paid by him in excess of six per cent. *per annum*. *Lucking v. Gegg*, 12 Bush (Ky.) 298.

In a proceeding by a surety to enforce against his principal an execution which he has been obliged to pay where the execution had been partly paid by the principal, an instruction that, if the jury find such to be the fact, they are still to find for the surety the whole amount of the execution, is error, under *Georgia Code*, § 2167, providing that the surety shall be reimbursed only. *Stanford v. Connerly*, 84 Ga. 731.

1. *Vance v. Lancaster*, 3 Hayw. (Tenn.) 130.

2. In *Powell v. Smith*, 8 Johns. (N. Y.) 250, the court said: "The surety is entitled to recover as much of the debt as he has paid, and no more. The plaintiff did not, upon the trial, show any contract or promise of indemnity against trouble and harm. He showed nothing more than that he had become surety on a note for the defendant, and that having omitted to take it up when it fell due, he had been sued and imprisoned. This fact alone did not entitle him to recover. A surety, *qua* surety, cannot call upon his principal at law, until he has actually paid the money."

In *Hayden v. Cabot*, 17 Mass. 169, the promise of a defendant was to save the plaintiff harmless from any loss he might sustain in consequence of signing a custom-house bond. Suit was brought to recover loss to plaintiff's

business occasioned by his flight to escape arrest. The court, by Parker, C. J., held that the plaintiff was not entitled to recover, and said: "Extraordinary expenses, which might have been avoided by payment of the money, or remote and unexpected consequences, are never considered as coming within the contract. Thus if a surety, by reason of being obliged to pay money for his principal, becomes embarrassed in his business, and is finally obliged to abandon it, it is not expected that the principal will be held to indemnify him for this consequential misfortune. It is not the natural and necessary effect of his becoming surety, but is occasioned by his undertaking to do what he was not in a condition to perform. So any loss or expense, occasioned by an attempt to avoid payment of an obligation, cannot have been contemplated by the parties as a subject of indemnity, the true meaning of the contract being, that if the surety pays voluntarily, he shall be reimbursed; if he is compelled by suit to pay, he shall also be indemnified for his costs and expenses. Flight to avoid payment of the debt is an accident wholly unforeseen, and its consequences cannot be considered as provided for. The principal had a right to calculate upon his surety's ability to pay, and did not stipulate to save him harmless from anything but the payment of money. If the surety were put in prison, or if his goods were sold at a sacrifice, these would not be legal grounds of suit for indemnity, because they might be avoided by payment, which he must be considered as stipulating he was able to make."

In *Badely v. Consolidated Bank*, 34 Ch. Div. 536; 55 L. T. N. S. 635; 35 W. R. 106, it was held that where a surety can prove that, by reason of the non-payment of the debt, he has suffered damage beyond the principal and interest which he had been compelled to pay, he is entitled to recover that damage from the principal debtor.

to make the payment notwithstanding usury in the debt, and the principal is bound to repay the money.¹

d. EXTINGUISHMENT OF DEBT BY PAYMENT OF LESS THAN FULL AMOUNT.—If a surety extinguishes the debt by paying a

1. *Usury*.—Usury in the note cannot affect the surety where the claim of the payee amounts to more than the note for which the surety is bound. *Gillon v. Kentucky Nat. Bank* (Ky. 1888), 8 S. W. Rep. 193.

In a suit by a surety against his principal to foreclose an indemnity mortgage, the principal cannot plead usury in the note to which the surety was not privy. *Turman v. Looper*, 42 Ark. 500.

A surety may recover of his principal, although the money was paid for him upon a usurious contract, made by the principal, and which he might have avoided. *Ford v. Keith*, 1 Mass. 139; *Shaw v. Lord*, 12 Mass. 447; *Thurston v. Prentiss*, Walk. (Mich.) 529.

If a judgment be confessed by principal and surety on a note, including usury, and execution be levied on the goods of the surety, and he pays the judgment, the principal is liable to the surety for the full amount of the judgment so paid. *Thurston v. Prentiss*, 1 Mich. 193.

Where a surety pays the debt after judgment recovered against him and the principal, the latter cannot resist a recovery from him by the surety, on the ground that a part of the debt paid by the surety was usurious. *Wade v. Green*, 3 Humph. (Tenn.) 547.

A surety in a bond may, with or without the consent of his principal, by his separate bill, claim, as credits on the bonds, sums that have been exacted from his principal as usurious interest; and where, in answer to such bill by the surety against the principal and the obligee of the bond, the principal relies upon the same facts in his answer, which he makes a cross-bill, and the obligee pleads the Statute of Limitations as a bar to the cross-bill only, it is no defense to the original bill by the surety. *Crutcher v. Traubue*, 5 Dana (Ky.) 80.

In *Ford v. Keith*, 1 Mass. 139, it was held that a surety might recover from his principal, although the money was paid for him upon a usurious contract made by the principal, and which the principal might have avoided. See *Polhill v. Brown*, 84 Ga. 338; *Spaulding v.*

Auston, 2 Vt. 555; *Jackson v. Jackson*, 51 Vt. 253; 31 Am. Rep. 688; *Kock v. Block*, 29 Ohio St. 565; *Maples v. Cox*, 74 Ga. 701; *Wade v. Green*, 3 Humph. (Tenn.) 547; *Johnson v. Johnson*, 11 Mass. 359. But see *Mims v. McDowell*, 4 Ga. 182; *Whitehead v. Peck*, 1 Ga. 140; *Hargraves v. Lewis*, 3 Ga. 162; *Jones v. Joyner*, 8 Ga. 562; *Thurston v. Prentiss*, 1 Mich. 193; *Lucking v. Gegg*, 12 Bush (Ky.) 208.

If a surety pays usurious interest to obtain time to pay the debt of the principal, he cannot recover it of the principal. *Thurston v. Prentiss*, 1 Mich. 193.

If a surety in usurious contract pays the same, knowing it to be so tainted, he cannot recover the amount of the usury, paid by him, of his principal. *Hargraves v. Lewis*, 3 Ga. 162.

When the defense of usury is not available to the principal, it cannot be to the surety. Thus, where a bill made by the principal in *Ohio* and taken to *Virginia*, and there signed by the surety, was usurious by the law of *Virginia*, but valid in *Ohio*, held that the surety could not claim to defend by recourse to the law of *Virginia*. *Pugh v. Cameron*, 11 W. Va. 523.

Where one person, as principal, and another as surety, gave their joint note for a usurious loan, and a suit was commenced against them jointly on the note, the surety was held to be a proper party to a suit by the principal, for relief against the usury. *Perrine v. Striker*, 7 Paige (N. Y.) 598.

A surety in a note given on settlement of a usurious transaction, cannot maintain a bill in equity for relief in his own name alone; the principal must be a party. *Breckenridge v. Bullitt*, 3 Litt. (Ky.) 3.

To a bill by a surety, on a joint and several note alleged to be usurious, to stay a suit at law upon the note, against principal and surety, praying a discovery of the usury, and relief against the note, but expressly leaving the holder of the note to his remedy against the principal, such principal is not a necessary party. *Beggs v. Butler*, 1 Clark (N. Y.) 517.

Where a debtor refused to join with his surety, in a bill to establish usury,

sum less than its full amount, he can recover from the principal only the amount that he has paid with interest and costs.¹

in defense of a suit at law, held, that the surety might file a bill making the principal debtor defendant. *Morse v. Hovey*, 9 Paige (N. Y.) 197.

1. In *Bonney v. Seely*, 2 Wend. (N. Y.) 482, it was held that a surety extinguishing a debt by the payment of only one-half its amount, is not entitled to recover more from his principal than the amount actually paid.

In *Butler v. Butler*, 8 W. Va. 674, it was held that if the surety pays the debt in a depreciated currency, he can only recover from the principal the market value of the currency at the time the payment was made.

In *Jordan v. Adams*, 7 Ark. 348, it appeared that a surety paid the debt of his principal to a bank, partly in notes of the bank which were worth only fifty cents on the dollar, but the bank received them at par for debts due to it. The court held that the surety could only recover from the principal the actual value of the money which he had paid. See also *Crozier v. Grayson*, 4 J. J. Marsh. (Ky.) 514; *Hall v. Creswell*, 12 Gill & J. (Md.) 36.

In *Reed v. Norris*, 2 M. & C. 361, it was held that a surety who compounds a debt for which his principal and himself are jointly liable, and takes an assignment of the debt to a trustee for himself, can only claim from his principal the amount which he has actually paid. The Lord Chancellor said: "He (the surety) enters into an obligation and becomes subject to a liability, upon a contract of indemnity. The contract between him and his principal is, that the principal shall indemnify him from whatever loss he may sustain by reason of incurring an obligation together with the principal. It is on a contract for indemnity that the surety becomes liable for the debt. It is by virtue of that situation, and, because he is under an obligation as between himself and the creditor of his principal, that he is enabled to make the arrangement with the creditor. It is his duty to make the best terms he can for the person in whose behalf he is acting. His contract with the principal is indemnity. Can the surety, then, settle with the obligee, and instead of treating that settlement as payment of the debt, treat it as an assignment of the whole debt to him-

self, and claim the benefit of it, as such, to the full amount, thus relieving himself from the situation in which he stands with his principal, and keeping alive the whole debt?" See, however, *Blow v. Maynard*, 2 Leigh (Va.) 29, where a contrary opinion was expressed.

In *Gieseke v. Johnson*, 115 Ind. 308, it was held that a surety taking up a promissory note executed by himself and his principal, not being required to pay the attorney's fees for collection stipulated for in the note, cannot recover them from his principal.

In general, a surety who has paid the debt in depreciated currency, as in Confederate notes, can recover from his principal only the market value of the payment at the time when made. *Teamster v. Withrow*, 9 W. Va. 296; 12 W. Va. 611.

If a surety extinguishes the debt of his principal, in whole or in part, for anything less than the full amount so extinguished, he can recover from his principal, in the absence of an express contract, only the amount actually paid. *Matthews v. Hall*, 21 W. Va. 510.

Where the surety on a bond has satisfied the same, he is entitled to claim from the principal no more than he actually paid in satisfaction. *Martindale v. Brock*, 41 Md. 571.

If a surety pay part of a debt only, he cannot, at law, control it against his principal. *Bridges v. Nicholson*, 20 Ga. 90.

If the value of property, paid by a surety for the debt of his principal, exceed the amount of the debt, no assumpsit is raised by law, on the part of the principal or co-sureties, to pay the value of the property, instead of the amount of the debt. *Hickman v. McCurdy*, 7 J. J. Marsh. (Ky.) 555.

If a surety pay a demand in notes of the Bank of the Commonwealth, he can recover from the principal only the value of the notes, interest, and costs. *Owings v. Owings*, 3 J. J. Marsh. (Ky.) 590.

A surety can recover from his principal only the actual amount paid. *Delaware, etc., R. Co. v. Oxford Iron Co.*, 38 N.J. Eq. 151.

Pickett v. Bates, 3 La. Ann. 627; *Southall v. Farish*, 85 Va. 403; *Walddrip v. Black*, 74 Cal. 409; *Crozier v.*

4. Action by Joint Sureties Against Principal.—Where two or more sureties pay the debt of their principal from money raised on their joint credit, or paid from a joint fund, the proper remedy to indemnify themselves is a joint action against the principal. Where, however, each of the several sureties pays a portion of the debt from his individual money, the sureties cannot have a joint action against the principal for the money so paid. Each must bring suit to recover the whole amount which he has paid, and if one has paid the whole debt, he alone can maintain suit.¹

5. Effect of Judgment Against Surety.—Where a surety has let judgment go against him by default, and has paid the debt, without knowing that there was a defense, he can recover from the principal, notwithstanding that the principal, when sued at the same court, by defending, obtained a judgment in his favor.² As a general rule, where a surety has made a reasonable defense, and judgment has gone against him, he may recover from the principal;³ and this is especially the case where the principal has notice of the suit against the surety.⁴

Grayson, 4 J. J. Marsh. (Ky.) 514; Hall v. Creswell, 12 Gill & J. (Md.) 36; Eaton v. Lambert, 1 Neb. 339; Miles v. Bacon, 4 J. J. Marsh. (Ky.) 457; Hill's Estate, 67 Cal. 238; Carpenter v. Minter, 72 Tex. 370.

1. In *Osborne v. Harper*, 5 East 225, Osborne, Amphlett, and Harper having dissolved partnership, Harper, after such dissolution, drew bills in the partnership firm in favor of Spooner, he not knowing of such dissolution, upon which Spooner brought his action against all the former partners, and Harper having pleaded his bankruptcy, Spooner entered a *nolle prosequi* as to him, and recovered judgment against Osborne and Amphlett, which was afterwards satisfied by the attorney of Osborne and Amphlett, who advanced part and borrowed the rest of the money on their joint credit. *Held*, that the sum so paid in satisfaction of the judgment might be recovered in a joint action. See also *Thomas v. Carter* (Vt. 1891), 22 Atl. Rep. 720.

In *Lowry v. Lumbermen's Bank*, 2 W. & S. (Pa.) 210, the court, by Rogers, J., said: "It would seem that where money, which two or more sureties pay for the principal, is raised on their joint credit, or paid from a joint fund, the proper remedy for a reimbursement is a joint action against the principal. *Osborne v. Harper*, 5 East 225; *Pearson v. Parker*, 3 N. H. 366; *Jewett v. Cornforth*, 3 Me. 107. The right to sue jointly does not arise from a joint

liability, but from a joint payment, where the money is raised on a joint credit or paid out of a joint fund. But where the payment is several, each must bring suit to recover the amount he has paid, and when one has paid the whole debt he alone can maintain suit, because he claims as the creditor of his principal, and of his co-sureties also. It would be obviously unjust to allow the principal to meet a claim arising from the payment of one, by proof of payment of it to another, who, although bound, had paid nothing."

2. *Stinson v. Brennan*, Cheves (S. Car.) 15.

3. *Montgomery v. Russell*, 10 La. 330; *Rice v. Rice*, 14 B. Mon. (Ky.) 335; *Thomas v. Beckman*, 1 B. Mon. (Ky.) 29; *Doran v. Davis*, 43 Iowa 86; *Peters v. Barnhill*, 1 Hill (S. Car.) 234; *Hare v. Grant*, 77 N. Car. 203; *Kean v. Goldsmith*, 12 La. Ann. 560; *Tinsley v. Oliver*, 5 Munf. (Va.) 419; *Kendrick v. Rice*, 16 Tex. 254; *Chandler v. Higgins*, 109 Ill. 602; *Katz v. Moesinger*, 110 Ill. 372.

4. *Konitzky v. Meyer*, 49 N. Y. 571. Where a surety is sued with his principal, or where he is sued alone and notifies his principal, so as to enable him to defend, or to furnish the surety with a defense, the recovery against the surety is the measure of his damages against his principal. And in an action to recover of his principal money paid to his use, the record of the recovery against the surety is con-

6. Where Indemnity is Given to the Surety.—The principal may lawfully execute a bond or mortgage, or even a deed for land, to indemnify his surety against any loss that may occur in consequence of the contract of suretyship. In such a case the liability of the surety is a sufficient consideration for the execution of the instrument.¹ Equity will authorize a surety, who has in his hands funds of his insolvent principal, to apply the same in satisfaction of the debt.²

clusive evidence. It would be iniquitous for the principal to stand by and see an excessive recovery against his surety, which he alone could prevent, and then set up the defense when his surety sues him. *Hare v. Grant*, 77 N. Car. 203.

In a suit against principal and surety judgment was recovered against both, and the surety paid the debt. In a suit by the surety, to recover the amount he had paid, held, that the principal could not be permitted to show the first suit was not well defended. *Rice v. Rice*, 14 B. Mon. (Ky.) 417.

The failure of a surety to appear and defend cannot be pleaded in defense of an action by the surety upon an indemnity bond given to protect him as surety, unless such failure was the result of negligence, or an appearance would have availed the defendant. *Doran v. Davis*, 43 Iowa 86.

1. *West v. Hayes*, 117 Ind. 290; *Kramer v. Farmers', etc., Bank*, 15 Ohio 253; *Patterson v. Martin*, 7 Ohio 225; *Choteau v. Thompson*, 3 Ohio St. 424; *Uhler v. Semple*, 20 N. J. Eq. 288; *Essex Co. v. Lindsley*, 41 N. J. Eq. 189; *Haseltine v. Guild*, 11 N. H. 390; *Grimes v. Sherman*, 25 Neb. 843; *Eaton v. Lambert*, 1 Neb. 339; *Pennington v. Woodall*, 17 Ala. 685; *Pond v. Clarke*, 14 Conn. 334; *Stonebroker v. Ford*, 81 Mo. 532; *Kassing v. International Bank*, 74 Ill. 16; *Vance v. Lancaster*, 3 Hayw. (Tenn.) 130; *White v. Carlton*, 52 Ind. 371; *McDaniel v. Austin* (S. Car.), 11 S. E. Rep. 350; *Price v. Trusdell*, 28 N. J. Eq. 200; *Ricketts v. Brown*, 42 Ind. 316; *Waller v. Todd*, 3 Dana (Ky.) 503; *Bachelor v. Priest*, 12 Pick. (Mass.) 399; *Rathbone v. Stocking*, 2 Barb. (N. Y.) 135; *Rex v. Adams*, 9 Vt. 233.

A public officer may legally secure, by assignment or otherwise, the sureties in his official bond, against the consequences of his past and future breaches of duty. *Dewey v. Littlejohn*, 2 Ired. Eq. (N. Car.) 495.

If a principal deposit money for the

protection of his surety, there is a sufficient consideration for the act, in the relations of the parties; and the bailee receiving it from the principal, or by his order, for the indemnity of the surety, thereby becomes the bailee of the surety—the receipt of the funds being in itself a consideration for a promise to pay the surety the amount of the deposit. *Keller v. Rhoades*, 39 Pa. St. 513.

A surety who, in good faith, takes a mortgage for his indemnity, is regarded in equity as entitled to a *bona fide* purchaser's preference over a creditor whose judgment is subsequent to a fraudulent sale by the principal debtor; and the mortgage inures to the benefit of an officer's sureties, added under an order of the court therefor, made after date of the mortgage. *Farmers' Nat. Bank v. Teeters*, 31 Ohio St. 36.

The sureties on a bond for delivery of property levied on, cannot be required to surrender to the judgment creditor the proceeds of property placed in their hands to indemnify them, until it is shown that they have been relieved from liability. *Cheatham v. Seawright*, 30 S. Car. 101.

Where one deposits money with another, who has signed notes with him, as a surety, before the notes mature, and it is agreed between them that the latter should apply the money in discharge of the notes, the former cannot afterwards revoke such agreement; the suretyship is a sufficient consideration to support it. *Mandigo v. Mandigo*, 26 Mich. 349.

2. *McKnight v. Bradley*, 10 Rich. Eq. (S. Car.) 557; *Battle v. Hart*, 2 Dev. Eq. (N. Car.) 31; *Abbey v. Campen*, 1 Freem. Ch. (Miss.) 273; *Polk v. Gallart*, 2 Dev. & B. Eq. (N. Car.) 395.

Where a debtor gives his surety a mortgage to indemnify him against loss, the property mortgaged can only be applied, when the surety has either paid the debt or has become immediately liable for its payment, and until

then, a court of equity will not interfere. *Constant v. Matteson*, 22 Ill. 546.

If a surety is liable for the immediate payment of a debt, owing by his principal, he may pay it and resort at once to any funds of the principal he holds as an indemnity, without waiting for the money to be collected by a resort to an action at law. *Constant v. Matteson*, 22 Ill. 546.

If a surety who has paid the note of his principal is appointed administrator of his estate, he may apply funds coming to his hands while the estate is solvent, to the discharge of the debt. *Bates v. Vary*, 40 Ala. 421.

The delivery of a chattel, by a purchaser, to one who has become his surety for the purchase-money is valid; and the surety may resume his possession, after allowing the purchaser to retain possession until the terms of agreement are complied with. *Ferguson v. Union Furnace Co.*, 9 Wend. (N. Y.) 345.

In *Ohio*, a surety whose liability is fixed by a judgment against himself, and who holds an assignment of the judgment against his principal, an intestate, for the same debt, may retain a sufficient portion of the debt due from himself to his principal to satisfy the debt secured, if the principal's estate be solvent; if insolvent, only so much as would be distributed to the creditor. *Creager v. Minard*, Wright (Ohio) 519.

A surety filed his bill for contribution, although he held funds of his deceased principal sufficient to discharge the debt which he had paid. *Held*, that he could not retain for his debt, but was liable to the administrator for the funds, to be administered according to law. *Sharp v. Caldwell*, 7 Humph. (Tenn.) 415.

One having exclusive custody of the goods of another for the purpose of carrying on a store, who pays for goods to replenish the stock, and becomes personally liable for them, has not a lien on the goods to secure him against such liability. *Gray v. Wilson*, 9 Watts (Pa.) 512.

When land is sold by a clerk and master, under a decree of a court of equity, and the legal title is retained until the purchase-money is paid, if the principal becomes insolvent before so doing, the sureties have an immediate equity, either before paying the money, or after, to subject the land.

Egerton v. Alley, 6 Ired. Eq. (N. Car.) 188.

Where one was surety for the deceased, whose estate was insolvent, and the administrators of the latter, in a suit against the surety, were entitled to judgment, held, that if the debt for which the surety was still liable, was then due, whether it had been due or not in the lifetime of the deceased, the defendant was equitably entitled to retain so much of the judgment as would satisfy the debt, until exonerated from his liability. *Beaver v. Beaver*, 23 Pa. St. 167.

Where judgment has been rendered against principal and surety, and the principal is insolvent, a court of chancery will entertain jurisdiction of a suit brought by the surety for the purpose of reaching credits of the principal, and appropriating them in payment of the judgment, although the surety has not paid the money. *McConnell v. Scott*, 15 Ohio 401.

A vendor who had executed a full title to land sold, took from the vendee a personal bond for the purchase-money, with two sureties. Upon the insolvency and death of the vendee and one of the sureties, and a sale of the land by the devisee of the vendee to a purchaser with notice, held, that the other surety could not subject the land for his indemnification upon the bond. *Miller v. Miller*, Phill. Eq. (N. Car.) 85.

A surety on a bond, paying his principal's debt, is entitled to recover, though the principal has been declared bankrupt by the laws of another State. *Haddon v. Chambers*, 1 Yeates (Pa.) 529; 2 Dall. (Pa.) 236.

See also on this subject, *Whipple v. Briggs*, 30 Vt. 111; *Vance v. Lancaster*, 3 Hayw. (Tenn.) 130; *West v. Bank of Rutland*, 19 Vt. 403; *Wesley Church v. Moore*, 10 Pa. St. 273; *Bird v. Benton*, 2 Dev. (N. Car.) 179; *Monell v. Smith*, 5 Cow. (N. Y.) 441; *Child v. Eureka, etc., Works*, 44 N. H. 354; *Cornwall v. Gould*, 4 Pick. (Mass.) 444; *U. S. Bank v. Stewart*, 4 Dana (Ky.) 27; *Porter v. Howard*, 1 A. K. Marsh. (Ky.) 358; *Hunter v. Levon*, 11 Cal. 11; *Frazer v. Goode*, 3 Rich. (S. Car.) 199; *Russell v. La Roque*, 11 Ala. 352; *Bryant v. Crosby*, 36 Me. 562; *Owen v. Ashlock*, 9 Port. (Ala.) 417; *Hellams v. Abercrombie*, 15 S. Car. 110; 40 Am. Rep. 684; *Tyree v. Parham*, 66 Ala. 424; *Taylor v. Cox*, 32 W. Va. 148; *Stone v. Hammell* (Cal.

7. Rights of Surety in Equity.—After the debt has become due, on default of the principal to pay it, the surety may at once file a bill in equity to compel the principal to pay the debt, and relieve the surety from liability upon it.¹ A surety may

1889), 22 Pac. Rep. 203; *McDaniel v. Austin*, 32 S. Car. 601.

1. In *Philadelphia, etc., R. Co. v. Little*, 41 N. J. Eq. 519, it was held that in equity, relief will be afforded to a surety for his indemnity out of the property of the principal where the equitable rights of the surety may be protected without prejudicing the substantial rights of the creditor, either by an injunction bill to restrain the sale of the surety's property until the principal's property pledged for the same debt is first applied, or by a bill for subrogation to the creditor's rights against the principal's property, or by marshaling the securities and the application of them to the debt in the order in which they are equitably chargeable, according to the circumstances of the particular case.

Though the liability of sureties is governed by the same principles at law, as in equity, a court of equity will not send a party suing there to a court of law for a discharge or relief, but will extend the same relief and exercise the same powers, in behalf of sureties that were exercised before jurisdiction of this subject was entertained at law. *Viele v. Hoag*, 24 Vt. 46.

A surety can have no relief at law against his liability, unless he has made some payment on account of it, but he can proceed in equity to compel his principal to make payment and the creditor to receive it. *Hannay v. Pell*, 3 E. D. Smith (N. Y.) 432.

On application of a surety, who apprehends injury from further delay, a court of equity may compel the principal debtor to discharge his debt past due, although the surety has not paid the debt or been sued. *Morton v. Reid*, 11 S. Car. 593.

Sureties can sustain a bill to have a debt paid by their principal, or out of his estate, before they have been compelled to pay the debt. *Thigpen v. Price*, Phill. Eq. (N. Car.) 146; *Stump v. Rogers*, 1 O. 533; *Bishop v. Day*, 13 Vt. 81.

A surety who has not paid the debt cannot maintain a suit in equity to compel the principal to convey his property to a receiver in order that the surety may be secured. *Nash v. Burchard* (Mich. 1891), 49 N. W. Rep. 492.

A surety has the right to go into equity at any time to compel the principal to exonerate him from liability. *Washington v. Tait*, 3 Humph. (Tenn.) 543.

Where a fund has been assigned, in trust, for the indemnification of a surety, the surety may come into equity to have the fund applied directly in discharge of the liability, before he has been actually damnified. *Daniel v. Joyner*, 3 Ired. Eq. (N. Car.) 513.

A surety in a bond for the purchase money of land, where the land has not been conveyed, nor any of the purchase money paid, may go into equity to subject the land to the payment of the debt, before he has been himself compelled to pay it. *Hatcher v. Hatcher*, 1 Rand. (Va.) 53.

In *Wooldridge v. Norris*, L. R., 6 Eq. 410, a surety on a bond to secure a money debt was secured by another bond of indemnity entered into by the principal debtor's father, who had died, having by will devised certain property specifically upon trust to pay the debt. The creditor having applied to the surety, the surety had recourse to the executors, who said they had no fund in hand, and that they were unable under the will to raise the money by sale of any portion of the testator's estate, except under a decree of the court. It was held that the surety, though he had not actually paid anything, was entitled to maintain a bill against the executor for administration, payment of the debt, and indemnity.

In *Ardesco Oil Co. v. North America Oil, etc., Co.*, 66 Pa. St. 375, the court, by Sharswood, J., said: "It is well settled that as soon as the surety's obligation to pay becomes absolute he is entitled in equity to require the principal debtor to exonerate him, and he may at once file a bill to compel an exoneration, although the creditor has not demanded payment from him." See to the same effect, *Delaware, etc., R. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151; *Beaver v. Beaver*, 23 Pa. St. 167; *Irick v. Black*, 17 N. J. Eq. 189; *Howell v. Cobb*, 2 Coldw. (Tenn.) 104; 88 Am. Dec. 591; *Saylors v. Saylors*, 3 Heisk. (Tenn.) 525; *Greene v. Starnes*, 1 Heisk. (Tenn.) 582; *Rice v. Downing*,

file a bill to set aside fraudulent conveyances made by his principal.¹

12 B. Mon. (Ky.) 44; *West v. Chasten*, 12 Fla. 315; *Bishop v. Day*, 13 Vt. 81; 37 Am. Dec. 582; Philadelphia, etc., R. Co. v. Little, 41 N. J. Eq. 519; *Ritenour v. Mathews*, 42 Ind. 7; *Huey v. Periney*, 5 Minn. 310; *Miller v. Stout*, 5 Del. Ch. 259; *Taylor v. Miller*, Phil. Eq. (N. Car.) 365; *Whitridge v. Durkee*, 2 Md. Ch. 442; *Moore v. Topliff*, 107 Ill. 241; *Miller v. Speed*, 9 Heisk. (Tenn.) 196; *Stevinson v. Taverners*, 9 Gratt. (Va.) 398; *Delaney v. Tipton*, 3 Hayw. (Tenn.) 14; *Anderson v. Walton*, 35 Ga. 202; *Outlaw v. Reddick*, 11 Ga. 669; *Gibbs v. Mennard*, 6 Paige (N. Y.) 258; *Gilliam v. Esselman*, 5 Sneed (Tenn.) 86; *Marsh v. Bennett*, 7 Miss. 215; *Carpenter v. Kee*, 5 Humph. (Tenn.) 585; *Humphreys v. Leggett*, 9 How. (U. S.) 207; 21 How. (U. S.) 66; *Allen v. Smitherman*, 6 Ired. Eq. (N. Car.) 341; *Taylor v. Taylor*, 8 B. Mon. (Ky.) 419; *Succession of Montgomery*, 2 La. Ann. 469; *Parlow v. Lane*, 3 B. Mon. (Ky.) 424; *Buford v. Francisco*, 3 Dana (Ky.) 68; *Edwards v. Prather*, 22 La. Ann. 334; *Mattingly v. Sutton*, 19 W. Va. 19; *Ridgeway v. Potter*, 115 Ill. 457; 55 Am. Rep. 875; *Benne v. Schnecko*, 100 Mo. 250; *Smith v. Harbin*, 124 Ind. 434; *Sheppard v. Conley* (Supreme Ct.), 9 N. Y. Supp. 777; *Richards v. Osceola Bank*, 79 Iowa 707; *Womack v. Glasgow*, 84 Va. 9; *Armstrong v. Poole*, 29 W. Va. 666; *Meador v. Meador*, 88 Ky. 217. *In re Reynolds*, 16 Nat. Bank, Reg. 158; *McMillen v. Mason*, 71 Wis. 405; *Paxton v. Rich*, 85 Va. 378; *Sims v. Wallace*, 6 B. Mon. (Ky.) 410.

1. *Findlay v. Bank of U. S.*, 2 McLean (U. S.) 44; *Taylor v. Heriot*, 4 Dev. Eq. (S. Car.) 227; *Kimball v. Greig*, 47 Ala. 230; *Martin v. Walker*, 12 Hun (N. Y.) 46; *Mugge v. Ewing*, 54 Ill. 236; *Pashly v. Mandigo*, 42 Mich. 172; *Loughridge v. Bowland*, 52 Miss. 546; *Baugh v. Boles*, 66 Ind. 376; *Choteau v. Jones*, 11 Ill. 300; 50 Am. Dec. 460. But see *Williams v. Tipton*, 5 Humph. (Tenn.) 66; 42 Am. Dec. 420.

Fraudulent Conveyances by Principal.

—A surety whose liability is contingent at the time a conveyance is made by his principal, and who is afterwards compelled to pay the debt, may attack the conveyance as fraudulent, being a creditor within the meaning of the Statute of Frauds. *Bragg v. Patterson*, 85 Va. 233.

To a bill which is filed by a surety against his principal, and which seeks to subject to the payment of the debt, lands alleged to have been conveyed by the principal in secret trust, the holder of the legal title to the lands is a necessary party. *Kimball v. Greig*, 47 Ala. 230.

Where a principal debtor, with money in his pocket, suffers the property of his surety to be sold, and becomes the purchaser, it is doubtful whether, even at law, the sale as against the surety is not a mere nullity; but in a court of equity, such a purchaser will not be allowed to set up a title thus acquired, against his surety. *Perry v. Yarrowborough*, 3 Jones Eq. (N. Car.) 66.

An administrator of a surety on an official bond may join in an action to set aside fraudulent conveyances of the principal, as he has a right to have the principal's property exhausted before resort is had to that of the surety. *Strong v. Taylor*, 79 Ind. 208.

Where a surety for the price of land, purchased by another, has paid or is liable to pay any sum on that account, he has an equity to be reimbursed or exonerated therefor by a sale of the land, and to that end he has a right to file a bill to prevent a conveyance to the purchaser by the vendor, who has kept the title as a security for the purchase-money. *Smith v. Smith*, 5 Ired. Eq. (N. Car.) 34.

Although a conveyance fraudulently made by a principal, with the view of injuring his surety, will be set aside, yet a debtor has a right fairly to convey his property to satisfy a debt without the surety's assent; and such a conveyance will be sustained. *Findlay v. Bank of the United States*, 2 McLean (U. S.) 44.

The relation of the debtor and creditor against principal and surety, so as to entitle the latter to avoid a voluntary conveyance made by the former, commences at the date of the obligation, and not from the time the surety makes payment. *Choteau v. Jones*, 11 Ill. 300.

The chancellor may set aside a fraudulent conveyance, and subject real estate to the repayment of money paid by a surety. *Parlow v. Lane*, 3 B. Mon. (Ky.) 424.

Exceptions.—In *Antrobus v. Davidson*, 3 Meriv. 578, the colonel of a regi-

8. Where Principal Is Not Liable.—Where the principal is not liable, the surety cannot recover from the principal the money which he has paid.¹

ment having taken a bond of indemnity from his agents, with another as surety, in respect of all charges, etc., to which he may become liable by their default, the agents afterwards having become bankrupt, and government having given notice to the representatives of the colonel (deceased) of a demand upon the colonel's estate by virtue of an unliquidated account, a bill by the representatives of the colonel against the representatives of the surety, to pay the balance due to government, and also to set aside a sufficient sum out of their testator's estate to answer future contingent demands, though attempted to be supported upon the principle of a bill *quia timet*, was dismissed with costs. The master of the rolls said: "It is true that a surety may come here to compel the principal to relieve him of his liability by paying off the debt. But Sir William Fawcett's representatives and Davidson do not stand in the relation of principal and surety in the sense in which the rule of equity considers that relation. Whatever loss there may be, it is true, will ultimately fall on Davidson, and therefore in a certain sense Davidson may be legally considered the principal debtor; but in equity he is no more the proper debtor than Sir William Fawcett. Both are answerable for Ross and Ogilvie; and though Davidson is bound to keep Sir William Fawcett indemnified, that obligation does not arise out of any principle of equity, but is created by special convention between the parties. Except for the bond, Davidson would have nothing to do with the debts of Ross and Ogilvie. The bond, therefore, which alone created, must determine the extent of, his liability. There is no principle upon which a court of equity can extend the legal effect of the bond. Its legal effect is to protect against the consequences of future deficiencies, but not to entitle the party to call for anticipated and precautionary payment, but by way of preventing the risk of his being hereafter damnified."

A surety has no right to file a bill to set aside an alleged fraudulent transfer of property by his principal until he has paid the debt and become himself the creditor, etc. *Meux v. Anthony*,

11 Ark. 411; *Williams v. Bizzell*, 11 Ark. 716.

A surety cannot, without having paid the debt or sustained loss, and before any judgment has been rendered against him, have property fraudulently conveyed by the debtor subjected to the payment of the debt without making the creditor a party to the proceeding. *Oneal v. Smith*, 10 Lea (Tenn.) 340.

A surety who has paid a judgment recovered against himself and his principal, cannot join with other creditors, after the death of the principal debtor, in a bill to set aside a conveyance made by the debtor in alleged fraud of creditors. He does not stand as a simple contract creditor. *Mugge v. Ewing*, 54 Ill. 236.

See also *Campbell v. Macomb*, 4 Johns. Ch. (N. Y.) 534; *McElroy v. Hatheway*, 44 Mich. 399; *Ridgeway v. Potter*, 114 Ill. 457; 55 Am. Rep. 875.

1. In *Harley v. Stapleton*, 24 Mo. 248, it was held that where a note was given to secure a sum of money bet on an election, and the surety on the note paid it, the surety could not recover from the principal.

In *Bancroft v. Abbott*, 3 Allen (Mass.) 524, there was a bond against incumbrances which stipulated that the grantor should fulfill his covenants, and pay and discharge all claims which any person or persons shall have on the premises, so that the grantee shall be indemnified and saved harmless from all expenses in defending the title. The surety paid the costs of defending two suits which the bond did not cover. The court held that he could not recover from his principal the sum which he had paid.

In *Duncan v. Keiffer*, 3 Binn. (Pa.) 126, it was held that if a surety makes an agreement with one of two persons for whom he is bound, that if he, the principal, will pay one-half the debt, he, the surety, will pay the other half for the other principal, and the one-half is paid by the principal according to the agreement, the surety cannot maintain an action against both principals to recover the part that he has paid.

In *Gibbs v. Mennard*, 6 Paige (N. Y.) 258, the defendant who was a resident of Cape Breton, as the master of a

9. Statute of Limitations as Between Surety and Principal.—The Statute of Limitations begins to run against the surety who has paid the debt from the time of the actual payment of the debt, and not from the time when the debt became due.¹

merchant vessel, executed a bond at Turk's Island in the penalty of 1,000 pounds, with the complainant as his surety, conditioned that the vessel of which he was master should not, upon her departure from the Bahama Islands, carry out of the government thereof any slave or servant without leave of the owner or master, and upon the sailing of the vessel, a slave, who had concealed himself without the knowledge of the defendant, was thus transported from Turk's Island to New York, whereupon a bill was filed against the defendant, to compel him to indemnify the complainant as his surety in the bond, and for a *ne exeat*. The court held, that the complainant was not entitled to a *ne exeat* until he had been actually sued, and a judgment had been recovered against him upon the bond, as such surety for the defendant, it being doubtful whether the defendant was liable.

In *Davis v. Stokes Co.*, 74 N. Car. 374, money was borrowed by a county court without any authority in law. The plaintiff became a surety for the money thus borrowed. The court held that he could not recover the money that he had paid on account of the suretyship.

If a surety pays a debt barred by the Statute of Limitations, he cannot recover from the principal. *Halshett v. Pegram*, 21 La. Ann. 722; *Elliott v. Nichols*, 7 Gill (Md.) 85; *Elder v. Elder*, 43 Kan. 514.

A surety in a bond, who has been compelled to pay the penalty, without any fraud or negligence on his part, may recover an indemnity from the principal, though the bond were given without consideration, and the obligees were not legally entitled to exact it. *Frith v. Sprague*, 14 Mass. 455.

When a surety pays a debt, he must be legally bound for it, to enable him to recover the amount paid of the principal, and the principal must also, at the same time, be under a legal obligation to pay the debt. *Hollinsbee v. Ritchey*, 49 Ind. 261.

A surety, who pays money voluntarily, on a judgment absolutely barred, loses his remedy against his principal; but if the judgment can be in any way enforced, the payment is not voluntary.

Randolph v. Randolph, 3 Rand. (Va.) 490.

The surety on a replevin bond was released from liability by the failure of the plaintiff to get out his execution within the year; but when he afterwards got it out, the surety paid the debt. *Held*, that as he was not legally obliged to make such payment, he could not recover the amount thereof from his principal, on the ground of an implied request and promise to him from such principal. *Kimble v. Cummins*, 3 Metc. (Ky.) 327.

For other cases holding that surety cannot recover from principal for a payment for which the principal was not liable, see *Palmer v. Dodge*, 4 Ohio St. 21; *Noole v. Blount*, 77 Mo. 235; *Brown v. Kidd*, 34 Miss. 291.

1. In *Wesley Church v. Moore*, 10 Pa. St. 273, the court held, that the Statute of Limitations begins to run in favor of the principal, from the time the property of the surety is sold to pay the debt.

In *Thayer v. Daniels*, 110 Mass. 345, the court, by Ames, J., said: "There was an implied promise, on the part of the defendant, as principal, to indemnify the surety, and to repay to him all the money that he might be compelled, in consequence of his liability as surety, to pay to the creditor. Until the surety has been compelled to make such payment, there is no breach of this implied promise. The cause of action accrues then for the first time, and the Statute of Limitations then begins to run."

In *Davies v. Humphries*, 6 M. & W. 153, it was held that if a surety, more than six years before the action, has paid a portion of the debt, and the principal has paid the residue within six years, the Statute of Limitation will not run in the payment by the surety, but from the payment of the residue by the principal, for until the latter date it does not appear that the surety has paid more than his share. But see *Williams v. Williams*, 5 Ohio 444.

In *Bauer v. Gray*, 18 Mo. App. 164, it was held that if a surety pays his principal's debt, he must present his claim for reimbursement from the es-

XII. RIGHTS OF SURETY AGAINST CREDITOR—1. Right to Full Disclosure.—At the time the contract of suretyship is entered into, the surety is entitled to a full disclosure of all material facts affecting his liability and relating to the business which is the subject of the contract. The creditor must disclose such facts within his knowledge as affect the character of the principal. Thus if the creditor conceals from the surety the fact that the principal has been a defaulter, the surety will be discharged.¹ The creditor, however, is not obliged to seek out the surety and explain to him

tate of the deceased principal within the time limited by statute, or the probate court cannot allow it.

In *Tennessee*, within the meaning of the act of 1789, ch. 23, limiting the time for bringing suits against executors and administrators, the surety is not a "creditor" of the principal, until payment by him or the rendition of judgment against him. *Marshall v. Hudson*, 9 Yerg. (Tenn.) 57.

1. In *Wilmington, etc., R. Co. v. Ling*, 18 S. Car. 116; 16 Am. & Eng. R. Cas. 539, it was held that the lower court committed no error in charging the jury "that if the plaintiffs knew when the bond was given, that their agent was in default and indebted to them in his pre-existing agency, and yet concealed this fact and held him out to the sureties as trustworthy, either expressly or impliedly, such conduct would be a fraud upon the sureties, and would make void the bond as to them."

In *Franklin Bank v. Cooper*, 36 Me. 179, the court, by Shepley, C. J., said: "One who becomes surety for another must ordinarily be presumed to do so upon the belief that the transaction between the principal parties is one occurring in the usual course of business of that description, subjecting him only to the ordinary risks attending it, and the party to whom he becomes a surety must be presumed to know that such will be his understanding, and that he will act upon it unless he is informed that there are extraordinary circumstances affecting the risk. To receive a surety known to be acting upon the belief that there are no unusual circumstances by which his risk will be materially increased, well knowing that there are such circumstances, and having an opportunity to make them known, and withholding them, must be regarded as a legal fraud, by which the surety will be relieved from his contract."

In *Davies v. London, etc., M. Ins.*

Co., 8 Ch. Div. 469, the officers of a company, believing that the retention of money by one of their agents amounted to felony, directed his arrest. Certain friends of his came to the officers of the company and proposed to deposit a sum of money by way of security for any deficiency. On the same day the company was advised that the acts of the agent did not amount to felony, and the direction for the arrest was withdrawn. Later in the day the friends of the agent had a second interview with the officers of the company, and agreed to deposit a sum of money as security for his defaults, no mention being made of the withdrawal of the directions for the arrest. The sum of money was afterwards deposited with trustees on an agreement for the security of the company. The court held that the change of circumstances ought to have been stated to the intending sureties, and that the agreement must be rescinded and the money returned to the sureties.

In *Pidcock v. Bishop*, 3 B. & C. 605; 10 E. C. L. 197, it was agreed between the buyer and seller of iron that the former should pay a certain sum beyond the market price, which sum was to be applied to the payment of a former debt due to one of the vendors. The payments of the goods was guaranteed by a third person, who was not informed of the secret agreement between the parties. The court held that the guarantor was discharged.

In *Harrison v. Lumbermen, etc., Ins. Co.*, 8 Mo. App. 37, an insurance company failed to disclose a material fact to a person who was about to become surety on the bond of the secretary of the company. The court held that the surety was relieved from liability.

In *Atlas Bank v. Brownell*, 9 R. I. 168; 11 Am. Rep. 231, which was an action on a cashier's bond, it was held that to avoid a bond on the ground of

all the details of the transaction, and the nature and extent of his liability. If the surety desires information about any particular subject affecting the contract, he must himself make inquiry about it.¹ Where the fact concealed is not connected with the

fraud on the part of the bank, or its directors, there must be a fraudulent concealment of something material for the surety to know.

In *Screwmen's Ben. Assoc. v. Smith*, 70 Tex. 168, the fact that the principal was dishonest was known to the obligee and not disclosed to the surety. It was held that the surety was not liable. See also *Sooy v. State*, 39 N. J. L. 135.

In *Drabek v. Grand Lodge*, 24 Ill. App. 82, which was a suit on the bond of the secretary of a lodge, it appeared that the president of the lodge, when questioned, represented that the secretary was not in default when in fact he was, and that, owing to this representation, the sureties signed the bond. *Held*, that the sureties were not liable.

In *Smith v. Joslyn*, 40 Ohio St. 409, it was held that neglect to inform the sureties that the employé had been guilty of culpable carelessness, would relieve the sureties.

In *Densmore v. Tidball*, 34 Ohio St. 411, an express company, having a belief, founded on reasonable and reliable information, that one of its agents was a defaulter, required a bond for his future fidelity, and, by holding him out as a trustworthy person, obtained the same. *Held*, that a surety so procured was not liable thereon.

See also on this subject, *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23; 19 Am. Rep. 50; *Casoni v. Jerome*, 58 N. Y. 321; *Sooy v. State*, 39 N. J. L. 135; *Owen v. Homan*, 4 H. L. Cas. 997; *Railton v. Mathews*, 10 C. & F. 934; *Densmore v. Tidball*, 34 Ohio St. 411; *Atlas Bank v. Brownell*, 9 R. I. 168; 11 Am. Rep. 231; *Wythes v. Labouchere*, 3 De G. & J. 593; *Hamilton v. Watson*, 12 C. & F. 109; *Stone v. Compton*, 5 Bing. N. Cas. 142; 35 E. C. L. 57; *State v. Atherton*, 40 Mo. 209; *Aetna L. Ins. Co. v. Mabbett*, 18 Wis. 668; *Guardians of Stokely Union v. Strother*, 22 L. T. 84; *Maltby's Case*, 1 Dow 294; *Roper v. Sangamon Lodge No. 6*, 91 Ill. 518; 33 Am. Rep. 60; *Watertown F. Ins. Co. v. Simmons*, 131 Mass. 85; 41 Am. Rep. 196; *Davis Sewing Mach. Co. v. Buckles*, 89 Ill. 237; *Taylor v. Lohman*, 74 Ind. 418; *Farmers' Nat. Bank v. Van Slyke*, 49

Hun (N. Y.) 7; *Warren v. Branch*, 15 W. Va. 21; *North British Assur. Co. v. Lloyd*, 10 Ex. Ch. 523; *Ham v. Greve*, 34 Ind. 18; *Small v. Currie*, 2 Drew. 102; *McCormick v. Hubbell*, 4 Mont. 87; *Phoenix Mut. L. Ins. Co. v. Holloway*, 51 Conn. 310; 50 Am. Rep. 21; *Pidcock v. Bishop*, 3 B. & C. 605; 10 E. C. L. 197; *Cashin v. Perth*, 7 Grant's Ch. 340; *Third Nat. Bank v. Owen*, 101 Mo. 558; *Drabek v. Grand Lodge*, 24 Ill. App. 82; *Guardian F. & L. Assur. Co. v. Thompson*, 68 Cal. 208; *State v. Rushing*, 17 Fla. 226; *Bourne v. Mt. Holly Nat. Bank*, 45 N. J. L. 360; *Cawley v. People*, 95 Ill. 249; *State v. Dunn*, 11 La. Ann. 549; *Home Ins. Co. v. Holway*, 55 Iowa 571; 39 Am. Rep. 179; *Remington Sewing Mach. Co. v. Kezertee*, 49 Wis. 409; *Monroe Bank v. Anderson*, 65 Iowa 692; *Stanford Bank v. Mattingly* (Ky. 1892), 18 S. W. Rep. 940.

1. In *Western New York L. Ins. Co. v. Clinton*, 66 N. Y. 326, the principal was liable under two contracts, the first of which was shown to the sureties when they executed the bond, but it did not appear that they saw or knew of the latter. The court held in an action upon the bond, that it embraced within its terms the premiums collected under both contracts, and that it was immaterial that the defendants had no knowledge of the second. The court, by Miller, J., said: "Nor does it relieve the defendants from liability upon the bond, because the sureties had no knowledge of the second agreement until after the execution of the bond. Even if they were misled by the principal, at whose request the bond was executed, as to the character and extent of the obligation assumed, it is no valid defense to this action, unless it appears that the plaintiff was a party to the fraud practiced upon the defendants. *Casoni v. Jerome*, 58 N. Y. 321; *McWilliams v. Mason*, 31 N. Y. 294. The position that the obligee in a bond is bound to seek out the sureties and explain to them the nature and extent of their obligation at the point of losing the security, or that he is to be held responsible for the fraudulent representations or concealment of the principal of any of the facts, is somewhat novel, and

is not upheld by any adjudged case. It is the duty of the sureties to look out for themselves and ascertain the nature of the obligation embraced in the undertaking, and any other rule would not only work serious inconvenience, but render securities of this character of but little, if of any, value."

The creditor is not bound to inform the surety of the insolvency of the principal. *Roper v. Sangamon Lodge No. 6*, 91 Ill. 518; 33 Am. Rep. 60; *Ham v. Greve*, 34 Ind. 18; *Farmers' Nat. Bank v. Branden (Pa.)*, 22 Atl. Rep. 1045.

In *Tapley v. Martin*, 116 Mass. 275, it was said: "The object of the bond is to guaranty to the bank the faithful performance by the cashier of his duties. His duties and obligations are not affected by the negligence of the officers or agents of the bank, and such negligence does not discharge the sureties;" and it was held that the surety upon the bond of the cashier of a national bank is not discharged by the fact that the cashier had, before the bond was given, committed frauds upon the bank, although they were guilty of gross negligence in not discovering them."

In *Hamilton v. Watson*, 12 C. & F. 109, there was an obligation to a banker by a third party to be responsible for a cash credit to be given to one of the banker's customers. Immediately after the execution of the obligation the cash credit was employed to pay off an old debt due to the banker. It appeared that it was intended to make this application of the money when the surety became bound, but it was not communicated to him as he made no inquiry. The court held that the obligation was not avoided. Lord Campbell said: "I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure; and I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily—namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction—that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect; and, if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if the surety

would guard against particular perils, he must put the question, and he must gain the information which he requires."

In *North British Assur. Co. v. Lloyd*, 10 Exch. 522, A obtained a loan of 10,000 pounds from the plaintiffs, an insurance company, on the deposit of certain railway shares, with a stipulation that, if the market value of the shares fell below a certain amount, A should either furnish fresh shares or pay their value, so as to leave a given surplus. When the time for repayment of the loan arrived, the shares having fallen in value, the time was extended to a further period on the deposit of additional shares and the acceptance of A's brother B to the amount of 2,000 pounds. Before the loan became due in pursuance of the terms of this second arrangement, B applied to the plaintiffs to be released from his acceptance, upon procuring the guaranty of the defendant and three others for five hundred pounds each. The plaintiffs assented to this arrangement. A then informed the defendant of the loan and of its terms, and told him, that, unless he could procure security, his shares would be sold at a great loss; but the arrangement as to the withdrawal of B's acceptance was not communicated to the defendant, and he was wholly ignorant of it. The defendant executed a guaranty, which did not refer to B's acceptance for 2,000 pounds, but recited the consideration for the guaranty to be the original loan, and of the plaintiffs' agreeing not to require any further security in the event of the depreciation of the shares as provided for by the original agreement. In an action on this guaranty, the court held that the non-communication of the private arrangement between the plaintiffs and A and his brother did not amount to constructive fraud, and afforded no defense to the action.

In *Appleton v. Bascom*, 3 Met. (Mass.) 169, it was held that the promise of a principal to indemnify his sureties is regarded as made to them jointly and severally; and when they jointly pay money for him, they may join in a suit against him, on each implied promise, for reimbursement.

In *Dye v. Mann*, 10 Mich. 291, it was held that sureties might bring a joint suit for indemnity against their principal, where they have borrowed money to pay a portion of the debt, for which

contract of suretyship and does not have the effect of increasing the responsibility of the surety, the concealment will not relieve the surety from liability.¹

2. Right to Disclosure Subsequent to the Contract.—Where a person becomes surety for an employé, and the master discovers that the employé has been guilty of dishonesty in the course of the service, and he continues him in his employment without the knowledge and consent of the surety, express or implied, he cannot afterwards hold the surety for any loss which may arise from the dishonesty of the employé during the subsequent service.² But mere delay on the part of the employer to

they gave their joint note, and for the balance they gave their joint note to the creditor, who had accepted it as payment.

For other cases on this subject see *Riddle v. Bowman*, 27 N. H. 236; *Pearson v. Parker*, 3 N. H. 366; *Peabody v. Chapman*, 20 N. H. 418; *Apgar v. Hiler*, 24 N. J. L. 812; *Whipple v. Briggs*, 28 Vt. 65; *Bunker v. Tufts*, 55 Me. 180; *Day v. Swann*, 13 Me. 165; *Evos v. Leach*, 18 Hun (N. Y.) 139; *Gould v. Gould*, 8 Cow. (N. Y.) 168; *Sevier v. Roddie*, 51 Mo. 580; *Parker v. Leek*, 1 Stew. (Ala.) 523; *Stewart v. Vaughn*, 1 Rice (S. Car.) 33; *Babcock v. Hubbard*, 2 Conn. 536; *Ross v. Allen*, 67 Ill. 317; *Rizer v. Callen*, 27 Can. 339; *Litler v. Horsey*, 2 Ohio 209; *Boggs v. Curtin*, 10 S. & R. (Pa.) 211.

In *Monroe Co. v. Otis*, 62 N. Y. 88, it was held that mere laches on the part of an obligee or creditor, or non-performance of some act which might prevent loss to surety, will not in the absence of some express covenant or condition, discharge the surety. To be available to him as a defense, the neglect must be some positive duty owing to him.

See also *Howe Mach. Co. v. Farrington*, 82 N. Y. 121; *Roper v. Sangamon Lodge, etc.*, Trustees, 91 Ill. 518; *Ashuelot Sav. Bank v. Albee*, 63 N. H. 152; *New York Mut. L. Ins. Co. v. Wilcox*, 8 Biss. (U. S.) 197; *Bank of Monroe v. Gifford*, 72 Iowa 750; *Aetna L. Ins. Co. v. American Surety Co.*, 34 Fed. Rep. 291; *Pine Co. v. Willard*, 39 Minn. 125; *Metropolitan Loan Assoc. v. Esche*, 75 Cal. 513; *Lucas v. Owens*, 113 Ind. 521.

1. In *Bostwick v. Van Voorhis*, 91 N. Y. 353, the court, by Earl, J., said: "Bartow was teller of the bank before he was appointed cashier thereof, and it is claimed that the directors, before

his appointment as cashier, were aware of certain misconduct of his as teller, which they concealed from the sureties, and which they were bound, acting in good faith, to have made known to them. It is undoubtedly true that if the directors had knowledge that Bartow had been dishonest and unfaithful in his office as teller, they were bound to apprise the sureties of that fact, otherwise they could not hold them. But mere irregularities or omissions of duty on the part of Bartow while he was acting as teller, which did not affect his moral character or his official integrity and fidelity, even if known to the directors, would not enable the sureties to defend upon the ground that they had been deceived. Sureties are supposed to know the character of their principal, and to be willing to be bound for his fidelity. They must inquire and inform themselves of the facts they desire to know, and if they omit to seek for or obtain the requisite information, they cannot easily avoid the bond upon inferential or unsatisfactory proof that they were drawn into signing it by bad faith on the part of the obligee. Before a bond in such a case can be avoided, the fraud and bad faith should be brought home to the obligee by quite clear and decisive evidence, otherwise bonds of this character will furnish a very precarious security to the parties who take them."

In *Comstock v. Gage*, 91 Ill. 328, it was held that in order that a failure to communicate a fact to a surety in respect to the subject-matter of the contract, should have the effect of a fraud upon him and vitiate the contract, it must be a fact which necessarily must have the effect of increasing the responsibility of the surety or operating to the prejudice of his interest.

2. In the leading case of *Phillips v. Foxall*, L. R., 7 Q. B. 666, Quain, J.,

notify the surety of a default by the principal has been held not to be a sufficient ground to relieve the surety from liability on his contract.¹ The surety of the employé of a corporation is not relieved from liability because the corporation has failed to notify him that the principal has failed to comply with the by-laws of the company, or has done some act contrary to its rules.²

after citing *Smith v. Bank of Scotland*, 1 Dow. 272; *Hamilton v. Watson*, 12 C. & F. 109; *North British Assur. Co. v. Lloyd*, 10 Exch. 523, and *Lee v. Jones*, 17 C. B. N. S. 482; 112 E. C. L. 482, to support the proposition that material concealment by the creditor at the time of making the contract would discharge the surety, continued as follows: "If, therefore, it is correct, as we think it is, on these authorities, to say that such a concealment as is here pleaded, if it had been practiced at the time when the contract was first entered into, would have discharged the surety, we think that in the case of a continuing guaranty a similar concealment made during the progress of the contract ought to have a similar effect as regards the future liability of the surety, unless his assent has been obtained, after knowledge of the dishonesty, that his guaranty should hold good during the subsequent service. One of the reasons usually given for holding that such a concealment as we are here considering would discharge the surety from his obligation, is, that it is only reasonable to suppose that such a fact, if known to him, must necessarily have influenced his judgment as to whether he would enter into the contract or not; and in the same manner it seems to us equally reasonable to suppose that it never could have entered into the contemplation of the parties that, after the servant's dishonesty in the service had been discovered, the guaranty should continue to apply to his future conduct, when the master chose for his own purposes to continue the servant in his employ without the knowledge or assent of the surety. If the obligation of the surety is continuing, we think the obligation of the creditor is equally so, and that the representation and understanding on which the contract was originally founded continue to apply to it during its continuance and until its termination."

In *Adjala v. McElroy*, 9 Ont. 580, it was held that where a municipal corporation continues to employ its treasurer after his defalcation, the sureties on

his bond are not liable for a subsequent loss. See also *Rapp v. Phoenix Ins. Co.*, 113 Ill. 390; 55 Am. Rep. 427; *Roberts v. Donovan*, 70 Cal. 108; *Dinsmore v. Tidball*, 34 Ohio St. 411; *Smith v. Josselyn*, 40 Ohio St. 409; *Connecticut Mut. L. Ins. Co. v. Scott*, 81 Ky. 540; *Atlantic, etc., Tel. Co. v. Barnes*, 64 N. Y. 385; 21 Am. Rep. 621. But see *Watertown F. Ins. Co. v. Simmons*, 131 Mass. 85; 41 Am. Rep. 196.

1. *Pickering v. Day*, 3 Houst. (Del.) 474; 95 Am. Dec. 291; *Planters' Bank v. Lamkin*, R. M. Charl. (Ga.) 29.

In *Peel v. Tatlock*, 1 B. & P. 419, it was held that if A become bound to B for the honesty of C who embezzles money, B may maintain an action on the guaranty, though three years have elapsed without any notice having been given of the embezzlement by B to A.

2. In *Watertown F. Ins. Co. v. Simmons*, 131 Mass. 85; 41 Am. Rep. 196, an agent of an insurance company gave a bond with sureties, conditioned for the faithful performance of his duties as agent, according to the by-laws of the company. A by-law required that the agents of the company should render monthly accounts, and pay each month the balance due the company. The agent rendered his accounts regularly, but in December, 1877, he failed to pay the whole balance due by him, and thereafter his indebtedness to the company increased from month to month until his death in March, 1879, when he owed a balance larger than the penal sum of the bond. The company did not notify the sureties of the default until after the agent's death. The court held that the sureties were not discharged, and, by Morton, J., said: "The sole object of the bond was to secure the performance by Dix of his duties under the by-laws, and they are referred to only for the purpose of defining these duties. They cannot be construed as importing a stipulation with the sureties that the plaintiff shall cause them to be observed and kept, under the penalty of discharging the sureties."

3. **Set-off.**—There is a conflict of opinion as to whether a surety can set off against the claim of the creditor a debt due by the creditor to the principal. In a number of cases it has been decided that such a set-off is proper;¹ while in other cases the right is denied, on the ground that the principal should be permitted to bring a separate action against the creditor to save himself from possibly losing a larger sum than that for which the surety was liable.²

4. **Right to Compel Creditor to Proceed Against Principal**—*a.* BY PROCEEDINGS IN EQUITY.—After a debt for which a surety is liable has become due, the surety may, by a bill in equity, compel the creditor to proceed against the principal to collect the debt.

In *Pittsburg, etc., R. Co. v. Shaeffer*, 59 Pa. St. 350, the rules of a railway company required from the cashier monthly reports and payments; the bond of the cashier and sureties was conditioned, that he should faithfully discharge his duties as required by the rules, "a copy of which he acknowledged to have received." The cashier neglected to account and pay over for six months, when he was dismissed, and the sureties were not notified of his default for three months afterwards. The court held that they were not discharged.

In *Frelinghuysen v. Baldwin*, 16 Fed. Rep. 452, it was held that a plea, by a surety on the bond of a cashier, in an action for the breach of the covenants in such bond, that charges no fraud or complicity against the president or directors, but simply a neglect of duty in not themselves discovering what the sureties covenanted the cashier should reveal, is bad.

See also *Richmond, etc., R. Co. v. Kasey*, 30 Gratt. (Va.) 218; *Mayor of Nashville v. Knight*, 12 Lea (Tenn.) 700.

1. In *Hollister v. Davis*, 54 Pa. St. 508, a set-off was allowed in favor of a surety on a lease. The principal owed the plaintiff for rent for three years, the bond was security for the rent of the first year; the plaintiff owed the principal on an account running through the three years, the account of the first year being less than that year's rent, and the whole account being larger. The court held that the whole account should be first appropriated to the first year's rent.

In *Downer v. Dana*, 17 Vt. 518, a judgment which the principal had recovered against the creditor was allowed as a set-off against a judgment

recovered by the creditor against the surety.

In *Bechervaise v. Lewis*, L. R., 7 C. P. 372, it was held that in an action by the payee of a joint and several promissory note against one who, to the knowledge of the payee, joined in it as a surety only, it is competent to the surety, by way of equitable defense, to plead a special plea of a set-off due from the payee to the principal, arising out of the same transaction out of which the liability of the surety arose.

In *Coffin v. McLean*, 80 N. Y. 560, the court, by Folger, J., said: "The general rule is that equity requires that cross-demands be set off against each other, if, from the nature of the claim or the situation of the parties, justice cannot otherwise be done; *Smith v. Felton*, 43 N. Y. 419. Insolvency of one of the parties, *ceteris paribus*, is sufficient ground for allowance of a set-off in equity (*id.*), and though one of the parties seeking the set-off be a surety for the other, equity will adjudge it in favor of both against a demand collectible of both. The force of this rule is strengthened when insolvency is the state of the surety's principal, as well as of the person suing."

For other cases which sustain the right of the surety to set off the claim of the principal, see *Andrews v. Varrall*, 46 N. H. 17; *Concord v. Pillsbury*, 33 N. H. 310; *Breese v. Schuler*, 48 Ill. 329; *Waterman v. Clark*, 76 Ill. 428; *Hayes v. Cooper*, 14 Ill. App. 490; *Stratman v. Stookey*, 3 Ill. App. 336; *Cole v. Justice*, 8 Ala. 793.

2. *Davis v. Toulmin*, 77 N. Y. 280; *O'Brien v. Karing*, 57 N. Y. 649; *Lasher v. Williamson*, 55 N. Y. 619; *Springer v. Dwyer*, 50 N. Y. 19; *Gillespie v. Torrance*, 25 N. Y. 306; 82

In such a case, however, the surety must indemnify the creditor against loss if the suit against the principal is fruitless.¹

b. BY NOTICE.—At common law a mere notice from the surety to the creditor to proceed against the principal was insufficient to discharge the surety, if the creditor failed to comply with it. This rule has been adhered to in *England* and in many of the *United States*,² but in some of the states it has been judicially

Am. Dec. 355; *Lafarge v. Halsey*, 1 Bosw. (N. Y.) 171.

1. In *Re Babcock*, 3 Story (U. S.) 398, the court, by Story, J., explained the circumstances under which the surety is entitled to this relief as follows: "There is no doubt that a surety for a debt may in many cases be entitled to relief by requiring the creditor to proceed against the principal. But this is ordinarily limited to cases where his character as surety stands confessed upon the face of the instrument itself; and also where he offers to indemnify the creditor in his proceedings against the principal, and also offers to pay whatever the principal may fail to pay under those very proceedings. This is the common course, where the surety seeks, by a bill against the creditor and the principal, to compel the latter to exonerate the surety from losses which may otherwise be sustained by him by the delays and forbearance of the creditor in enforcing his debt. Upon a similar ground, if the creditor in the case of the bankruptcy of the principal has not proved his debt against him, but declines to do so, a court of equity will, upon a bill filed by the surety, compel the creditor to prove his debt in bankruptcy, and give the surety the benefit thereof; but then, in such a case, the relief is granted upon the terms that the surety brings the amount due into court. And if the creditor has himself already proved his debt in bankruptcy, the surety will have a right upon payment of the debt to stand in equity as substituted to the rights of the creditor, and will be entitled to the dividends." See also *King v. Baldwin*, 17 Johns. (N. Y.) 384; 8 Am. Dec. 415; *Rathbone v. Warren*, 10 Johns. (N. Y.) 587; *Thompson v. Taylor*, 72 N. Y. 32; *Hays v. Ward*, 4 Johns. Ch. (N. Y.) 123; 8 Am. Dec. 52; *King v. Baldwin*, 2 Johns. Ch. (N. Y.) 554; *Croone v. Bivens*, 2 Head (Tenn.) 339; *Ranclagh v. Hayes*, 1 Vern. 189; *Antrobus v. Davidson*, 3 Merl. 569; *Gilliam v. Esselman*, 5 Sneed (Tenn.) 86; *White v. Hart*, 35

Ga. 269; *Huey v. Pinney*, 5 Minn. 310; *Lee v. Rook*, Mos. 318; *Rees v. Barrington*, 2 Ves. Jr. 540; *Whitridge v. Durkee*, 2 Md. Ch. 442; *Irick v. Black*, 17 N. J. Eq. 189; *Hogaboom v. Herrick*, 4 Vt. 131; *Rice v. Downing*, 12 B. Mon. (Ky.) 44; *Kent v. Matthews*, 12 Leigh (Va.) 573; *Morton v. Reid*, 11 S. Car. 593; *West v. Chasten*, 12 Fla. 315; *Nisbet v. Smith*, 2 Brown Ch. Cas. 582; *Wright v. Simpson*, 6 Ves. 734; *Keel v. Levy*, 19 Oregon 450; *Reusch v. Keenan*, 42 La. Ann. 419.

In *Indiana*, the surety on a note who has not yet been compelled to pay the debt cannot sue in equity to compel the holder of the note to bring suit to collect it, for *Rev. St. Indiana* 1881, § 1210, 1211, furnish an adequate remedy at law by providing that the surety may serve notice on the creditor to sue on the note, after which his failure to do so will release the surety. *Barnes v. Sammons*, 128 Ind. 596.

Although a surety may maintain a bill *quia timet* to compel a creditor to exonerate him from liability, a bill cannot be maintained by a principal on the mere ground that he fears a judgment already obtained by the payee against the surety is about to be collected, and that the surety will thereupon take judgment against the complainant and force him to pay the amount. *White v. Schurer*, 4 Baxt. (Tenn.) 23.

2. *Davis v. Huggins*, 3 N. H. 231; *Hogaboom v. Herrick*, 4 Vt. 131; *Hickok v. Farmers', etc., Bank*, 35 Vt. 476; *Frye v. Barker*, 4 Pick. (Mass.) 382; *Adams Bank v. Anthony*, 18 Pick. (Mass.) 238; *Pintard v. Davis*, 21 N. J. L. 632; 47 Am. Dec. 172; *Thompson v. Bowne*, 39 N. J. L. 2; *Wilds v. Attiz*, 4 Del. Ch. 253; *Newton v. Hammond*, 38 Ohio St. 430; *Jenkins v. Clarkson*, 7 Ohio 72; *Carr v. Howard*, 8 Blackf. (Ind.) 190; *Miller v. Arnold*, 65 Ind. 488; *May v. Reed*, 125 Ind. 199; *Halstead v. Brown*, 17 Ind. 202; *Jerauld v. Trippet*, 62 Ind. 122; *Hogshead v. Williams*, 55 Ind. 145; *Gage v. Mechanics' Nat. Bank*, 79 Ill. 62; *Langdon v. Markle*, 48 Mo. 357; *Har-*

decided that a non-compliance with such a notice will release the

ris v. Newell, 42 Wis. 687; *Nichols v. McDowell*, 14 B. Mon. (Ky.) 5; *Huff v. Slife*, 25 Neb. 448; *Dane v. Corduan*, 24 Cal. 157; 85 Am. Dec. 53; *Findley v. Hill*, 8 Oregon 247; 34 Am. Rep. 578; *Herbert v. Hobbs*, 3 Stew. (Ala.) 9; *Ellis v. Jones*, 1 How. (U. S.) 197; *Scott v. Bradford*, 5 Port. (Ala.) 443; *Shimer v. Jones*, 47 Pa. St. 268; *Wilson v. Glover*, 3 Pa. St. 404; *Erie Bank v. Gibson*, 1 Watts (Pa.) 110; *Cope v. Smith*, 8 S. & R. (Pa.) 110; *Manning v. Shotwell*, 5 N. J. L. 544; *Conklin v. Conklin*, 54 Ind. 289; *Brown v. Flanders*, 80 Ga. 209; *Owen v. State*, 25 Ind. 107; *Bellows v. Lovell*, 5 Pick. (Mass.) 307; *Branch Bank v. Perdue*, 3 Ala. 409; *Dennis v. Rider*, 2 McLean (U. S.) 451; *Headington v. Neff*, 7 Ohio 229; *Simpson v. Blunt*, 42 Mo. 542; *Perry v. Barret*, 18 Mo. 140; *Hickam v. Hollingsworth*, 17 Mo. 475; *Freligh v. Ames*, 31 Mo. 253; *Pintard v. Davis*, 21 N. J. L. 632; *King v. Baldwin*, 2 Johns. Ch. (N. Y.) 554; *Baldwin v. Western Reserve Bank*, 5 Ohio 276; *Phillips v. Riley*, 27 Mo. 386; *Daily v. Robinson*, 86 Ind. 383; *Jackson v. Huey*, 10 Lea (Tenn.) 184; *Marsh v. Duncel*, 25 Hun (N. Y.) 167; *Denick v. Hubbard*, 27 Hun (N. Y.) 347; *Keirn v. Andrews*, 59 Miss. 39; *Vancil v. Hagler*, 27 Kan. 407; *Wilds v. Attix*, 4 Del. Ch. 253; *Smith v. Freyler*, 4 Mont. 489; *Cochran v. Orr*, 94 Ind. 433; *Croughton v. Duval*, 3 Call (Va.) 69; *Miller v. White*, 25 S. Car. 235; *Charlotte Bank v. Homesley*, 99 N. Car. 531; *Martin v. Orr*, 96 Ind. 491; *Clark v. Osborn*, 41 Ohio St. 28.

In *Taylor v. Beck*, 13 Ill. 376, it was held that a surety is not permitted to discharge himself, by requesting the creditor to proceed against the principal; the undertaking of a surety is different from that of indorser.

In *Hellen v. Crawford*, 44 Pa. St. 105, it was held that a notice by a surety on an undue note, that he will not remain responsible if the holder does not sue the principal debtor as soon as the note comes due, or get other security, will not discharge the surety.

Notice by the surety to the obligee to seize the principal's crops does not release the surety, as the obligor was not bound to take anything but money; and it did not appear that the crop was sufficient to discharge the debt, and because the landlord's right to

seize the crops is not compulsory, so that the tenant or his surety may demand its exercise. *Miller v. White*, 25 S. Car. 235.

Notice to proceed in a particular way, it seems, will not discharge the surety on non-compliance by the creditor. Thus a request to levy on the property of the principal was held insufficient in *Buckalew v. Smith*, 44 Ala. 638; *Newell v. Hamer*, 4 How. (Miss.) 684; 35 Am. Dec. 415; and a notice to distrain in *Brooks v. Carter*, 36 Ala. 682; and to arrest the principal in *Warner v. Beardsley*, 8 Wend. (N. Y.) 194.

Where an existing debt or security is transferred for value and guaranteed, the guarantor cannot by notice impose upon the creditor the duty of active diligence at the risk of discharging the guarantor if he does not comply with the notice. *Wells v. Mann*, 45 N. Y. 327; 6 Am. Rep. 93.

In *Bissell v. Smith*, 2 Dev. Eq. (N. Car.) 27, it is held to be the law that where the creditor is requested by the surety to sue the debtor, and he neglects or refuses to do so, the surety is not released unless he suffers some injury thereby.

The neglect of a creditor, when requested by a surety, to prosecute the principal debtor, discharges the surety, irrespective of knowledge or notice to the creditor of any facts suggesting the probability that delay could prove injurious to the surety. *Ramsen v. Beekman*, 25 N. Y. 552.

Where one of several co-sureties notifies the creditor to sue the principal, a failure to do so within a reasonable time will not discharge the other sureties. *Trustees of Schools v. Southard*, 31 Ill. App. 359.

Where the payee of a note induces one of the sureties not to give him notice in writing to proceed to collect the note from the principal by representing that the note is settled, the liability of the other sureties is not affected, in the absence of any evidence that such surety was acting for the others. *Casson v. Rasback*, 36 Ill. App. 40.

A notice to sue, given by sureties, upon a note made to trustees for a school fund loan, to the treasurer of the board alone, is insufficient, but should be given also to the board of trustees. *Trustees of Schools v. Southard*, 31 Ill. App. 359.

surety;¹ and in some of the states it has been so expressly

1. In the leading case of *King v. Baldwin*, 17 Johns. (N. Y.) 384; 8 Am. Dec. 415, it appeared that King signed a note as surety with Fowler to Baldwin; that after the note became due King applied to Baldwin representing the approaching insolvency of Fowler, and earnestly urging him to prosecute Fowler and collect the note; that Baldwin peremptorily refused to do so, declaring that he would not trouble Fowler if he never got his money. The evidence showed that had Baldwin brought suit when he was requested to do so, the money might have been collected of Fowler. The court held that the surety was discharged from liability. The court by Spencer, C. J., said: "I do not, then, perceive any solid objection to a court of law taking cognizance of the matters forming the grounds of the appellant's relief, because in such cases courts of equity have also jurisdiction. Much less do I perceive the necessity of applying to a court of equity to compel a creditor to do what equity and good conscience requires of him. Courts of equity, when they interpose to compel a creditor, at the instance of a surety, to sue the principal debtor, undoubtedly proceed on the sound and just principle, that it is the duty of the creditor to obtain payment, in the first instance, of the principal debtor, and not of the man who is a mere surety that the principal shall pay the debt. The doctrine is, that it is inequitable and unjust for the creditor, by delaying to sue, to expose the surety to the hazards arising from a prolongation of the credit, and that the surety has an equity sufficient to invoke the interposition of the powers of a court of chancery for his protection. In every such case a court of equity proceeds on a pre-existing equitable obligation binding on the conscience of the creditor, to exert himself to obtain payment of the debt from the principal, who is regarded as the real debtor, and who ought to be coerced to pay the debt; and it must be the natural and necessary consequence, that if the creditor, after an order or decree that he shall proceed at law to collect the debt of the principal, omits to do so, and thereafter the principal becomes insolvent, that the surety will be discharged. If this duty exists, and does bind the con-

science of the creditor, I cannot conceive why it cannot be brought into exercise, by an act *in pais*, and without the interposition of a court of equity. Upon an application to that court by the surety, if the facts were conceded, an order or decree that the creditor shall prosecute the principal debtor would be a matter of course; the decree would operate as a mere declaration of the duty of the creditor, and unless his conscience was dead to a sense of moral duty, it would not stand in need of such an admonition. If we are at liberty, as I think we are, to regard the consequences of the contrary doctrine, that the surety must either pay the debt himself or resort to a court of equity to coerce the creditor to proceed at law against the principal, we shall find abundant cause to adopt the principle of the decision in *Pain v. Packard*. The delay and expense are serious evils; the debt itself may, and undoubtedly will, in many cases, be jeopardized and lost, as regards the principal, and the surety will be exposed to the final payment, with a vast accumulation of costs. The principal objection to the decision in *Pain v. Packard* is 'that it will open a litigious inquiry as to the certainty and efficiency of the notice.' This objection lies with equal force to all acts *in pais*, such as a demand of the goods in an action of trover, a demand of the maker of a note, and notice of the non-payment to the indorser, due demand and notice of non-payment to the guaranty; so in a great variety of other cases, the responsibilities depend on acts *in pais*; and I cannot perceive any ground for alarm or apprehension, as to the mode of proof, unless we are prepared to distrust parol evidence in all cases."

Examples.—Delay of thirty-six days to sue principal after notice from the surety, will discharge the latter, when it appears that, if suit had been brought immediately or soon after receiving the notice the debt could have been paid out of the principal's goods. *Miller v. Gray*, 31 Ill. App. 453.

If a creditor fail to present his claim against the estate of an insolvent principal when requested to do so by the surety and the debt is thereby lost, the surety is released to the extent of the amount that might have been collected

from the estate. *McCollum v. Hinckley*, 9 Vt. 143.

A creditor was requested by a surety to prosecute his principal, who at the time was able to pay, but subsequently became insolvent. The creditor refused the request, and the court held that the surety was discharged, and by *Savage, C. J.*, said: "The conduct of plaintiffs in refusing to prosecute the principal on the request of the surety was virtually an agreement to discharge the surety and look to the responsibility of the principal alone." *Manchester Iron Mfg. Co. v. Sweeting*, 10 Wend. (N. Y.) 163.

Where one of two copartners purchases the interest of the other in the partnership property, and assumes and agrees to pay the partnership debts, as to such debts the former becomes in equity the principal debtor and the latter a surety; and this relationship a firm creditor having notice of the agreement is bound to observe. Where a creditor, having such notice, is requested by the partner, who thus became surety, to collect his claim, and he refuses or neglects so to do, if, at the time of the request the principal was solvent and able to pay, but thereafter becomes insolvent, the surety is discharged. *Colgrove v. Tallman*, 67 N. Y. 95; 23 Am. Rep. 90.

It is immaterial with respect to the right of a surety to require the creditor to sue the principal, and in default thereof to be discharged from his obligation, that the creditor should have known of the relation of principal and surety between the parties at the time the liability was created. *O'Howell v. Kirk*, 41 Mo. App. 523.

The neglect of a creditor, when requested by a surety, to prosecute the principal debtor, discharges the surety, irrespective of knowledge or notice to the creditor of any facts suggesting the probability that delay could prove injurious to the surety. *Remsen v. Beekman*, 25 N. Y. 552.

A request to bring suit against the principal debtor is sufficient without a tender of expenses or a stipulation to pay them, or an offer by the surety to take the obligation and bring suit himself, unless the creditor, at the time of the notice, expressly puts his refusal to sue on the ground of the trouble and expense, and offers to proceed if that objection be removed. *Wetzel v. Sponsler*, 18 Pa. St. 460.

The goods of Miller who was the

tenant of *Lichtenthaler* under a lease for a year were seized in execution. *Miller*, who had been tenant of *Kline*, under a lease of the same premises for the preceding year, was indebted also to *Kline* for that year's rent; and *Kline* lodged a landlord's warrant with the officer who had levied on the goods. *Thompson*, the surety of *Miller* in the lease gave notice to the latter to claim his preference, which *Lichtenthaler* refused to do. The court held that the surety was discharged. *Lichtenthaler v. Thompson*, 13 S. & R. (Pa.) 157; 15 Am. Dec. 581.

A provision in a note that an extension of time of payment, with or without the knowledge of the sureties, should not release them, is not a waiver of their right to require the payee to proceed against the principal. *Trustees of Schools v. Southard*, 31 Ill. App. 359.

Where a payee, on leaving the state, placed notes in the hands of his son for collection, held that notice to the son by a surety on one of the notes to proceed against the maker was equivalent to notice to the father, and that a statement by the son to the surety that the debt was paid, and that he need give himself no further trouble about it, stopped the father from afterward proceeding on the note against the surety. The son was his father's agent respecting all matters properly connected with the collection of the notes. *Thornburgh v. Madren*, 33 Iowa 380.

For other examples, see *Hempstead v. Watkins*, 6 Ark. 317; 42 Am. Dec. 696; *Bates v. State Bank*, 7 Ark. 394; *Thompson v. Robinson*, 34 Ark. 44; *Cummins v. Garretson*, 15 Ark. 182; *Nichols v. McDowell*, 14 B. Mon. (Ky.) 6; *Hancock v. Bryant*, 2 Yerg. (Tenn.) 476; *Hopkins v. Spurlock*, 2 Heisk. (Tenn.) 152; *Thompson v. Watson*, 10 Yerg. (Tenn.) 362; *Musket v. Rogers*, 5 Bing. N. Cas. 728; 35 E. C. L. 289; *Reid v. Cox*, 5 Blackf. (Ind.) 312; *Thornburgh v. Madren*, 33 Iowa 380; *Kaufman v. Wilson*, 29 Ind. 504; *Harriman v. Egbert*, 36 Iowa 270; *Bruce v. Edwards*, 1 Stew. (Ala.) 11; *Wheeler v. Benedict*, 36 Hun (N. Y.) 478; *Lockridge v. Upton*, 24 Mo. 184; *Martin v. Skehan*, 2 Colo. 614; *Trimble v. Thorne*, 16 Johns. (N. Y.) 152; 8 Am. Dec. 301; *Converse v. Cook*, 31 Hun (N. Y.) 417; *Geddes v. Howk*, 10 S. & R. (Pa.) 33; *Johnston v. Thompson*, 4 Watts (Pa.) 446; *Huffman v. Hurlburt*, 13 Wend. (N. Y.) 377; *Routon v. Lacy*,

enacted by statute.¹ Notice to discharge a surety must be clear, unequivocal, and distinct, and in such terms that its meaning can be at once apprehended without explanation or argument.²

17 Mo. 399; *Towns v. Riddle*, 2 Ala. 604; *Dorman v. Bigelow*, 1 Fla. 281; *Bailey v. New*, 29 Ga. 214; *Craft v. Dodd*, 15 Ind. 380; *Nichols v. McDowell*, 14 B. Mon. (Ky.) 6; *Nunemacher v. Ingle*, 20 Ind. 135; *Martin v. Skehan*, 2 Colo. 614; *Merritt v. Lincoln*, 21 Barb. (N. Y.) 249; *Thompson v. Hall*, 45 Barb. (N. Y.) 214.

1. *Ross v. Jones*, 22 Wall. (U. S.) 576; *Cedar Co. v. Johnson*, 50 Mo. 225; *Waterford v. Hensley*, Mart. & Y. (Tenn.) 275; *Cockrill v. Dye*, 33 Mo. 365; *Starling v. Buttles*, 2 Ohio 303; *First Nat. Bank v. Smith*, 25 Iowa 210; *Halstead v. Brown*, 17 Ind. 202; *Hempstead v. Watkins*, 6 Ark. 317; *Shehan v. Hampton*, 8 Ala. 942; *Sapington v. Jeffries*, 15 Mo. 628; *Hill v. Sherman*, 15 Iowa 365; *Hancock v. Bryant*, 2 Yerg. (Tenn.) 476; *Wilson v. Tebbetts*, 29 Ark. 579; *Harrison v. Price*, 25 Gratt. (Va.) 553; *Gillilan v. Ludington*, 6 W. Va. 128; *Maquoketa v. Willey*, 35 Iowa 323; *Graham v. Rush*, 73 Iowa 451; *Sisk v. Rosenberger*, 82 Mo. 46; *German American Bank v. Denmire*, 58 Iowa 137.

Where the payee is notified by the surety on March 31 to bring suit, and that the circuit court of the county in which the principal resides is in session and will be for three weeks, so that under *Indiana Rev. St.* 1881, § 516, suit might have been brought returnable and triable at that term, an action commenced on April 2, in the county where the surety resides, and returnable to the June term in the latter county, is not brought within a reasonable time after the notice, and the surety is released under sections 1210, 1211, above. *Hamrick v. Barnett*, 1 Ind. App. 1.

Code Iowa, §§ 2108, 2109, provide that a surety who apprehends that the principal is about to become insolvent, or remove permanently from the State, may by writing require the creditor to sue, or permit the surety to do so in the creditor's name, and if the creditor refuse, or neglect for ten days to sue, or allow the surety to do so, the surety shall be discharged. *Held*, that the fact that the principal debtor had removed to another State before the surety gave notice to the creditor that the principal was about to become insolvent did not release the creditor from

the obligations of the statute. *Hayward v. Fullerton*, 75 Iowa 371.

The personal representative of a deceased surety is competent to give notice requiring the creditor to sue under *Missouri Rev. St.* 1879, §§ 3896, 3897, providing that "any person" bound as surety for another in any bond for the payment of money, may require the creditor to sue, etc. *O'Howell v. Kirk*, 41 Mo. App. 523.

Where a joint and several negotiable note is made by two, one of whom in fact signed as surety, though his suretyship is not in any way indicated in the note, such surety may avail himself of the provisions of *Indiana Rev. St.* 1881, §§ 1210, 1211, that "any person bound as surety on any contract may require the creditor or obligee to institute suit on it within a reasonable time after the right of action has accrued, and shall be released on the creditor's failure to bring suit in a reasonable time after notice to do so. *Hamrick v. Barnett*, 1 Ind. App. 1.

A statement by the payee of a note to the sureties that he will not hold them, but will look to the principal alone, is a release of the sureties; and *Iowa Code*, §§ 2108, 2109, providing that sureties may serve a written notice requiring the creditor to sue, or to permit the surety to do so, does not apply to such case. *Wolf v. Madden* (*Iowa*, 1891), 47 N. W. Rep. 981.

Under *Missouri Rev. St.*, § 3898, requiring that notice to the surety by the holder of a note to sue the principal "shall be served by delivering a copy thereof to the person, or leaving a copy at his usual place of abode," etc., a personal service is necessary, and proof of proper mailing of the notice, and receipt thereof through the post, is not sufficient. *Conway v. Campbell*, 38 Mo. App. 473.

2. *Requisites of the Notice.*—In *Wollenshlare v. Searles*, 45 Pa. St. 45, it was held in an action against a surety where the witness relied on to prove notice, did not testify clearly whether it applied to the note in suit or other notes held by an attorney in fact of the holder, that the proof of notice was not sufficient. The court, by Lowrie, C. J., said: "It seems to us that the

warning is not made out here. The witness very evidently had not a clear idea whether the warning given applied to this note or to those held by Johnson; and, surely, warning, or the evidence of it, that requires a long and tedious analysis to show its application to the note sued on, cannot be regarded in equity as sufficient. It, and the evidence of it, ought to be so clear and distinct, that its meaning will strike the mind of the hearer at once and without argument. This does not at all do so; and argument in its favor only makes it sufficiently less clear."

In *Cope v. Smith*, 8 S. & R. (Pa.) 110; 11 Am. Dec. 582, the court, by Tilghman, J., said: "From a consideration, therefore, of all the adjudged cases and the inconvenience and injustice that would flow from establishing the principle that no request *in pais* would be sufficient to give the surety an equity against the creditor, I am of opinion that an equitable defense may be supported on a request *in pais*, provided that it be proved clearly and beyond all doubt, and provided the request be positive, and accompanied with a declaration that unless it be complied with, the surety will be considered as discharged. But I give no opinion, at present, whether even all this would be sufficient, if it should appear that the insolvency of the principal would have prevented the recovery of the debt, if suit had been brought against him when required. I need hardly add, that the evidence in the case before us was quite insufficient to bring the defendants within the rule I have laid down. It did not appear at what time the request was made by Frederick Smith, nor that the suit was requested at all. The words of the witness are, that the plaintiff told him, Frederick Smith said, he should call on Henry K. Helmuth and demand (or ask) the money; not that unless suit was brought, the defendants should consider themselves as discharged."

In *Goodwin v. Simonson*, 74 N. Y. 133, the court, by Miller, J., said: "Ordinarily, to discharge a surety by reason of a neglect to proceed against a solvent principal, on request, it must be shown that the creditor was requested to enforce the collection of debt by due process of law. Nothing short of that will exonerate the surety. *Singer v. Troutman*, 49 Barb. (N. Y.) 182."

In *Strickler v. Burkholder*, 47 Pa. St. 476, it was held that a notice by the

surety in a note to the holder to collect it, as he would not stand bail any longer, is sufficiently precise.

In *Iliff v. Weymouth*, 40 Ohio St. 101, a surety notified a holder of a note "to at once proceed to collect the note you hold, upon which I am surety; I will stand no longer." The court held that the notice was sufficient.

In *Singer v. Troutman*, 49 Barb. (N. Y.) 182, a notice to "push and keep pushing him" was held sufficient when it appeared that both parties understood that a suit at law was intended.

In *Coykendall v. Constable*, 1 N. Y. Supp. 9, the sureties on a note notified the holder's attorney that they "would urge the collection of the note" from the maker. The court held that such notice was not sufficiently explicit.

A notice by a surety on a note to the holder, that he must "make Daniel (the principal) come to time this fall," as it is "the best time for making money with farmers," is not sufficient.

Notice by a surety that he "wishes" the creditor to proceed for his debt, or have it arranged in some way; that he "does not wish" to remain bail any longer, is insufficient.

The following telegram to the holder of a note by the surety was held not to be a sufficient "notice in writing," within the meaning of 2 Gav. & H., §§ 672; 673, to discharge the surety: "Express Noland & Co's note to Esquire Bennett, for collection, to-day. Don't fail." *Kaufman v. Wilson*, 29 Ind. 504.

A letter containing this: "I am desirous that you should bring suit on M's note on which I am surety, and would prefer that you would enter suit in this county early in August, so that the principal would not have the same time to dodge," is not such a notice as will, under *Alabama Code*, § 2647, discharge the surety if the creditor neglect to sue. *Savage v. Carleton*, 33 Ala. 443.

A surety on a note held by a bank, wrote the cashier that he hoped the note "would be put in train for collection as he had reason to believe the principal would avoid payment, if possible." Held, this was not notice to sue, under the statute of *Arkansas*. *Bates v. State Bank*, 7 Ark. 394.

A notice to the holder of a promissory note by a surety, in these words: "Sir: You are hereby notified that I will not stand good as security any longer, on the note you hold against

W. U. and myself as security," signed by the surety, is not a sufficient requisition to sue within the statute. *Lockridge v. Upton*, 24 Mo. 184.

For other cases on this subject see *Payne v. Webster*, 19 Ill. 103; *Christy v. Horne*, 24 Mo. 241; *Conrad v. Foy*, 68 Pa. St. 381; *Harriman v. Egbert*, 36 Iowa 270.

Declaration that Surety Will No Longer Remain Liable.—In some cases it has been held that the notice must contain a declaration that the surety will no longer remain liable unless suit is brought. In *Greenawault v. Crider*, 3 Pa. St. 264, the notice was as follows:

"Sir: Please take notice that you hold a bond against Benjamin Stees for \$100, in which Charles Greenawault and myself are bail. I therefore notify you that I will be no longer considered bail. Please take another bond from him, or payment." The court held that the notice was insufficient.

In *Fidler v. Hershey*, 90 Pa. St. 363, the court by Prunkey, J., said: "It has repeatedly been ruled that the surety shall be exonerated only when the payee has refused to bring suit, after a positive request and explicit declaration by the surety that he would otherwise hold himself discharged. *Erie Bank v. Gibson*, 1 Watts (Pa.) 143."

The Notice Must be Given After the Debt Becomes Due.—In *Hellen v. Crawford*, 44 Pa. St. 105, it was held that a notice by a surety on a note not due, that he would not remain responsible, if the holder did not sue the principal debtor as soon as the note came due or get other security, will not discharge the surety. The court by Read, J., said: "The counsel for the plaintiff in error, candidly acknowledged that he could not find any cause in which such a notice given before the note was due and the surety actually fixed had been held to be good; no expression of any judge had been cited even looking that way; now such notices were substitutes for a proceeding in chancery to effect the same object, and no bill was ever filed for such a purpose until the debt was actually due and unpaid. By analogy, therefore, such a notice cannot be given by the surety until the debt is due. The inconvenience of any other rule in negotiable paper would be very great, for the holder of it would be obliged to keep a separate book for entering such notices, and if not in writing, to put down what he might suppose to

be the language addressed to him in conversation. We have gone as far as policy dictates in allowing the force that has been given to notices of this character, and we are not disposed to take another step unsanctioned by any authority or by the analogies of the practice in equity."

In *Osborne v. Campbell*, 6 Pa. C. Ct. 623, it was held in an action on a contract of suretyship that an affidavit of defense is insufficient which alleges a discharge by plaintiff's failure to proceed after notice, but which does not allege that the request to proceed was accompanied by a declaration that unless it was complied with, "the surety would hold himself discharged, and which does not show that the notice was given after the maturity of the principal obligation, and at a time when compliance would have been effectual.

Notice May be Given by or to an Agent.—In *Wetzel v. Sponsler*, 18 Pa. St. 460, the court, by Black, C. J., said: "It is not necessary for the surety to make his request of the creditor to sue the principal in person. He may employ an agent. If he has a general agent who transacts all his business, it is the duty of such general agent, without special instruction, to give the notice on a proper case; and the validity of a notice so given is not to be questioned for want of authority. Where the creditor has gone out of the country or neighborhood, leaving the obligation in the hands of an agent or attorney for collection, the request to sue the principal may be addressed by the surety to such agent or attorney of the creditor; and it is not necessary to follow the creditor himself, or wait until he returns."

In *Conrad v. Foy*, 68 Pa. St. 381, it was held that the husband of a legatee of a deceased surety is not a person authorized to give notice to the creditor to collect. In *Shimer v. Jones*, 47 Pa. St. 268, it was held that notice by the surety to the husband of the creditor was not sufficient.

Notice to sue, given by sureties to the clerk of the trustees of a bank, is not notice to the trustees, although one of them had actual notice, within the statute of *Arkansas* requiring suit to be instituted against a principal debtor within thirty days after notice. *Adams v. Roane*, 7 Ark. 360.

Where by virtue of the statute any security on any bank, bill or note for the payment of money or property may,

5. When Surety Is Led to Believe that Debt Is Paid.—If a surety is led by the creditor to believe that the debt is paid, and the surety thereby releases a security or loses an opportunity of securing himself against the principal, the surety is discharged, although the debt was not in fact paid, and the creditor was honestly mistaken in the declaration which he made.¹

6. When Creditor Agrees to Look to the Principal Alone.—If the creditor expressly agrees to look to the principal alone for the payment of a debt, and the surety relies on the statement and takes no steps to secure himself against the principal, the surety will be discharged.²

by notice in writing, require the person having the right of action upon it to bring suit against the principal debtor, held that notice to an attorney of the plaintiff is not sufficient within the statute, he not being the person having the right of action, and it not appearing that he is an authorized agent of his. *Cummins v. Garretson*, 15 Ark. 133.

The Notice Need Not be in Writing.—*Conrad v. Foy*, 68 Pa. St. 381; *Fidler v. Hershey*, 90 Pa. St. 363; *Thompson v. Watson*, 10 Yerg. (Tenn.) 362; *Strader v. Houghton*, 9 Port. (Ala.) 334; *Herbert v. Hobbs*, 3 Stew. (Ala.) 9; *Goodman v. Griffin*, 3 Stew. (Ala.) 160.

A notice by a surety on a promissory note to sue the principal, must be in writing, under the statute of this state. *Colerick v. McCleas*, 9 Ind. 245; *Reid v. Cox*, Blackf. (Ind.) 312; *Stevens v. Campbell*, 6 Iowa 538; *Jenkins v. Clark*, 7 Ohio 72; *Petty v. Douglass*, 76 Mo. 70.

Notice, by a surety on a promissory note, to the holder thereof, to bring suit, etc., must, under the provisions of the Code of *Mississippi*, be in writing. Verbal notice will not operate a release of the surety. *Bridges v. Winters*, 42 Miss. 135.

1. In *Baker v. Briggs*, 8 Pick. (Mass.) 123, 19 Am. Dec. 311, the jury were instructed that if they believed the plaintiff told the defendant that the note in suit was paid, intending to be so understood, and that the defendant was clear of it, as testified by the first witness, and that in consequence the defendant lost an opportunity to secure himself against the principal, the defendant would be discharged, though in point of law the transaction in relation to the note was not a pay-

ment. On appeal the supreme court sustained the charge.

In *Brooking v. Farmers' Bank*, 83 Ky. 431, sureties on a note who had been led to believe for over four years that the note had been paid, were discharged from liability.

In *Carpenter v. King*, 9 Met. (Mass.) 511, 43 Am. Dec. 405, the court, by Shaw, C. J., said: "We consider it well settled, by numerous authorities, that when a creditor, who knows that one debtor is a surety, gives him notice that the debt is paid by the principal, and such debtor, in consequence, changes his situation, as by surrendering security or forbearing to obtain security when he might, or otherwise suffers loss by it, he is discharged. And although the debt has not been paid, and such notice was given by mistake, and without any fraudulent design, it is a mistake made at his own peril, and he shall rather bear the loss than throw it upon one who has been misled by it." See also *Teague v. Russell*, 2 Stew. (Ala.) 420; *Waters v. Creagh*, 4 Stew. & P. (Ala.) 410; *Whitaker v. Kirby*, 54 Ga. 277.

In *Sioux Valley State Bank v. Kellogg* (Iowa 1890), 46 N. W. Rep. 859, it was held that the fact that a surety has been informed by the creditor that the principal debtor has paid the debt, and that, relying on that statement, the surety does not attempt to make his principal secure him, is no defense to an action against the surety where there is no evidence that he could have secured anything from his principal had he attempted to do so.

2. In *Auchampaugh v. Schmidt*, 80 Iowa 186, defendant, in an action on a note signed by him as surety, alleged that, being about to leave the State, he asked the holder to release him, and

The release of the surety in such a case does not discharge the principal.¹

7. Right of Surety to Defend Suit Against Principal.—A surety has a right to intervene and defend a suit against the principal.²

stated that, if he would not do so, he (defendant) would proceed to have the note collected from the principal, or would serve notice for his own release as surety; that the holder then promised to look to the principal alone; that, relying on such promise, defendant took no steps to protect himself as he might have done, and that the principal was then solvent. *Held*, that the facts alleged were sufficient to estop the holder from afterwards suing defendant on the note.

In *West v. Brison*, 99 Mo. 684, it was held that if a surety is led to suppose that the principal alone will be looked to for payment, and is lulled into security, and thereby suffers a loss, he will be discharged.

In *Wolf v. Madden* (Iowa, 1891), 47 N. W. Rep. 981, it was held that where a creditor states to a surety that he will not hold the surety for the debt, but will look to the principal alone, and the surety, relying on the statement, takes no steps to collect the debt from the principal, which he could then have done, the surety is released.

In *Harris v. Brooks*, 21 Pick. (Mass.) 195; 32 Am. Dec. 254, it appeared that soon after a note became due the surety on the note called on the holder and said that if he had to pay it he wished to attend to it soon, as he could then get security; that the holder replied that he would look to the principal for payment, and that the surety need not give himself any trouble about the note, for he should not be injured. The court held that the surety was discharged. See also *Michigan State Ins. Co. v. Soule*, 51 Mich. 312; *Driskell v. Mateer*, 31 Mo. 325; 80 Am. Dec. 105; *Barney v. Clark*, 46 N. H. 514.

But the intent to release the surety must be clear. In *Howe Machine Co. v. Farrington*, 82 N. Y. 121, the defendant who was surety on the bond of the sewing-machine agent testified that the general agent of the company said to him when there was some question about the bond: "Go home, Mr. Farrington; give yourself no uneasiness on account of the bond; I have never sued a bondsman yet; I shall get it of Davis; and you need not trouble yourself about it." The son of the surety testified that the agent said: "Mr. Farrington,

don't give yourself any more uneasiness about this matter; I assure you that no harm will come to you, for the amount is small and Davis is doing a good business; I manage to make my agents settle up satisfactorily some way, and I have never had to sue a bondsman yet." The court said: "This statement, at most, can be regarded only as the expression, by the agent, of a confident opinion that Davis would pay the debt and that the defendant would not be subjected to loss. The agent did not assume to discharge the defendant from his liability as guarantor, or agree to look only to Davis for payment, and the case is not brought within the decisions in *Harris v. Brooks*, 21 Pick. (Mass.) 195; 32 Am. Dec. 254, and *Hogaboom v. Herrick*, 4 Vt. 131."

In *Brubaker v. Okeason*, 36 Pa. St. 519, the court by Strong, C. J., said: "It never yet has been held that a declaration of the creditor that a principal debtor was good enough; that the surety was in no danger, and that the debt would be collected from the principal, without more, was sufficient to estop the creditor from proceeding against the surety. Such declarations are exceedingly common. They are often made to induce the surety to go into the contract, and they are repeated afterwards without any design to mislead, or without being understood as a waiver of any rights. They are made and received as expressions of opinion. They neither invite confidence nor is confidence often reposed in them. Standing alone, they will not discharge the surety."

1. In *McIlhenny Co. v. Blum*, 68 Tex. 197, it was held that a creditor may release one who is bound to him as surety without releasing the principal debtor.

In *Mortland v. Hines*, 8 Pa. St. 265, it was held that the release of a surety even after a joint judgment against him and his principal, does not discharge the principal from his obligation to pay the judgment.

2. In *Stark v. Fuller*, 42 Pa. St. 320, a person holding a mortgage on which a balance is due, assigned it to another, with guarantee of payment; the mortgage being sued out and a verdict

8. Defenses of the Surety in Law and Equity.—It seems now to be generally held that a surety may make the same defense at law that he could in equity. If, therefore, an action at law is brought against a surety on his contract of suretyship, he is bound to offer in defense all such matters as would be a proper defense in a court of equity, and if he fails to do so, unless prevented by fraud or accident, he cannot afterwards avail himself of such matters as a defense in equity.¹

had for less than the amount for which it had been assigned, the counsel for the guarantor moved for a new trial, on the argument of which the attorney of the assignee filed a paper alleging that neither he nor his client had moved for the new trial, and that he was not aware of any grounds therefor, the counsel for the guarantor protesting against the withdrawal of the rule, and giving notice that it would be considered a discharge of the guaranty; the rule being dismissed on the ground of the paper filed by the plaintiff, suit was brought on the guaranty, on the trial of which it was held that the act of the attorney of the assignee, in discontinuing the rule for the new trial against the consent of the guarantor, discharged the guaranty. The court, by Woodward, J., said: "The discontinuance of the rule for a new trial was final. It was equivalent to a discharge of the debt. It was a voluntary and persistent acceptance by Stark of the amount of the verdict in lieu of the amount guaranteed. Of course it worked the discharge of the guarantor. It was a much more decisive act than indulgence granted after notice to proceed, with an intimation that the consequence of neglect would be to release the guarantor. It was saying the suit shall not be prosecuted in the only form in which it was possible to prosecute it, even though I forfeit my hold upon the guaranty. After such a decisive declaration of record against notice and protest, Stark had no shadow of right, in law or equity, to seek recourse against Fuller's estate." See also *Jewett v. Crane*, 35 Barb. (N. Y.) 208.

1. In *People v. Jansen*, 7 Johns. (N. Y.) 332; 5 Am. Dec. 275, in an action brought against a surety on a bond of a loan officer, it was held that the surety might set up in his defense the laches of the supervisor in not discharging and prosecuting the loan officer for his first default, but suffering him to continue after repeated defaults for upwards of ten years, when

he became insolvent, the court, by Thompson, J., said: "I am unable to discover any good reason for sending the defendants into a court of chancery for relief. There is nothing in the nature of the defense to make it peculiarly a subject of equity jurisdiction. That the ancestor of the defendants was a surety only appears upon the face of the bond; and whatever would exonerate the security in one court ought also in the other. The facts being ascertained, the rule must be the same in this court as in the court of chancery. And this seems to be the light in which the subject was viewed, in the case of *Rees v. Barrington*, 2 Ves. Jr. 542. The doctrine of this case clearly is, that whether a surety has been discharged or not, is a legal principle, and that, if the form of the security and mode of proceeding at law would authorize an inquiry into the fact, whether security or not, the defense would be the same at law as in equity. Lord Loughborough says, it is the form of the security that forces these cases into equity. For where the principal and security are bound jointly and severally, the security cannot aver, by pleading that he is bound as surety; but if he could establish that at law, the rule or principle by which his liability is to be determined, is a legal principle. The case of *Trent Nav. Co. v. Harley*, 10 East 34, does not appear to me essential to impugn this doctrine. In the case of *Peel v. Tatlock*, 1 B. & P. 419, where the laches of the plaintiff was relied upon by the guarantee, in discharge of his responsibility, it was never suggested that this was not a defense at law; and it was submitted to the jury as a question of fact, whether, under the circumstances appearing in evidence, the plaintiff had not waived the guaranty, and exonerated the defendant. That the defense set up in the case before us ought to be admitted in a court of law, appears

XIII. RIGHTS OF SURETIES AGAINST EACH OTHER—1. Contribution Among Sureties.—If one of several sureties is obliged to pay the whole debt, he can enforce contribution from the other sureties so as to divide and equalize the loss.¹ He can recover in equity

to be fortified by the consideration, that this is a bond of indemnity under a penalty; and which, under the statute, requires an assignment of breaches. The occasion of this statute was to moderate the rigor of the common law which drove parties into equity for relief against the penalty; and since the statute, courts of law have the same jurisdiction, in this respect, as the court of chancery had before. The defense, therefore, in my opinion, is admissible at law." See also *Boston Hat Mfg. Co. v. Messinger*, 2 Pick. (Mass.) 223; *Baker v. Briggs*, 8 Pick. (Mass.) 122; 19 Am. Dec. 311; *Shelton v. Hurd*, 7 R. I. 403; *Dickerson v. Ripley Co.*, 6 Ind. 128; *Heath v. Derry Bank*, 44 N. H. 174; *Rogers v. School Trustees*, 46 Ill. 428; *Smith v. Clopton*, 48 Miss. 66; *Smith v. McLain*, 11 W. Va. 654.

In some cases it has been held that the surety may make his defense in equity if he has not already made it at law. *Hempstead v. Conway*, 6 Ark. 317; 42 Am. Dec. 606; *Wayland v. Tucker*, 4 Gratt. (Va.) 267; 50 Am. Dec. 76.

In *King v. Baldwin*, 17 Johns. (N. Y.) 384; 8 Am. Dec. 415, the court, by Spencer, C. J., said: "It has been held that where there is no question that the defense of a surety can be made at law, then it must be made there, and the decision of that tribunal is conclusive. But if it be doubtful whether a court of law can take cognizance of the defense, and there exists no doubt of the jurisdiction of a court of equity, and if in such a case a defendant at law, under the influence of such a doubt, omits to make his defense, or if he bring it forward and it be overruled under the idea that it is no defense at law, it is not granting a new trial for a court of equity to afford relief, notwithstanding the trial at law."

1. In *Wells v. Miller*, 66 N. Y. 255, the court by Church, C. J., said: "The right to contribution between co-sureties depends upon principles of equity rather than upon contract. It is well settled that the liability exists, although the sureties are ignorant of each other's engagement. (*Craythorne v. Swinburne*, 14 Ves. 160; *Norton v. Coons*,

6 N. Y. 33; *Barry v. Ransom*, 2 N. Y. 462.) The equity springs out of the proposition that, when two or more sureties stand in the same relation to a principal, they are entitled equally to all the benefits, and must bear equally all the burdens of the position. In such a case the maxim 'equality is equity' applies. It is not sufficient that both parties are sureties—they must occupy the same position in respect to the principal, and without equities between themselves giving an advantage to one over the other."

In *Agnew v. Bell*, 4 Watts (Pa.) 32, the court by Kennedy, J., said: "It is certainly a rule too well established now to be questioned, that where any one or more of those who are co-sureties have had to pay, as such, the debt of their principal, or any part thereof, and he is unable to reimburse it, the loss arising therefrom must be borne equally by all of them. Hence has arisen the right to contribution. This right has been considered as depending rather upon a principle of equity than upon contract; but it may well be considered as resting alike on both for its foundation; for although, generally, there is no express agreement entered into between joint sureties, yet from the uniform and almost universal understanding which seems to pervade the whole community, that from the circumstance alone of their agreeing to be, and becoming accordingly co-sureties of the principal, they mutually become bound to each other to divide and equalize any loss that may arise therefrom to either or any of them, it may with great propriety be said that there is at least an implied contract. *Deering v. Winchelsea*, 2 Bos. & Pull. 270; *Craythorne v. Swinburne*, 14 Ves. 160. This liability between sureties to contribution, in case of loss through the inability of their principal to pay, being known to them at the time of their becoming sureties, may well be considered a great, if not the main inducement, in many instances, to their becoming such."

In *Lansdale v. Cox*, 7 T. B. Mon. (Ky.) 401, the court by Bibb, C. J., said: "Natural justice says that one surety, having become so with other

a *pro rata* amount paid by taking into consideration the number of solvent sureties, but excluding the insolvent ones.¹ In law he can only recover from each of his co-sureties the portion of the debt for which each is liable, taking into consideration the whole number of sureties, both solvent and insolvent.²

sureties, shall not have the whole debt thrown upon him by the choice of the creditor, in not resorting to remedies in his power without having contribution for those who entered into the obligation equally with him. This obligation of co-sureties to contribute to each other is not founded in contract between them, but stood upon a principle of equity until that principle of equity had been universally acknowledged that courts of law in modern times have assumed jurisdiction. This jurisdiction of the courts of common law is based upon the idea that the equitable principle had been so long and so generally acknowledged and enforced that persons in placing themselves under circumstances to which it applies may be supposed to act under the dominion of contract, implied from the universality of that principle. For a great length of time equity exercised its jurisdiction exclusively and individually; the jurisdiction assumed by courts of law is comparatively of very modern date."

See also as to the equity and common-law jurisdiction, *Hayden v. Thrasher* (Fla. 1891), 980 Rep. 355; *Norton v. Coons*, 6 N. Y. 33; *Jeffries v. Ferguson*, 87 Mo. 244; *Craythorne v. Swinburne*, 14 Ves. 169; *McGehee v. Owen*, 61 Ala. 440; *Bragg v. Patterson*, 85 Ala. 233; *Camp v. Bostwick*, 20 Ohio St. 337; 5 Am. Rep. 669; *Drummond v. Yager*, 10 Ill. App. 380; *Armitage v. Pulver*, 37 N. Y. 494; *Russell v. Fallor*, 1 Ohio St. 327; 59 Am. Dec. 631; *Campbell v. Messier*, 4 Johns. Ch. (N. Y.) 337; 8 Am. Dec. 570; *Deering v. Winchelsea*, 2 B. & P. 273; *Monson v. Drakeley*, 40 Conn. 552; 16 Am. Rep. 74.

1. In *Easterly v. Barber*, 66 N. Y. 433, the court by Miller, J., said: "It is claimed that an action at law by a surety for contribution must be against each of the sureties separately for his proportion, and that no more can be recovered, even where one or more are insolvent. In the latter case, the action must be in equity against all the co-sureties for contributions, and, upon proof of the insolvency of one or more of the sureties, the payment of the

amount will be adjudged among the solvent parties in due proportion. The principle stated is fully sustained by the authorities. It is thus stated in *Parsons on Contracts*, vol. 1, page 34: 'At law a surety can recover from his co-surety an aliquot part, calculated upon the whole number, without reference to the insolvency of others of the co-sureties; but in equity it is otherwise.' (See also *Browne v. Lee*, 6 B. & C. 689; 13 E. C. L. 294; *Cowell v. Edwards*, 2 B. & P. 268; *Beaman v. Blanchard*, 4 Wend. (N. Y.) 435; *Story's Eq. Juris.*, § 496; 1 Chitty on Con. (5th Am. ed.) 597, 598; *Willard's Eq. Juris.* 108). There seems to be a propriety in the rule that where sureties are called upon to contribute, and some of them are insolvent, that all the parties should be brought into court and a decree made upon equitable principles in reference to the alleged insolvency. There should be a remedy decreed against the insolvent parties, which may be enforced if they become afterwards able to pay, and this can only be done in a court of equity and when they are parties to the action." See also *Preston v. Preston*, 4 Gratt. (Va.) 88; 47 Am. Dec. 717; *Young v. Lyons*, 8 Gill (Md.) 162; *Powell v. Matthis*, 4 Ired. (N. Car.) 83; 40 Am. Dec. 427; *Burroughs v. Lott*, 19 Cal. 125; *Wayland v. Tucker*, 4 Gratt. (Va.) 267; 50 Am. Dec. 76; *Young v. Clark*, 2 Ala. 264; *Gross v. Davis*, 87 Tenn. 226.

2. In *Cowell v. Edwards*, 2 B. & P. 268, which was an action of *assumpsit*, the court held that one of several co-sureties in a bond may recover against any one of the others his aliquot proportion of the money paid by him under the bond, regard being had to the number of sureties, though the insolvency of the principal and of the others sureties be not proved.

In *Moore v. Bruner*, 31 Ill. App. 400, where one of several co-sureties upon a guardian's bond is forced to pay the same in full, he may recover in law from the others a *pro rata* share of the sum so paid, with interest; but the insolvency of one or more of the co-sureties cannot operate to increase the

Contribution will not be enforced where it will work results which would be inequitable. Thus, if a surety pays less than the whole debt, he can recover from the other sureties only the amount which he has paid in excess of his share;¹ and if he has bought the claim of the creditor at a discount, he will be only entitled to contribution to the amount which he has actually paid.²

2. Co-sureties Alone Liable to Contribution.—Several persons may be sureties for the same principal, but not upon the same obligation or with reference to the same transaction. In such a case they are not bound to contribution among themselves.³ If, however, they are co-sureties bound for the debt or miscarriage of the same person in the same transaction, they are liable to contribution among themselves.⁴ Evi-

amounts for which the others are ratably liable. See also *Gross v. Davis*, 87 Tenn. 226; *Riley v. Rhea*, 5 Lea (Tenn.) 115; *Stothoff v. Dunham*, 19 N. J. L. 181; *Acers v. Curtis*, 68 Tex. 423; *Beaman v. Blanchard*, 4 Wend. (N. Y.) 432; *Dodd v. Winn*, 27 Mo. 504; *Morrison v. Poyntz*, 7 Dana (Ky.) 307; *Cobb v. Haynes*, 8 B. Mon. (Ky.) 137.

Where a partnership in the firm name signs a contract of suretyship, the partners count as but one surety on a question of contribution. *Chaffee v. Jones*, 19 Pick. (Mass.) 260. Sureties who leave the State are considered in the position of insolvents in ascertaining the liabilities of the remaining sureties. *McKenna v. George*, 2 Rich. Ex. (S. Car.) 15; *Boardman v. Paige*, 11 N. H. 431; *Liddell v. Wiswell*, 59 Vt. 365.

1. In *Morgan v. Smith*, 70 N. Y. 537, the court by *Folger, J.*, said: "The obligation of one of two co-sureties is to pay the whole debt. His right is, if he pays the whole debt, to recover one-half from his co-surety, or the whole from the principal. If he pays less than the whole debt, he cannot recover from his co-surety, though he may from the principal, more than the amount which he has paid in excess of the moiety which, as between him and his co-surety, it was his duty to pay." See also *Bryam v. McDowell*, 15 Lea (Tenn.) 581; *Lowell v. Edwards*, 2 B. & P. 268; *Browne v. Lee*, 6 B. & C. 689; 13 E. C. L. 294.

In *Gourdin v. Trenholm*, 25 S. Car. 362, two guarantors on a number of bonds agreed, in writing, that as between themselves they should be liable for certain proportions of the bonds, and bound themselves to pay to each

other any sum that might be paid by either in excess of his portion, and interchanged mortgages to secure the fulfillment of such agreement. *Held*, that one of such guarantors had no right of action against the other, until his payment exceeded the portion assumed by him, and then only for such excess.

2. In *Tarr v. Ravenscroft*, 12 Gratt. (Va.) 642, it was held that where one of two co-sureties of an administrator purchased at a discount, legacies for which the administrator was bound, he could only recover from his co-sureties one-half of what he actually paid for the legacy. See also *Fuselier v. Babinneau*, 14 La. Ann. 777; *Sinclair v. Reddington*, 56 N. H. 146.

If a surety has paid the debt in real estate, the actual value of the land is the basis upon which contribution can be enforced from the co-sureties. *Jones v. Bradford*, 25 Ind. 305; *Hickman v. McCurdy*, 7 J. J. Marsh. (Ky.) 555.

If a surety has paid less than the whole amount of the debt, he cannot recover contribution from his fellow sureties unless the amount he has paid has been in excess of his share. *Fletcher v. Grover*, 11 N. H. 368; 35 Am. Dec. 497.

3. If an administrator who has given a general bond, subsequently gives another bond to secure the purchase money of real estate which he is ordered to sell, the sureties on the two bonds are not liable to contribute to each other. *Salysers v. Ross*, 15 Ind. 130. See also *Coope v. Twynam*, 1 T. & R. 426.

4. *Powell v. Powell*, 48 Cal. 235; *Armitage v. Pulver*, 37 N. Y. 404; 16 Am. Rep. 74; *Warner v. Price*, 3 Wend. (N. Y.) 397; *Monson v. Darkeley*, 40

dence as to the true relation between the parties may be shown by parol.¹

Conn. 552; *Norton v. Coons*, 3 Den. (N. Y.) 130; *Barry v. Ransom*, 12 N. Y. 462; *Collins v. Carlisle*, 7 B. Mon. (Ky.) 13; *Hammock v. Baker*, 3 Bush (Ky.) 208; *Brandenburg v. Flynn*, 12 B. Mon. (Ky.) 397.

Accommodation indorsers.—In a number of cases it has been held that the accommodation indorsers on a negotiable instrument, are not, in the absence of an agreement to the contrary, co-sureties liable to contribution amongst each other. In *McCarty v. Roots*, 21 How. (U. S.) 432, the court, by McLean, J., said: "The various parties to an accommodation bill, where no consideration has passed as among themselves, are not, unless by special agreement, bound to pay in equal proportions as co-sureties." See to the same effect, *Aiken v. Barkley*, 2 Spears (S. Car.) 747; *McCune v. Belt*, 45 Mo. 174; *Stillwell v. How*, 46 Mo. 589; *Hillegas v. Stephenson*, 75 Mo. 118; 42 Am. Rep. 393; *Wilson v. Stanton*, 6 Blackf. (Ind.) 507; *Armstrong v. Harshman*, 61 Ind. 52; 28 Am. Rep. 665; *Sherrod v. Rhodes*, 5 Ala. 683; *McGurk v. Huggett*, 56 Mich. 187. But see *Freeman v. Cherry*, 46 Ga. 14; *Dillenbeck v. Dygert*, 97 N. Y. 303; 49 Am. Rep. 525; *Gomez v. Lazarus*, 1 Dev. Eq. (N. Car.) 205; *Stovall v. Border Grange Bank*, 78 Va. 188; *Daniel v. McRae*, 2 Hawks (N. Car.) 590; 11 Am. Dec. 787.

1. In *Craythorne v. Swinburne*, 14 Ves. 160, it was held that parol evidence may be admitted to show that parties were not really co-sureties. The lord chancellor said: "If, therefore, by his contract, a party may exempt himself from the liability, or that extent of liability, in which without a special engagement he would be involved, it seems to follow, that he may by special engagement contract so as not to be liable in any degree. That leads to the true ground, the intention of the party to be bound, whether as a co-surety; or only if the other does not pay: that is, as surety for the surety; not as co-surety with him. As to the bond itself, it is clear upon the face of this bond, and according to its language, that the bank and Sir John Swinburne, if at liberty to do so, did consider that this sum of money was to be in advance as between Sir John Swinburne and the bank, to the other two. They have no right to

complain of it; for there is no contract by Sir John Swinburne with the other two; he might limit his engagement with reference to them, as he thought proper; and the bond upon the face of it makes him surety only for the principal and the other surety. But it is clear upon the parol evidence; and why is not that competent evidence? Evidence is admitted to show who is the principal and who the surety, and, in order to determine that, to show to whom the money was advanced; and why is it not to be admitted to show to whom the money was advanced as between Sir John Swinburne and the others. But this goes farther; for the evidence is, not in contradiction to, but in support of, the instrument; and, whether the demand is founded upon the equity only, or upon the implied contract, why should not evidence be admitted to show that the equity ought not to be applied, and the contract ought not to be inferred?"

In *Clapp v. Rice*, 13 Gray (Mass.) 403; 74 Am. Dec. 639, it was held that where several persons indorse their names on a promissory note, in order to enable the maker to get it discounted; and some of them indorsed afterwards, on the failure of the maker pay the note, they cannot maintain an action against the others for contribution without proving that the relation between them was really that of co-sureties. But parol evidence of that fact will maintain such an action.

In *Mansfield v. Edwards*, 136 Mass. 15; 49 Am. Rep. 1, it was held that in an action for contribution to the amount paid by the plaintiff upon a promissory note signed by A as principal and by the plaintiff and the defendant as sureties, the declaration alleging that they were joint makers with A, oral evidence is admissible to show that the signers of the note were joint makers by agreement amongst themselves.

In *Barry v. Ransom*, 12 N. Y. 462, it was held that an agreement, made between parties prior to or contemporaneously with their executing a written obligation as sureties, by which one promises to indemnify the other from loss, does not contradict or vary the terms or legal effect of the written obligation, and it may be proved by parol evidence. Such promise, although not in writing, is a bar to an action by the

3. Contribution Among Sureties Liable on Different Instruments.—

If sureties are bound for the debt or default of the same person in reference to the same transaction, they are liable to contribute to each other, although they are bound by different instruments.¹

4. Surety in Legal Proceedings Need Not Contribute to Original Surety.—Where a person becomes a surety in the course of legal proceedings to collect the debt from the principal, he is not a co-surety with the original surety for the debt, and is not liable

party making it against his co-surety for contribution.

See also on this subject, *Williams v. Glenn*, 92 N. Car. 253; 53 Am. Rep. 416; *Hunt v. Chambliss*, 7 Smed. & M. (Miss.) 532; *Camp v. Simmons*, 62 Ga. 73; *Hayden v. Rice*, 18 Vt. 353; *Harshman v. Armstrong*, 43 Ind. 126; *Smith v. Morrill*, 54 Me. 48.

1. In the leading case of *Deering v. Winchelsea*, 2 B. & P. 270, it was held that if A B and C become bound as sureties for D in three separate bonds, and any one of them be compelled to pay the whole debt of the principal, the two others are compellable to contribute in proportion to the penalties of their respective bonds. The Lord Chief Baron Eyre said: "In the particular case of sureties, it is admitted that one surety may compel another to contribute to the debt for which they are jointly bound. On what principle? Can it because they are jointly bound? What if they are jointly and severally bound? What if severally bound by the same or different instruments? In every one of those cases sureties have a common interest and a common burden. They are bound as effectually *quoad* contribution as if bound in one instrument, with this difference only, that the sums in each instrument ascertain the proportions, whereas if they were all joined in the same engagement they must all contribute equally. In this case Sir E. Deering, Lord Winchelsea, and Sir F. Rous were all bound that Thomas Deering should account. At law all the bonds are forfeited. The balance due might have been so large as to take in all the bonds; but here the balance happens to be less than the penalty of one. Which ought to pay? He on whom the crown calls must pay to the crown; but as between themselves they are in *aequali jure*, and shall contribute. This principle is carried a great way

in the case of three or more sureties in a joint obligation; one being insolvent, the third is obliged to contribute a full moiety. This circumstance and the possibility of being made liable to the whole has probably produced several bonds. But this does not touch the principle of contribution where all are bound as sureties for the same person."

In *Armitage v. Pulver*, 37 N. Y. 494, the plaintiff executed his bond as surety, in the penal sum of \$2,000, and the defendants executed their bond in the penal sum of \$18,000, each for the same principal, and for the same debt, etc. The court held that they were liable in the ratio of one-ninth and of eight-ninths, or in the ratio of the penalties of their respective bonds, and that contribution might be compelled accordingly. In *Whiting v. Burke*, L. R., 6 Ch. 341, a bond was executed by a principal and two sureties, with a stipulation that the sureties should not be discharged by any new arrangement between the creditor and the principal. One of the sureties compounded with his creditors, and by the terms of the bond the moneys secured became immediately payable. After this the plaintiff signed a separate undertaking to become liable for the whole amount; and upon the principal becoming insolvent, the creditor sued the plaintiff and obtained payment of the amount due. The plaintiff signed his bill against the solvent surety in the first bond for contribution. The court held that the plaintiff was entitled to contribution from the defendant.

See also on this subject, *Pickens v. Miller*, 83 N. Car. 543; *Monson v. Drakeley*, 40 Conn. 552; 16 Am. Rep. 74; *Bell v. Jasper*, 2 Ired. Eq. (N. Car.) 597; *Bright v. Lennon*, 83 N. Car. 183; *Perrins v. Ragland*, 5 Leigh (Va.) 552; *Bosley v. Taylor*, 5 Dana (Ky.) 157; 30 Am. Dec. 677.

to contribution.¹ The original surety, however, who pays the debt is entitled to subrogation as against the surety in the legal proceedings.²

1. Thus where a judgment is obtained against a principal and his sureties, and execution issues and a levy is made on the property of the principal, a person who enters a forthcoming bond and is obliged to pay the debt, cannot claim contribution from the original sureties. *Dunlap v. Foster*, 7 Ala. 734.

In *Chaffin v. Campbell*, 4 Sneed (Tenn.) 184, the second surety was on an appeal bond, and a similar decision was rendered. See also *Cowan v. Duncan*, Meigs (Tenn.) 470. Where one of the original sureties gives the additional bond in the legal proceedings, he does not lose his right of contribution from his co-sureties. *Preston v. Preston*, 4 Gratt. (Va.) 88; 47 Am. Dec. 717; *John v. Jones*, 16 Ala. 454.

2. In *Pott v. Nathans*, 1 W. & S. (Pa.) 155; 37 Am. Dec. 456, it was held that if, after judgments are obtained against a principal and surety, a third person interposes and gives his note for the debt to obtain a stay of execution for the principal, and the surety is afterwards obliged to pay the debt, he is entitled to have an assignment of the judgment on the note of the third person, to indemnify him for such payment. The court, by Sergeant, J., said: "The general doctrine that a surety who pays to the creditor the debt due by his principal, shall enjoy the benefit of the sureties for the debt placed in the power of the creditor by the principal, has been acted on by courts of equity, and recommends itself to our sense of justice. It seems right, that the creditor should transfer the means of indemnification, for which he has no longer occasion, to him who, under a legal obligation to pay, in default of the principal debtor, has released these securities from the demand of the creditor, and paid the debt for which they were furnished. Where, however, such means consist of the responsibility of an individual, becoming a later surety or guaranty for the same debt of the principal, there arises a conflict of equities, which may give rise to new questions as to priority between the former and the latter surety. Such latter surety, stipulating at the instance of the principal to pay the debt, suffers no absolute injustice in being obliged to do

so, since he is compelled to perform no more than he undertook, and has no right to complain that he is not allowed to use, as a payment by himself, the money which proceeds from another person whom his principal was previously bound to save harmless. How the equity would be, in a naked case of this kind, I give no opinion; it is sufficient that it is settled, that if the interposition of the second surety may have been the means of involving the first in the ultimate liability to pay, the equity of the first surety decidedly preponderates."

In *Schnitzel's Appeal*, 49 Pa. St. 23, it was held that if, after judgment entered jointly against two, one of whom is named on the record as surety, a third person intervenes, solely on request of the principal, and becomes bail for stay of execution, taking indemnity from him therefor, and on the expiration of the stay the surety be compelled to pay the judgment, he is entitled to subrogation thereto, and may recover therein against the bail.

In *Wolf v. Stover*, 107 Pa. St. 206, the sureties in the legal proceedings were relieved from liability. In that case the court, by Mercur, C. J., said: "The plaintiffs and one George Stover jointly and severally executed the promissory note on which suit was brought against all the makers, and the judgment was recovered thereon. The defendants became bail for stay of execution, and entered into recognizance conditioned that they would pay the judgment, in the event the defendants therein failed to pay the same. After the term of stay had expired, two of the defendants in the judgment, who are the present equitable plaintiffs, paid the same, and now seek to collect the amount thereof out of the sureties on their recognizance. The court correctly instructed the jury to find for the defendants. They had no knowledge of the relation which the defendants in the original judgment bore to each other. When they entered into the recognizance they did not know that the present plaintiffs were sureties. They therefore assumed the obligation, relying on the credit of all the defendants in that judgment. As all of those defendants did not fail to pay the judg-

5. **Surety of Surety.**—A surety of a surety is not liable to contribute to a debt paid by a co-surety of the principal.¹

6. **Wrongful Payment by Co-surety.**—Where a surety wrongfully pays a debt for which the principal is not liable, he cannot enforce contribution from his fellow sureties.²

7. **Sureties Entitled to Indemnity Given Co-surety.**—Where one of several sureties has obtained a security as an indemnity for his liability, such security inures to the benefit of all the other sureties.³

ment, those who did pay the same cannot now collect the amount thereof of the present defendants on their recognition."

1. *Knox v. Vallandigham*, 13 Smed. & M. (Miss.) 529; *Craythorne v. Swinburne*, 14 Ves. 160; *Adams v. Flanagan*, 36 Vt. 400; *Robertson v. Deatherage*, 82 Ill. 511; *Baldwin v. Fleming*, 90 Ind. 177; *Dawson v. Pettway*, 4 Dev. & B. (N. Car.) 396.

In *Chapeze v. Young*, 87 Ky. 476, it was held that where one signs a note under an agreement with the principal that he is to be liable, not as surety for the principal alone, but as surety for both the principal and a prior surety, he may show such an agreement by parol, and recover of the prior surety whatever he may have been compelled to pay on account of his suretyship.

2. At the time of the execution of a deed of warranty of land, and as a part of the same transaction, a third person executed and delivered to the grantee a bond, reciting the deed, and providing that if the grantor therein should "fulfill the terms of his covenants" therein, and "pay and discharge any and all claims which any and all persons shall have" upon the land conveyed, "so that the title in said premises shall ever be perfect" in the grantee, and the grantee "shall be kept harmless and indemnified from all expenses in defending said title," then the bond should be void, but otherwise in force. *Held*, that the bond was only collateral security for the performance of the grantor of the covenants in the deed, and did not bind the obligor to pay expenses incurred by the grantee in defending his title against a groundless claim. *Bancroft v. Abbot*, 3 Allen (Mass.) 524.

See also *Lowndes v. Pinckney*, 1 Rich. Eq. (S. Car.) 155; *Russell v. Failor*, 1 Ohio St. 327; *Skramka v. Rohan*, 18 Mo. App. 340; *Stockmeyer v. Oertling*, 35 La. Ann. 467; *Craven*

v. Freeman, 82 N. Car. 361; *Ledoux v. Durrive*, 10 La. Ann. 7.

But in *Warner v. Morrison*, 3 Allen (Mass.) 566, it was held that it is no defense to an action for contribution between sureties that the plaintiff who paid the debt did not avail himself of the defense of usury, if he was ignorant of the fact of usury. See also *Houck v. Graham*, 106 Ind. 195; 55 Am. Rep. 727.

3. "It is well settled that in equity a surety is entitled to the benefit of any property or collateral securities received by the creditor from the principal debtor." *Guild v. Butler*, 127 Mass. 389.

In *Agnew v. Bell*, 4 Watts. (Pa.) 33, the court by Kennedy, J., said: "Sureties are bound to observe good faith toward each other, and when funds are placed by the principal in the hands of one surety to be applied either to the payment of the debt, or for the purpose of indemnifying him against any loss that may arise from the suretyship, he must be considered as holding them for the common benefit of all concerned."

In *Berridge v. Berridge*, 44 Ch. Div. 168, five sureties executed a guaranty to a bank, by which they jointly and severally undertook to repay to the bank a balance owing to it for the time being by a customer on his current account to the amount of 2,000 pounds. Afterwards the principal debtor deposited with one of the sureties a policy of insurance on his own life, to secure that surety against all liability in respect of the suretyship. The principal debtor became bankrupt, owing more than £2,000 to the bank, and the bank called upon the sureties for payment of that amount under the guaranty, and it was paid by the sureties in unequal shares. Upon the death thereafter of the principal debtor, the amount of the policy was received by

8. **Loss or Release of Security by Co-surety.**—Where a surety, after the contract of suretyship is complete, obtains a security from the principal, and subsequently releases or loses it, he cannot call upon his fellow sureties for contribution.¹

9. **Release of Principal.**—If a surety releases the principal from his duty to reimburse him for the loss, he cannot enforce contribution from his co-sureties.²

the surety with whom it had been deposited. *Held*, that such deposit in effect insured for the benefit of all the co-sureties to the full extent of the principal debt, and that the policy money must accordingly be applied in repaying to all of them the amounts which they had respectively paid under their guaranty. See also on this subject, *McCune v. Belt*, 45 Mo. 147; *Seibert v. Thompson*, 8 Kan. 65; *Brown v. Ray*, 18 N. H. 102; 45 Am. Dec. 361; *Cannon v. Conaway*, 5 Del. Ch. 559; *Taylor v. Morrison*, 26 Ala. 728; 62 Am. Dec. 747; *Steele v. Mealing*, 24 Ala. 285; *Parham v. Green*, 46 N. Car. 436; *Smith v. Conrad*, 15 La. Ann. 579; *Hinsdill v. Murray*, 6 Vt. 136; *Leary v. Cheshire*, 3 Jones' Eq. (N. Car.) 170; *Low v. Smart*, 5 N. H. 353; *Gregory v. Murrell*, 2 Ired. Eq. (N. Car.) 233; *Hall v. Robinson*, 8 Ired. (N. Car.) 56; *Fagan v. Jacobs*, 4 Dev. (N. Car.) 263; *Steel v. Dixon*, 17 Ch. Div. 825; *Reinhart v. Johnson*, 62 Iowa 155.

1. *Paulin v. Kaighn*, 29 N. J. L. 480; *Schmidt v. Coulter*, 6 Minn. 492; *Chilton v. Chapman*, 13 Mo. 470.

In *Guild v. Butler*, 127 Mass. 386, which was an action upon a promissory note against B, the maker, it appeared that A borrowed a sum of money of the plaintiff, and gave him his promissory note therefor, and at the same time delivered to him as collateral security this note of B and a note of C; and there was evidence tending to show that the plaintiff, after the maturity of B's note, and with knowledge acquired since it was made that it was an accommodation note, discharged C from his note, upon payment of half the amount thereof by the check of another person. *Held*, that the plaintiff had no ground of exception to a ruling that, if he knew when he released C that the note in suit was an accommodation note, he must account for the full value of C's note, unless he satisfied the jury that it was not worth its face; and that it was not sufficient for him to

prove all the facts and circumstances in reference to which the compromise was made, and that the compromise had not been prejudicial to the defendant. The court, by Gray, C. J., said: "In equity a surety is entitled to the benefit of any property or collateral securities received by the creditor from the principal debtor, and that if the creditor, knowing the relation between the debtors, surrenders such property or securities, in whole or in part, without the consent of the surety, he exonerates the surety to the amount so surrendered. *Baker v. Briggs*, 8 Pick. (Mass.) 122; 19 Am. Dec. 311; *American Bank v. Baker*, 4 Met. (Mass.) 164."

2. *Fletcher v. Jackson*, 23 Vt. 581; 56 Am. Dec. 98; *Draughan v. Bunting*, 9 Ired. (N. Car.) 10.

In *Hobart v. Stone*, 10 Pick. (Mass.) 215, a testator after bequeathing certain specific legacies, gave the residue of his estate, real and personal, to his son, whom he named as executor. After the making of the will, the testator paid a bond given by his son as principal and himself and the defendant as sureties, but never called upon the defendant for contribution. Upon his death his real estate was attached and levied on by the creditors of the son, who was insolvent. The son did not take upon himself the trust of executor, being unable to procure bondsmen, and the plaintiff was appointed administrator *cum testamento annexo*. The personal estate alone of the testator was not sufficient to pay the debts and specific legacies, but the personal and real together were more than sufficient for that purpose. In an action by the plaintiff, as administrator, against the defendant, for contribution, it was held that by the provisions of the will, the debt of the son as principal, inasmuch as it was not required for the payments of the debts and legacies, but would only go to enlarge the residuum, was extinguished and released, and consequently the defendant as surety was discharged.

10. Where Contract Is Entered Into at the Request of Co-surety.—Where a person becomes a surety at the request of a co-surety, he is not liable to the latter for contribution.¹

11. Death of Surety.—Although the death of one of the sureties in a joint obligation relieves his estate both in law and equity from responsibility for the debt of the principal,² this rule does not apply to the right of a surety to recover contribution from the estate of a deceased co-surety.³

12. Statute of Limitations.—The Statute of Limitations begins to run in favor of co-sureties against a claim for contribution from the time the surety has paid the debt of the principal.⁴

1. *Jones v. Letcher*, 13 B. Mon. (Ky.) 363; *Daniel v. Ballard*, 2 Dana (Ky.) 296; *Cutter v. Emery*, 37 N. H. 567; *Byers v. McClanahan*, 6 Gill & J. (Md.) 250; *Bagott v. Mullen*, 32 Ind. 332; 2 Am. Rep. 351; *Hayden v. Thrasher*, 18 Fla. 795; *McKee v. Campbell*, 27 Mich. 497.

In *Turner v. Davies*, 2 Esp. 478, Lord Kenyon said: "I have no doubt, that where two parties become joint sureties for a third person, if one is called upon and forced to pay the whole of the money, he has a right to call on his co-surety for contribution; but where one has been induced so to become surety at the instance of the other, though he thereby renders himself liable to the person to whom the security is given, there is no pretense for saying that he shall be liable to be called upon by the person at whose request he entered into the security. This is the case here. *Davies*, the defendant, became security, at the instance of *Turner*, for plaintiff, to *Brough*, and there is still less pretext for *Turner* to call on the defendant in this action, as he took the precaution to secure himself by a bill of sale. The defendant ought to have a verdict."

In *Barry v. Ransom*, 12 N. Y. 462, it was held that an agreement, made between parties prior to, or contemporaneously with, their executing a written obligation as sureties, by which one promises to indemnify the other from loss, is a bar to an action by the party against his co-surety for contribution.

In *Taylor v. Savage*, 12 Mass. 98, the court, by *Parker, C. J.*, said: "It is settled that when a surety joins in the bond at the request of him who sues for contribution, he shall not be held to pay."

In *Blake v. Cole*, 22 Pick. (Mass.) 97, in an action by a surety on an administration bond against a co-surety for contribution, it appeared that the

defendant signed the bond at the request of the plaintiff, and upon the plaintiff's verbal promise to save him harmless, it was held that this promise might be performed within a year, and therefore was not required by the Statute of Frauds to be in writing, and that it was a valid defense to the action.

2. "When the surety in a joint obligation dies, there is no remedy at law on the obligation against his estate, and, in the absence of fraud or mistake, equity will not charge his estate with the payment of such obligation." 1 *Brandt on Suretyship*, 206. See also *Aikin v. Peay*, 5 Strobb. (S. Car.) 15; *McKenna v. George*, 2 Rich. Eq. (S. Car.) 15; *Johnson v. Harvey*, 84 N. Y. 363; 38 Am. Rep. 515; *Williams v. Ewing*, 31 Ark. 229; *Stevens v. Tucker*, 73 Ind. 73; *Sanders v. Weelburg*, 107 Ind. 266; *Conover v. Hill*, 76 Ill. 342; *Camp v. Bostwick*, 20 Ohio St. 337; 5 Am. Rep. 669; *Cornes v. Wilkin*, 14 Hun (N. Y.) 428; *Primrose v. Bromley*, 1 Atk. 90; *Batard v. Hawes*, 2 E. & B. 287; 75 E. C. L. 285; *Baskin v. Andrews*, 53 Hun (N. Y.) 95.

3. In *Hecht v. Skaggs*, 53 Ark. 291; *Bradley v. Burwell*, 3 Den. (N. Y.) 61; *Johnson v. Harvey*, 84 N. Y. 363; *Dussol v. Bruguire*, 50 Cal. 456; *Sanders v. Weelburg*, 107 Ind. 266; *Voris v. State*, 47 Ind. 345; *Royal Ins. Co. v. Davies*, 40 Iowa 469; *Conover v. Hill*, 76 Ill. 342.

4. In *Wood v. Leland*, 1 Met. (Mass.) 387, the court, by *Shaw, C. J.*, said: "Defendants contend that as they could not be held responsible to the obligee . . . after one year, so they would not be liable for a contribution to a surety after that time. But the court are of opinion that the Statute of Limitations cannot be so applied. It may well be admitted that the Statute of Limitations would be a good bar to an action by the obligee . . . but the right of action

13. Effect of Discharge in Bankruptcy.—In *England*, and in some of the *United States*, it has been held that where a surety is discharged in bankruptcy, his co-surety may, notwithstanding the discharge, enforce contribution from him.¹ In a number of American cases however, it has been held, that a surety is relieved by a discharge in bankruptcy.²

by the surety for contribution does not accrue at the breach of the bond, but upon his payment of the money pursuant to that breach."

In *Martin v. Frantz*, 127 Pa. St. 389, it was held that whatever rights of contribution a surety may have, arise out of his payment of more than his due proportion of the joint obligation, and will date from such payment, entirely unaffected by the fact that the Statute of Limitations has barred any direct liability of his co-surety to the creditor.

In *Camp v. Bostwick*, 20 Ohio St. 337, 4 Am. Rep. 669, it was held that the right to contribution does not arise directly from the original instrument of joint obligation, but from the equity of one who has borne more than his just share of a joint burden. The court, by McIlvaine, J., said: "This equity having once arisen between co-sureties, neither the creditor, the principal, the Statute of Limitations, nor the death of a party can take it away."

In *Peaslee v. Breed*, 10 N. H. 489, 34 Am. Dec. 178, one of two joint makers of a note was protected against the holder, by the Statute of Limitations, while the other, through payments made by himself, remained liable. The latter having paid, was held entitled to recover of the former his share for contribution. The court, by Parker, C. J., said: "We are of opinion that the plaintiff is entitled to recover for the amount paid after the period when no action could have been sustained directly against the defendant by the payee of the note."

In *Davies v. Humphries*, 6 M. & W. 153, Parke, B., said: "If the surety, more than six years before the action, have paid a portion of the debt, and the principal has paid the residue within six years, the Statute of Limitations will not run from the payment of the surety, but from the payment of the residue by the principal, for, until the latter date, it does not appear that the surety has paid more than his share."

See also *Preston v. Gould*, 64 Iowa 44; *Magruder v. Admire*, 4 Mo. App. 133; *Broughton v. Robinson*, 11 Ala.

922; *Crosby v. Wyatt*, 10 N. H. 318; *Williamson's Adm'r v. Rees' Adm'r*, 15 Ohio 572; *McClatchie v. Durham*, 44 Mich. 435; *Boardman v. Paige*, 11 N. H. 438; *Powder v. Carter*, 12 Ired. (N. Car.) 242; *Leak v. Covington*, 99 N. Car. 559; *Shelton v. Farmer*, 9 Bush (Ky.) 314; *Sherrod v. Woodard*, 4 Dev. (N. Car.) 360; 25 Am. Dec. 714; *Singleton v. Townsend*, 45 Mo. 379; *Preslar v. Stallworth*, 37 Ala. 402; 34 Ala. 505; *May v. Vann*, 15 Fla. 553; *Beck v. Tarrant*, 61 Tex. 402; *Knotts v. Butler*, 10 Rich. Eq. (S. Car.) 143; *Loughbridge v. Bowland*, 52 Miss. 546; *Bushnell v. Bushnell*, 77 Wis. 435.

1. In *Clements v. Langley*, 2 N. & M. 269, by Denman, C. J., said: "There was here no debt capable of estimation in order to its being proved, because two contingencies were to be taken into consideration; first, whether the original debtor would not himself pay the debt, and, secondly, whether this defendant would ever be called upon to pay it. I do not see how it is possible to say that any such debt existed between these parties as could have been proved under the commission." *Craven v. Freeman*, 82 N. Car. 361.

In *Re Blumer*, 13 Fed. Rep. 623, the treasurer of a city defaulted, and the city council passed a resolution that the sureties might give their individual bonds, payable in eighteen months, for their *pro rata* of the balance due, but that the old bond should be retained and remain in full force. Five of the seven sureties gave individual bonds in accordance with the resolution, each for one-fifth of the debt. The other sureties were insolvent, proceedings in bankruptcy having been commenced against them. *Held*, that their estates were not released by the acceptance of the bonds of their co-sureties, and that the city might prove against their estates for the whole debt. See also *Byers v. Alcorn*, 6 Bradw. (Ill.) 39; *Liddell v. Griswold*, 59 Vt. 365; *Swayn v. Barber*, 29 Vt. 292; *Goss v. Gibbons*, 8 Humph. (Tenn.) 197; *Kerr v. Clark*, 11 Humph. (Tenn.) 77.

2. *Tobias v. Rogers*, 13 N. Y. 59;

XIV. DISCHARGE OF SURETY—1. By Payment of the Debt.—Payment of the debt either by the principal or surety will, of course, discharge the surety from his liability on his contract. Such a payment will release the surety even though there be a secret agreement between the principal and holder to keep the debt alive against the surety.¹

Hibernia Bank v. LaCombe, 84 N. Y. 368; *Hayes v. Ford*, 55 Ind. 52; *Miller v. Gillespie*, 59 Mo. 220; *Ames v. Wilkinson*, 49 N. W. Rep. 666.

1. *Coots v. Farnsworth*, 61 Mich. 497; *Hampshire Mfg. Bank v. Billings*, 17 Pick. (Mass.) 87; *Merrimack Bank v. Parker*, 7 Pick. (Mass.) 88; *Chapman v. Collins*, 12 Cush. (Mass.) 163; *Burnet v. Courts*, 5 Har. & J. (Md.) 78; *Foster v. Walker*, 34 Miss. 365; *New England & Mut. L. Ins. Co. v. Randall* (La.), 7 S. Rep. 679; *Carlisle Bank v. Barnett*, 3 W. & S. (Pa.) 248; *Keel v. Levy* (Oregon), 24 Pac. Rep. 253; *Duluth v. Henry* (Minn.), 45 N. W. Rep. 7; *Clark v. Seckler*, 64 N. Y. 231; *Bonner v. Nelson*, 57 Ga. 433; *Lockwood v. Penn*, 22 La. Ann. 29; *Garey v. Hegnutt*, 32 Md. 552; *Furbush v. Lee Co.*, 37 Ark. 87; *Heller v. Howell*, 74 Ga. 174; *Lackey v. Steere*, 121 Ill. 598.

What Constitutes Payment.—*Eastman v. Plumer*, 32 N. H. 238; *Petefish v. Watkins*, 124 Ill. 384; *Coots v. Farnsworth*, 61 Mich. 497; *Stewart v. Levis*, 42 La. Ann. 37. What constitutes a payment has been discussed in various cases. In *King v. Blackmore*, 72 Pa. St. 347, 13 Am. Rep. 684, it was held that the giving of a replevin bond was not the payment of the debt so as to relieve the surety. In *Fuller v. Loring*, 42 Me. 481, a levy on the property of the principal did not discharge its surety.

The acceptance of a new note with the definite understanding that it is to be a payment of the debt, will relieve the surety. *In re Morrill*, 2 Sawy. (U. S.) 356; *Greening v. Patten*, 51 Wis. 146; *Kemmerer's Appeal*, 102 Pa. St. 558; *Hopkins v. Farwell*, 32 N. H. 425; *Rhodes v. Hart*, 51 Ga. 320; *Gardner v. Fisher*, 87 Ind. 369.

Imprisonment of principal has been held to constitute a payment. *Koenig v. Steckel*, 58 N. Y. 475.

The acceptance of the notes of a private banker has been held sufficient to relieve the surety. In *Litchfield Union v. Green*, 1 H. & N. 884, the defendant executed a bond conditioned for the fidelity of Green as treasurer of a

poor-law union. Green was a country banker issuing his own notes. The plaintiffs, the guardians of the union, drew several orders for money, some of which were presented at Green's bank, and ninety-five pounds were paid in notes of the bank. Subsequently two hundred pounds more were paid in notes on similar orders. Green was subsequently declared bankrupt. At the time of the presentment of the order, Green had in his hands sufficient gold to pay them. The court held that the surety was not liable.

In *Ruble v. Norman*, 7 Bush (Ky.) 582, the principal delivered to the creditor a number of hogs more than sufficient to pay the debt. The creditor was to sell the hogs and pay himself out of the proceeds. Subsequently the principal was permitted by the creditor to sell the hogs. He retained a portion of the proceeds, and part of the debt consequently remained unpaid. The court held that the surety was discharged.

In *Manufacturers' Union Co. v. Todd*, 4 Mo. App. 591, it was held that an execution returned "unsatisfied in full" is presumptive evidence of payment, and is a release of surety.

Where a payment, although accepted by the creditor, is in fact illegal, and the creditor is compelled to pay over the money to those who are really entitled to it, the surety will not be discharged. In *Petty v. Cooke*, L. R., 6 Q. B. 789, the payee of a promissory note made by principal and surety accepted the amount thereof from the principal in good faith, and without notice that the payment was a fraudulent preference. The principal afterwards entered into a composition deed for the benefit of his creditors; the trustees under the deed avoided the payment, as a fraudulent preference; and the payee handed over the amount to the trustees. In an action by the payee against the surety, held, that the payment did not operate as a satisfaction of the debt, and that the acceptance of the money from the principal by the payee was not an act done

Where the principal owes two debts, for one of which there is a surety, he may apply a payment to the unsecured debt, and the surety on the other debt cannot object.¹ The creditor to whom the debts are due may, when no application is made by the debtor, apply a general payment to the debt for which he has no security.² If a payment is made generally and no specific application of it has been made by either the debtor or creditor, the law will apply it in accordance with the equities of each particular case, and the rights of the surety will be considered.³

against the faith of the contract with the surety so as to discharge the surety. The court said: "The act of the creditor which discharges the surety must be an act involving something inequitable at the time it is done, and which interferes with the rights of the surety; an acceptance of money from a debtor, which the creditor thought at the time he accepted it was good and valid payment, cannot, therefore, discharge the surety. The creditor, under present circumstances, could not have refused to accept the money; its acceptance was an advantage, not an injury, to the surety." See *Mitchell v. Cotten*, 2 Fla. 136, where an invalid usurious note was in question. See also *Herbert v. Servin*, 41 N. J. L. 225; *Pritchard v. Hitchcock*, 6 M. & G. 151; 46 E. C. L. 149.

It does not ordinarily make any difference where the money came from. In *Harding v. Tift*, 75 N. Y. 461, the court, by *Rapallo, J.*, said: "If the money had been raised by the debtor, by the aid of the indorsement of the surety given for the express purpose of enabling the debtor to raise funds to pay the secured debt, and these facts had been communicated to the creditor he would not be permitted, even with the consent of the debtor, to misapply it. But it can hardly be disputed that if the debtor brought money thus raised to the creditor, and paid it to him expressly upon the unsecured debt, without disclosing the means by which the money had been raised or any agreement as to its use, the payment would be valid." See also *Burnett v. Courts*, 5 Har. & J. (Md.) 78; *Felch v. Lee*, 15 Wis. 265.

Where surety has been released by arrangement for payment between debtor and holder, his liability cannot again be revived without his consent. *Gibson v. Rix*, 32 Vt. 824; *Woodman v. Mooring*, 3 Dev. (N. Car.) 237. And where a fund has been appropriated by

the principal to the payment of the debt, it cannot be diverted from that object without the consent of the surety. *Baugh v. Duphorn*, 9 Gill (Md.) 314.

1. *Application of Payments.*—*Robeson v. McKoin*, 18 La. Ann. 544; *Harding v. Tift*, 75 N. Y. 461; *Wetherell v. Joy*, 40 Me. 325; *Allen v. Jones*, 8 Minn. 202.

2. *Application by Creditor.*—In *Allen v. Culver*, 3 Den. (N. Y.) 284, it appeared that a tenant was bound to pay his rent quarterly, and there were other dealings between the landlord and tenant. The landlord kept an account with the tenant in which he charged the rent as it became due along with other accounts against the tenant, and credited payments made by the latter. From time to time he rendered these accounts to the tenant. In an action of covenant for the rent against a surety of the tenant, the court held that the payment must be applied in satisfaction of the several items of the account including the rent, according to the priority of time in which they were charged in the account.

See also as to the right of the creditor to apply the payments, *Harding v. Tift*, 75 N. Y. 461; *Hansen v. Rounsavell*, 74 Ill. 238; *Mathews v. Switzler*, 46 Mo. 301; *Mosher v. Hotchkiss*, 3 Abb. App. Dec. (N. Y.) 326.

In *Morrison v. Citizens' Nat. Bank* (N. H. 1890), 20 Atl. Rep. 300, it was held that where a creditor who attaches his debtor's property in a suit on an unsecured claim, subject to an attachment levied by him in another action on a claim for which a third person is surety, and who obtains judgment in both suits, may, without prejudice to his rights against the surety, apply the attached property to the satisfaction of the judgment on the unsecured demand.

3. *Application by Law.*—"If no application had been made by either party, and the duty were cast upon the court

of making the proper application, the equities of the surety would doubtless be considered." *Harding v. Tefft*, 75 N. Y. 461. In *Bond v. Armstrong*, 88 Ind. 65, it was held that in the application of payments the law generally favors the surety.

In *Stone v. Seymour*, 15 Wend. (N. Y.) 19, an action against sureties on a bond conditioned that their principal, a collector of tolls, should pay over all moneys received by him. It was held that the intention of the collector that certain payments made by him should be specifically applied might be inferred from circumstances, and that the jury were appointed to make appropriations accordingly, and apply payments in extinguishment of defalcations existing previous to the accruing of the liability of the sureties, although large portions of the payments thus appropriated arose from tolls collected after the accruing of the liability of the sureties, and the payments were credited at the accounting office on a general account, no direction or intimation being given by the collector, at the time of the payments, as to any specific appropriations, and none being in fact made by the accounting officer.

In *Reusch v. Keenan*, 42 La. Ann. 419, it was held that where a creditor has applied the proceeds of a judicial sale of his debtor's land to the payment of a note secured by a junior mortgage thereon, and then sues the surety on a note secured by a prior mortgage on the same land, the surety may compel him to credit the amount already received on the note already secured by the prior mortgage instead of on the other.

In *Lysaght v. Walker*, 5 Bligh, N. S. 1, *Walker & Company* were brewers, and had an agency for the sale of ale and porter at Banagher, Ireland. Considine, wishing to be employed as their agent at that place, brought a letter of credit to them from Lysaght, in which the latter promised that he would be answerable to them in the sum of £500, for the faithful discharge of the trust reposed in Considine as such agent. Weekly returns of the receipts and disbursements of the agency were transmitted by Considine to Walker & Co., and the moneys were from time to time sent to them and entered on account. In February, 1821, he removed to Loughrea, where Walker & Co. had another agency of the same

kind, and he continued in their employ at that place, until his death in May of the same year; transmitting weekly statements in the same manner, and remitting balances from time to time, which were passed to his credit in the account. At the time of his removal from B. there was a balance in his hands of about £379; but the total amount of the moneys which he had remitted from Loughrea exceeded the balance due from him at the time of his removal to that place; and the amount which was still in his hands at the time of his death exceeded the £379. Lysaght was sued upon his guaranty, to recover the balance which was due at the time his responsibility for moneys received by the agent terminated, by the change of his place of employment. Upon the trial before Baron Pennefather, the defendant's counsel insisted that the subsequent payments must be applied to the previous indebtedness. The judge refused to give such instructions to the jury, but left it to them to determine upon what account the remittances from Loughrea were made. The defendant took an exception to the charge, and the jury found a verdict for the plaintiffs for the balance in the hands of the agent at the time of his removal from Banagher; and the Courts of Exchequer and Exchequer Chamber in Ireland, and finally the House of Lords in England, held that the decision of the judge who tried the case was right.

In *Hollister v. Davis*, 54 Pa. St. 508, the principal owed the plaintiff for rent for three years; the bond was security for the rent of the first year; the plaintiff owed the principal on an account running through the three years, the account of the first year being less than that year's rent, and the whole account being larger. *Held*, that the whole account should be first appropriated to the first year's rent.

For other cases on the application of payments, see *Pemberton v. Oakes*, 4 Russ. 154; *Pierce v. Knight*, 31 Vt. 701; *Gaston v. Barney*, 11 Ohio St. 506; *Mathews v. Switzler*, 46 Mo. 301; *Stamford Bank v. Benedict*, 15 Conn. 437; *Miller v. Montgomery*, 31 Ill. 350; *Martin v. Pope*, 6 Ala. 532; 41 Am. Dec. 66; *Bank of Bengal v. Mitter*, 4 Moore's Privy Council Cas. 140; *Pardee v. Markle*, 111 Pa. St. 548; 56 Am. Rep. 299; *Berghaus v. Alter*, 9 Watts (Pa.) 386; *Frost v. Missell*, 38 N. J. Eq. 586; *Simmons v. Cates*, 56 Ga. 609;

A tender of payment to the creditor, when refused by him, will release the surety from his obligation.¹

A partial payment by the debtor releases the surety to that extent.²

2. Extension of Time to the Principal—*a. IN GENERAL.*—Any agreement upon a consideration between the creditor and the principal for an extension of time to the principal, without the surety's consent, will release the surety.³ But a mere

Pearl v. Deacon, 24 Beav. 186; *Wright v. Austin*, 56 Barb. (N. Y.) 13; *Strong v. Foster*, 17 C. B. 201; 84 E. C. L. 201.

1. *Joslyn v. Eastman*, 46 Vt. 258; *Johnson v. Ivey*, 4 Coldw. (Tenn.) 608; 94 Am. Dec. 206; *Fisher v. Stockebrand*, 26 Kan. 565. But the tender must be in lawful money, *Bonner v. Nelson*, 57 Ga. 433; *Williams v. Reynolds*, 11 La. 230. And it seems not necessary thereafter to keep the tender good, *Fisher v. Stockebrand*, 26 Kan. 565. *Compare Wilson v. McVey*, 83 Ind. 108. A mere offer to pay will not release surety, *Winne v. Colorado Springs Co.*, 3 Colo. 155; *Clark v. Sickler*, 64 N. Y. 231; 21 Am. Rep. 606; *Wilson v. McVey*, 83 Ind. 108; *White v. Life Assoc.*, 63 Ala. 419; 35 Am. Rep. 45; *Hiller v. Howell*, 74 Ga. 174.

In *Sharp v. Miller*, 57 Cal. 415, the sureties upon an appeal bond were released by a tender to the creditor of the amount of the bond.

In *Johnson v. Mills*, 10 Cush. (Mass.) 503, it was held that if a collector of taxes, who has given bond to the town treasurer, instead of to the town, carries money, collected by him for taxes, to the treasurer, and would pay it to him if payment were required, and the treasurer thereupon agrees with him, without the consent or knowledge of his sureties on the bond, that he may keep the money for a time, and pay his own debts with it, and he does so, the sureties are thereby discharged from their liability for the money so retained. But see *State v. Alden*, 12 Ohio 59, where under somewhat similar circumstances sureties on an official bond were held not discharged.

In *Hampshire Mfg. Bank v. Billings*, 17 Pick. (Mass.) 87, it was held that the tender of an amount due on a joint and several promissory note, by a surety, while an action brought by the holder against the principal is pending, will not discharge the surety from his liability, unless he also offers to

indemnify the holder against the costs of such action.

An informal tender by the debtor while insolvent, if not accepted by the creditor, discharges the surety. *Life Assoc. v. Neville*, 72 Ala. 517.

Where money is actually produced, and an unconditional offer made by the principal debtor to pay at once his note then due, and the creditor refuses to accept it, and asks the debtor to retain it, the sureties are discharged. *Spurgeon v. Smitha*, 114 Ind. 453.

2. *Gould v. Robson*, 8 East 580; *Lawson v. Snyder*, 1 Md. 71; *Walwyn v. St. Quintin*, 1 B. & P. 652. See also, where security is taken for remainder, surety is wholly released. *English v. Darley*, 2 B. & P. 361. Part payment in satisfaction of debt with knowledge of surety's relation to the obligation will release him. *Paddleford v. Thacher*, 48 Vt. 574. When a creditor accepts part payment of a note, and re-loans the balance to the principal debtor, the sureties are discharged. *Spurgeon v. Smitha*, 114 Ind. 453; *Wilson v. McVey*, 83 Ind. 108.

3. *Arkansas.*—*Vestal v. Knight*, 54 Ark. 97; *Caldwell v. McVicar*, 9 Ark. 418; *Ferguson v. State Bank*, 8 Ark. 416; *King v. State Bank*, 9 Ark. 185; 47 Am. Dec. 739; *Stone v. State Bank*, 8 Ark. 141.

Alabama.—*Ellis v. Bibb*, 2 Stew. (Ala.) 63; *Hetherington v. Branch Bank*, 14 Ala. 68; *Buckalew v. Smith*, 44 Ala. 638; *Prout v. Branch Bank*, 6 Ala. 309; *State Bank v. Edwards*, 20 Ala. 512; *Haden v. Brown*, 18 Ala. 641; *Branch Bank v. James*, 9 Ala. 949; *Mobile, etc., R. Co. v. Brewer*, 76 Ala. 135; *DeWitt v. Bigelow*, 11 Ala. 480; *Arkansas v. Mobile, etc., R. Co.*, 44 Ala. 611; *Armstrong v. Thomas*, 9 Ala. 586; *Chilton v. Robbins*, 4 Ala. 223; *Fletcher v. Gamble*, 3 Ala. 335; *Carpenter v. Devon*, 6 Ala. 718; *Cox v. Mobile, etc., R. Co.*, 44 Ala. 611; *Scott v. Scruggs* (Ala. 1892), 11 So. Rep. 215.

California.—Humphreys v. Crane, 5 Cal. 173.

Colorado.—Winne v. Colorado Springs Co., 3 Colo. 155; Byers v. Hussey, 4 Colo. 515.

Connecticut.—Continental L. Ins. Co. v. Barber, 50 Conn. 567; Adams v. Way, 32 Conn. 160; Boardman v. Larabee, 51 Conn. 39.

Delaware.—Hazel v. Sinix (Del. 1886), 6 Atl. Rep. 625.

Florida.—Pfeiffer v. Knapp, 17 Fla. 144.

Georgia.—Howell v. Lawrenceville, etc., Co., 31 Ga. 663; Scott v. Saffold, 37 Ga. 384; Randolph v. Flemming, 59 Ga. 776; Crawford v. Gaudlen, 33 Ga. 173; Stewart v. Parker, 55 Ga. 656; Worthan v. Brewster, 30 Ga. 112.

Illinois.—Flynn v. Mudd, 27 Ill. 323; Farwell v. Myer, 35 Ill. 40; Governor v. Bowman, 44 Ill. 499; Cunningham v. Wren, 23 Ill. 64; Galbraith v. Fullerton, 53 Ill. 126; Gardner v. Watson, 13 Ill. 347; Myers v. First Nat. Bank, 78 Ill. 257; Wing v. Beach, 31 Ill. App. 78; Home Nat. Bank v. Waterman, 134 Ill. 461; German Ins., etc., Inst. v. Vahle, 28 Ill. App. 557; Reed v. Cramb, 22 Ill. App. 34; Truesdell v. Hunter, 28 Ill. App. 292; Kerns v. Ryan, 26 Ill. App. 177; Wittmer v. Ellison, 72 Ill. 301.

Indiana.—Hogshead v. Williams, 55 Ind. 145; Shook v. State, 6 Ind. 113; Abel v. Alexander, 45 Ind. 523; 15 Am. Rep. 270; White v. Whitney, 51 Ind. 124; Jarvis v. Hyatt, 43 Ind. 163; Pierce v. Goldsberry, 31 Ind. 52; Calvin v. Wiggam, 27 Ind. 489; Davis v. Stout, 126 Ind. 12; Merriman v. Barker, 121 Ind. 74; Post v. Losey, 111 Ind. 74; 60 Am. Rep. 677; Lamson v. Veony Bank, 82 Ind. 31; Williams v. Scott, 83 Ind. 405; Thorp v. Parker, 86 Ind. 102; Albright v. Griffin, 78 Ind. 182; Hamilton v. Winterwood, 43 Ind. 393; Post v. Losey (Ind.), 12 N. E. Rep. 121; Dickerson v. Commissioners, 6 Ind. 128; Musgrave v. Glasgow, 3 Ind. 31.

Iowa.—Davis v. Graham, 29 Iowa 514; Hunt v. Postlewait, 28 Iowa 427; Lambert v. Shetler, 71 Iowa 463; Hubbard v. Hart, 71 Iowa 668; Citizens' Bank v. Barnes, 70 Iowa 412; Miller v. McCallen, 69 Iowa 681; Howard v. Clark, 36 Iowa 114; Hancock v. Wilson, 46 Iowa 352; Morgan v. Thompson, 60 Iowa 280; Bonney v. Bonney, 29 Iowa 448.

Kansas.—Rose v. Williams, 5 Kan. 483.

Kentucky.—Neel v. Harding, 2 Metc. (Ky.) 247; Lewis v. Harbin, 5 B. Mon.

(Ky.) 564; Cooper v. Fisher, 7 J. J. Marsh, (Ky.) 396; Blandford v. Barger, 9 Dana (Ky.) 22; Robinson v. Offott, 7 B. Mon. (Ky.) 540.

Louisiana.—Allison v. Thomas, 29 La. Ann. 732; Jackson v. Michie, 33 La. Ann. 723; Bordelon v. Weymouth, 14 La. Ann. 93; Manice v. Duncan, 12 La. Ann. 715.

Maine.—Berry v. Pullen, 69 Me. 101; 31 Am. Rep. 248; Kennebec Bank v. Tuckerman, 5 Me. 130; 17 Am. Dec. 209; Phillips v. Rounds, 33 Me. 357; Stowell v. Goodenow, 31 Me. 538.

Maryland.—Oberndorf v. Bank, 31 Md. 126; 1 Am. Rep. 31; Claggett v. Salmon, 5 Gill & J. (Md.) 314; Lawson v. Snyder, 1 Md. 71.

Massachusetts.—Wilson v. Foot, 11 Metc. (Mass.) 285.

Missouri.—White v. Middlesworth, 42 Mo. App. 368; Barrett v. Davis, 104 Mo. 549; Citizens' Bank v. Moorman, 38 Mo. App. 484; Snarr v. Schmetter, 38 Mo. 478; Hartman v. Redman, 21 Mo. App. 124; First Nat'l Bank v. Leavitt, 65 Mo. 562.

Mississippi.—Brown v. Prophett, 53 Miss. 649; Roberts v. Stewart, 31 Miss. 664; Haynes v. Covington, 9 Smed. & M. (Miss.) 470; Meggett v. Baum, 57 Miss. 22; Woodlington v. Gary, 15 Miss. 522.

New York.—Bank of Albion v. Burns, 46 N. Y. 170; Remsen v. Graves, 41 N. Y. 471; Miller v. McCan, 7 Paige (N. Y.) 451; Hubby v. Brown, 16 Johns. (N. Y.) 70; King v. Baldwin, 17 Johns. (N. Y.) 384; 8 Am. Dec. 415; Myers v. Welles, 5 Hill (N. Y.) 463; Douglass v. White, 3 Barb. Ch. (N. Y.) 621; Holmes v. Dole, Clarke Ch. (N. Y.) 71; Wagman v. Hoag, 14 Barb. (N. Y.) 232; Gahn v. Niemcewicz, 11 Wend. (N. Y.) 312; Vilas v. Jones, 1 N. Y. 274; Boughton v. Bank of Orleans, 2 Barb. Ch. (N. Y.) 458; Lowman v. Yates, 37 N. Y. 601; Moore v. Paine, 12 Wend. (N. Y.) 123; Carr v. Lewis, 20 N. Y. 138; Coleman v. Wade, 6 N. Y. 44; Bower v. Tiermann, 3 Den. (N. Y.) 378; Powers v. Silverstein (N. Y.), 15 N. E. Rep. 185; Wilson v. Edwards, 6 Lans. (N. Y.) 134; Ducker v. Rapp, 67 N. Y. 464; Thayer v. King, 31 Hun (N. Y.) 437; Jester v. Sterling, 25 Hun (N. Y.) 344.

New Jersey.—Grover v. Hoppock, 26 N. J. L. 191; Thompson v. Bowne, 39 N. J. L. 2; Haskell v. Burdette, 35 N. J. Eq. 31.

New Hampshire.—Hoyt v. French,

24 N. H. 198; *Bailey v. Adams*, 10 N. H. 162; *Rochester Sav. Bank v. Chick*, 64 N. H. 410; *Hutchison v. Wright*, 61 N. H. 108; *Bank v. Woodward*, 5 N. H. 99.

Nebraska.—*Dillon v. Russell*, 5 Neb. 484.

North Carolina.—*Prairie v. Jenkins*, 75 N. Car. 515; *Peppin v. Bond*, 5 Ired. (N. Car.) Eq. 91; *Howerton v. Sprague*, 64 N. Car. 451; *Hollingsworth v. Tomlinson*, 108 N. Car. 245; *Shaw v. McFarlane*, 1 Ired. (N. Car.) 216; *Forbes v. Sheppard*, 98 N. Car. 111; *Deal v. Cochran*, 66 N. Car. 269.

Ohio.—*Ide v. Churchill*, 14 Ohio St. 372; *Farmers', etc., Bank v. Lucas*, 26 Ohio St. 385; *Bebout v. Bodle*, 38 Ohio St. 500; *Uppington v. May*, 40 Ohio St. 247; *Miller v. Spein*, 41 Ohio St. 376; *Kleinhaus v. Generous*, 25 Ohio St. 667; *Blazer v. Bundy*, 15 Ohio St. 57; *Kugler v. Wiseman*, 20 Ohio St. 361; *Reddish v. Watson*, 6 Ohio St. 510.

Pennsylvania.—*Baring's Appeal* (Pa. 1887), 9 Cent. Rep. 394; *Henderson v. Ardery*, 36 Pa. St. 449; *Zane v. Kennedy*, 73 Pa. St. 182; *Neel v. Com.* (Pa. 1888), 7 Atl. Rep. 74; *Siebeneek v. Anchor Sav. Bank*, 111 Pa. St. 187 (note containing collection of authorities); *Riddle v. Thompson*, 104 Pa. St. 330; *Hutchinson v. Woodwell*, 107 Pa. St. 509; *People's Bank v. Legrand*, 103 Pa. St. 309; 49 Am. Rep. 126; *Grayson's Appeal*, 108 Pa. St. 581; *Shaffer v. Clark*, 90 Pa. St. 94; *Calvert v. Good*, 95 Pa. St. 65; *Uhler v. Applegate*, 26 Pa. St. 140.

Tennessee.—*Apperson v. Cross*, 5 Heisk. (Tenn.) 481; *White v. Summers*, 57 Tenn. 154; *Bryant v. Rudisell*, 4 Heisk. (Tenn.) 656; *Washington v. Tait*, 3 Humph. (Tenn.) 543; *Peay v. Poston*, 10 Yerg. (Tenn.) 111.

Texas.—*Mann v. Brown*, 71 Tex. 241; *Yeary v. Smith*, 45 Tex. 59; *Lane v. Scott*, 57 Tex. 367.

Vermont.—*Austin v. Dorwin*, 21 Vt. 38.

Virginia.—*Burson v. Andes*, 83 Va. 445; *Stuart v. Lancaster*, 84 Va. 772; *Smith v. Com.*, 25 Gratt. (Va.) 780; *Harnsberger v. Geiger*, 2 Gratt. (Va.) 144; *Devers v. Ross*, 10 Gratt. (Va.) 252.

West Virginia.—*Sayre v. Kevy*, 17 W. Va. 562; *Glenn v. Morgan*, 23 W. Va. 467.

Wisconsin.—*Jaffray v. Crane*, 50 Wis. 349; *Weed Sewing Mach. Co. v. Oberreigh*, 38 Wis. 325.

United States.—*Bank of Uniontown v. Mackey*, 140 U. S. 220; *U. S. v. Nicholl*, 12 Wheat. (U. S.) 505; *Sprigg v. Bank of Mount Pleasant*, 14 Pet. (U. S.) 201; *U. S. v. Hillegas*, 3 Wash. (U. S.) 70; *Vary v. Norton*, 6 Fed. Rep. 808; *Hudson v. Bishop*, 32 Fed. Rep. 519; *Suydam v. Vance*, 2 McLean (U. S.) 99; *Kendall v. Grice*, 1 Mackey (D. C.) 279.

England.—*Clarke v. Birley*, 41 Ch. Div. 422; *Combe v. Woulfe*, 1 M. & S. 241; *Oriental, etc., Corp. v. Overend, L. R.*, 7 Ch. 150; *Samuel v. Howarth*, 3 Meriv. 272; *Newton v. Chorlton*, 2 Drew. 553; *Wright v. Simpson*, 6 Ves. 734; *Nisbet v. Smith*, 2 Bro. C. C. 578; *Rees v. Berrington*, 2 Ves. Jr. 539; *Clarke v. Henty*, 3 Y. & C. 187; *Blake v. White*, 1 Y. & C. 620; *Hawkshaw v. Parkins*, 2 Swanst. 539; *Browne v. Carr*, 7 Bing. 508; 20 E. C. L. 221; *Bailey v. Edwards*, 4 B. & S. 761; 116 E. C. L. 761; *English v. Darley*, 2 B. & P. 61; *Moss v. Hall*, 5 Exch. 46; *Oakeley v. Pasheller*, 10 Bligh N. S. 548; *Isaac v. Daniel*, 8 Q. B. 500; 55 E. C. L. 500; *Davies v. Stainbank*, 6 De G. M. & G. 679; *Pooley v. Harradine*, 7 E. & B. 431; 90 E. C. L. 430; *Bank of Ireland v. Beresford*, 6 Dow. 233; *Eyre v. Barthrop*, 3 Madd. 224; *Howell v. Jones*, 1 C. M. & R. 97; *Greenough v. McClelland*, 2 E. & E. 426; 105 E. C. L. 422.

In *Oriental, etc., Corp. v. Overend, L. R.*, 7 Ch. 142, the reason why the surety is discharged is explained by Lord Hatherly as follows: "The principle is laid down very clearly that if you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety, because if you sue the surety you immediately turn him upon the principal, and therefore your act breaks the agreement into which you have entered with the principal. It is not simply neglecting to sue the principal which would have any effect upon the surety, but there must be a positive agreement with the principal that the creditor will postpone the suing of him to a subsequent period."

Examples.—An agreement between the defendant and a commissioner to postpone a case for one year, made without the consent of the surety on the recognizance, which was conditioned for the appearance for the defendant at a certain time, though the delay was for the defendant's benefit, will discharge the surety, where the defendant duly ap-

peared at the time named in the bond and the court took no action in regard to his case. *U. S. v. Backland*, 33 Fed. Rep. 156.

A wife mortgaged her land, as a continuing security for notes to be indorsed by her husband, or any renewals thereof. *Held*, that an agreement by the creditor, to extend the time of payment, without a renewal, discharged her liability as surety. *Smith v. Townsend*, 25 N. Y. 479.

An agreement after a three months' stay of execution, discharges the surety in a forthcoming bond. *Blaine v. Howard*, 4 Pa. St. 183.

If one in possession of a negotiable note, with all the indicia of ownership, give time to the maker, one who indorsed it as surety is discharged. *Scoville v. London*, 50 N. Y. 686.

Where a building is erected by contract, it occupies the position of surety for the contractor, with respect to the materialmen; and, therefore, an agreement to give time to the contractor, discharges the lien. *Hill v. Witmer*, 2 Phila. (Pa.) 72.

Extensions of time, given by a creditor to his debtor by a binding agreement after the death of a surety, releases the surety's estate. *Home Nat. Bank v. Waterman's Estate*, 134 Ill. 461.

In *Bank of Untontown v. Mackey*, 140 U. S. 220, a promissory note made by two persons, one as principal and the other as surety, was indorsed for the accommodation of the principal by the payee, who afterwards, by agreement in writing with the holder, "waives presentment for payment, protest, notice of protest, and consents that the payment thereof may be extended until he gives written notice to the contrary." *Held*, that this authorized only an extension assented to by both makers of the note; that an extension by agreement between the holder and the principal, without the consent of the surety, discharged the indorser.

In *Post v. Losey*, 111 Ind. 74, 60 Am. Rep. 677, a married woman made a mortgage of her separate property to secure a note of her husband. He was afterwards discharged in bankruptcy, and the creditor, without her knowledge, indorsed on the note an agreement to extend the time of payment and reduce the rate of interest. *Held*, that the wife being a surety, her mortgage was released.

In *Home Nat. Bank v. Waterman*, 30 Ill. App. 535, it was held that where collateral security is put up by a third party, or a third party becomes security for the payment of principal indebtedness, and the time of payment of such indebtedness is extended by valid agreement by the parties thereto without the consent of the owner of the collaterals, or the personal security, such action releases the collaterals or the security, as the case may be.

An agreement to give time to a principal by which a surety will be discharged, need not be in writing, nor in any precise form of words, nor even in express language, but may be inferred from acts, declarations, circumstances and facts; and, when, from these sources, the mutual agreement of the parties is to be gathered, it is for the jury to determine what were the intention and understanding upon which the minds of the parties met. *Brooks v. Wright*, 13 Allen (Mass.) 72.

If a collector of taxes, who has given bond to the town treasurer, instead of to the town, carries money, collected by him for taxes, to the treasurer, and would pay it to him if payment were required, and the treasurer thereupon agrees with him, without the consent or knowledge of his sureties on the bond, that he may keep the money for a time, and pay his own debts with it, and he does so, the sureties are thereby discharged from their liability for the money so retained. *Johnson v. Mills*, 10 Cush. (Mass.) 503.

Where the obligee of a bond conditioned for the payment of all claims for books sold the principal obligor, within three months from the date of each delivery, took a note from such obligor for books sold, payable nominally three months from the time of delivery, but in fact, adding the days of grace, three days later, held, that the sureties were discharged by the extension of time. *Appleton v. Parker*, 15 Gray (Mass.) 173.

The receipt from the principal debtor by the holder, at the maturity of a promissory note, of interest for sixty days on the unpaid balance, with an understanding between them, without the knowledge of the surety, that the principal may pay the note at the expiration of that time, will not discharge the surety, if unaccompanied by any agreement for extension of time, on which the principal debtor could have any remedy in law or equity against

forbearance on the part of the creditor will not discharge the surety.¹

b. EXTENSION MUST BE BASED ON CONSIDERATION.—An agreement to extend time to the principal will not operate to discharge the surety from liability, unless it is based upon a sufficient consideration.² The actual payment of interest in advance for

the creditor. *Agricultural Bank v. Bishop*, 6 Gray (Mass.) 317.

Where, by the usage of a bank, the credit of a note was continued without a new note being given, and without preventing the bank from collecting the note before such new credit had expired, held, that such enlargement of the time of payment did not discharge the surety. *Blackstone Bank v. Hill*, 10 Pick. (Mass.) 129.

Thorn v. Penkham, 84 Me. 103; *Blackwell v. Bainbridge*, 19 N.Y. Supp. 681; *Phelps v. Walkley*, 50 N. W. Rep. 560; *Clark v. House*, 16 N. Y. Supp. 777; *Gordon v. Third Nat'l Bank*, 144 U. S. 97; *Cross v. Allen*, 141 U. S. 528; *Manchester v. Van Brunt*, 19 N. Y. Supp. 685.

1. *Allen v. O'Donald*, 28 Fed. Rep. 17; *Powell v. Waters*, 17 Johns. (N. Y.) 176; *King v. Baldwin*, 2 Johns. Ch. (N. Y.) 554; *Sailly v. Elmore*, 2 Paige (N. Y.) 497; *Schroepf v. Shaw*, 3 N. Y. 446; *Lowman v. Yates*, 37 N. Y. 601; *Draper v. Romeyn*, 18 Barb. (N. Y.) 166; *Bank of Utica v. Ives*, 17 Wend. (N. Y.) 501; *Vilas v. Jones*, 10 Paige (N. Y.) 76; *Hunt v. Knox*, 34 Miss. 655; *McMullen v. Hinkle*, 39 Miss. 142; *Oleondorf v. Union Bank*, 31 Md. 126; 1 Am. Rep. 31; *Rucker v. Robinson*, 38 Mo. 154; 90 Am. Dec. 412; *McCune v. Belt*, 38 Mo. 281; *Kirby v. Studebaker*, 15 Ind. 45; *Love v. Brown*, 38 Pa. St. 307; *Cope v. Smith*, 8 S. & R. (Pa.) 110; 11 Am. Dec. 582; *U. S. v. Simpson*, 3 P. & W. (Pa.) 437; 24 Am. Dec. 331; *Johnston v. Thompson*, 4 Watts (Pa.) 446; *Gardner v. Ferree*, 15 S. & R. (Pa.) 28; *Mundorff v. Singer*, 5 Watts (Pa.) 172; *Kramph v. Hatz*, 52 Pa. St. 525; *Reid v. Flippen*, 47 Ga. 273; *Humphreys v. Crane*, 5 Cal. 173; *Whiting v. Clark*, 17 Cal. 407; *Roberts v. Colvin*, 3 Gratt. (Va.) 358; *Johnson v. Planters' Bank*, 4 Smed. & M. (Miss.) 165; *Grimes v. Nolen*, 3 Humph. (Tenn.) 412; *People v. Russell*, 4 Wend. (N. Y.) 570; *Valentine v. Farrington*, 2 Edw. (N. Y.) 53; *Rutledge v. Greenwood*, 2 Desaus. (S. Car.) 389; *King v. Baldwin*, 17 Johns. (N. Y.) 384; *Washburn v.*

Holmes, Wright (Ohio) 67; *Bizzell v. Smith*, 2 Dev. Eq. (N. Car.) 27; *Nashville Bank v. Campbell*, 7 Yerg. (Tenn.) 353; *Townsend v. Riddle*, 2 N. H. 448; *Bray v. Howard*, 7 Mon. (Ky.) 467; *Lyle v. Morse*, 24 Ill. 95; *People v. Jansen*, 7 Johns. (N. Y.) 332; *Hunt v. U. S.*, 1 Gall. (U. S.) 32; *Naylor v. Moody*, 3 Blackf. (Ind.) 93; *Hunt v. Bridgman*, 2 Pick. (Mass.) 581; *Dawson v. Real Estate Bank*, 5 Ark. 283; *People v. White*, 11 Ill. 341; *Freeman's Bank v. Rollins*, 13 Me. 202; *Leavitt v. Savage*, 16 Me. 72; *Montgomery v. Dillingham*, 3 Smed. & M. (Miss.) 647; *Hawkins v. Ridenhour*, 13 Mo. 125; *Williams v. Townsend*, 1 Bosw. (N. Y.) 411; *Carter v. Jones*, 5 Ired. Eq. (N. Car.) 196; *Johnston v. Searcy*, 4 Yerg. (Tenn.) 182; *Commissioners of Berks v. Ross*, 3 Binn. (Pa.) 520; *Weaver v. Shryock*, 6 S. & R. (Pa.) 262; *Barbee v. Pitman*, 3 Bush (Ky.) 259; *Rankin v. White*, 3 Bush (Ky.) 545; *Davies v. Womack*, 8 B. Mon. (Ky.) 383; *Craig v. Gresham*, 12 B. Mon. (Ky.) 401; *Andrus v. Carpenter*, 52 Ill. 171; *Buckalew v. Smith*, 44 Ala. 638; *Davis v. Graham*, 29 Iowa 514; *Pierce v. Goldsberry*, 31 Ind. 52; *Wintersmith v. Tabor*, 5 Bush (Ky.) 105; *Richard v. Beauchamp*, 21 La. Ann. 635; *Pitman v. Chisolm*, 43 Ga. 442; *Meniffee v. Clark*, 35 Ind. 304; *Hagood v. Blythe*, 37 Fed. Rep. 249; *Edwards v. Dargan*, 30 S. Car. 177; *Benedict v. Olson*, 37 Minn. 431; *Jordan v. Trumbo*, 6 Gill & J. (Md.) 103; *Sasscer v. Young*, 6 Gill & J. (Md.) 243; *Crawford v. Gauden*, 33 Ga. 173; *Nichols v. McDowell*, 14 B. Mon. (Ky.) 6; *Hunt v. Knox*, 34 Miss. 655; *Huddleston v. Francia*, 26 Ill. App. 224; *Martin v. Orr*, 96 Ind. 491; *Udpike v. Lane*, 78 Va. 132; *Banks v. State*, 62 Md. 88; *Smith v. McKean*, 99 Ind. 101; *Vancil v. Hagler*, 27 Kan. 407; *Neal v. Freeman*, 85 N. Car. 441; *Scott v. Stockwell*, 65 How. Pr. (N. Y.) 249; *McKim v. Williams*, 134 Mass. 136.

2. *Hayes v. Wells*, 34 Md. 512; *McComb v. Kittridge*, 14 Ohio 348; *Byers v. Harris*, 67 Iowa 685; *Brown v. Kirk*, 20 Mo. App. 524; *Fay v. Tower*, 58

an extended period is a sufficient consideration upon which to base an agreement of extension so as to discharge the surety.¹ In some cases, however, it has been held, that payment of inter-

Wis. 286; Knight v. Charter, 22 W. Va. 422; Bramble v. Ward, 40 Ohio St. 267; Wendling v. Taylor, 57 Iowa 354; Williams v. Jensen, 75 Mo. 681; Hogshead v. Williams, 55 Ind. 145; Bonner v. Nelson, 57 Ga. 433; Newcomb v. Blakely, 1 Mo. App. 289; Wright v. Watt, 52 Miss. 634; Montgomery v. Hamilton, 43 Ind. 451; Hunt v. Postlewait, 28 Iowa 427; Davis v. Graham, 29 Iowa 514; Galbraith v. Fullerton, 53 Ill. 126; Carson v. McDaniel, 78 Ga. 561; Halstead v. Brown, 17 Ind. 202; Buchanan v. Bordley, 4 Har. & M. (Md.) 41; Kerns v. Ryan, 26 Ill. App. 177; Rochester Sav. Bank v. Chick, 64 N. H. 410; Austin v. Curtis, 31 Vt. 64; Draper v. Romeyn, 18 Barb. (N. Y.) 166; Ghan v. Niemcewicz, 11 Wend. (N. Y.) 312; New Hampshire Sav. Bank v. Gill, 16 N. H. 578; Hinds v. Ingham, 31 Ill. 400; Creath v. Sims, 5 How. (U. S.) 192; Wilson v. Roberts, 5 Bosw. (N. Y.) 100; Semple v. Atkinson, 64 Mo. 504; Williams v. Covilland, 10 Cal. 419; Goodwyn v. Hightower, 30 Ga. 249; Carr v. Howard, 8 Blackf. (Ind.) 190; Shook v. State, 6 Ind. 113; Shook v. Ripley County, 6 Ind. 461; Leavitt v. Savage, 16 Me. 72; Bailey v. Adams, 10 N. H. 162; Joslyn v. Smith, 13 Vt. 353; Payne v. Commercial Bank of Natchez, 6 Smed. & M. (Miss.) 24; Newell v. Hamer, 4 How. (Miss.) 684; Nichols v. Douglass, 8 Mo. 49; Marks v. Bank of Missouri, 8 Mo. 316; Coman v. State, 4 Blackf. (Ind.) 241; Harter v. Moore, 5 Blackf. (Ind.) 367; Farmers' Bank v. Reynolds, 13 Ohio 84; Haynes v. Covington, 9 Smed. & M. (Miss.) 470; Anderson v. Mannon, 7 B. Mon. (Ky.) 217; Ford v. Beard, 31 Mo. 459; Saily v. Elmore, 2 Paige (N. Y.) 497; King v. Baldwin, 2 Johns. (N. Y.) 554; Hoyer v. Penn, 1 Bland (Md.) 528; Hunter v. Jett, 4 Rand. (Va.) 103; Morris v. Crumme, 2 Rand. (Va.) 323; Burn v. Poaug, 3 Desaus. (S. Car.) 596; Thompson v. Watson, 10 Yerg. (Tenn.) 362; Brinagar v. Phillips, 1 B. Mon. (Ky.) 283; Stout v. Ashton, 5 T. B. Mon. (Ky.) 251; Vilas v. Jones, 10 Paige (N. Y.) 76; Brubaker v. Okeson, 36 Pa. St. 519; Hunter v. Clark, 28 Tex. 159.

1. In Hollingsworth v. Tomlinson, 108 N. Car. 245, it was held that the acceptance of interest in advance at

the maturity of a note, and the indorsement thereof on the note by the payee, is *prima facie* evidence of a contract to extend the time of the note and forbear to sue thereon.

In Reynolds v. Barnard, 36 Ill. App. 218, there was an agreement made between the maker and payee of a note made after maturity, and without the knowledge or consent of the surety, to extend the note for six months. The payee was to receive interest for that time. The court held that the surety was released.

In Grayson's Appeal, 108 Pa. St. 581, it was held that where time is given the maker of a note in consideration of payment in advance of interest for the period of extension, it is a good consideration, and binds the parties and discharges the surety who has not agreed thereto.

In Wakefield Bank v. Truesdell, 55 Barb. (N. Y.) 602, it was held that if the holder of a note, at maturity, receive from the maker a payment of interest in advance for a definite period, and indorse it on the note, this is an implied agreement to give time, and discharges a guarantor.

The reception of interest in advance upon a note at maturity, is *prima facie* evidence of a binding contract to delay the time of payment, which will discharge a surety. Scott v. Saffold, 37 Ga. 384; Robinson v. Miller, 2 Bush (Ky.) 179; Woodburn v. Carter, 50 Ind. 376.

From the payment of interest in advance, by the maker, whether at the rate specified in the note or at a higher rate, and the receipt thereof by the holder as interest, an agreement is implied to extend the time of payment during the period for which interest is thus paid. Jarvis v. Hyatt, 43 Ind. 163; Abel v. Alexander, 45 Ind. 523.

The payment of interest in advance upon a debt, or the purchase by the debtor of the creditor, at the latter's request, of property and the execution of the former to the latter of his note and mortgage therefor are, either of them, a sufficient consideration to support a promise to delay the collection of the original debt, which, when made by the creditor to the principal, will discharge the surety. Dunham v. Dow-

est for the extended period is not sufficient consideration to support an agreement to extend time so as to discharge the surety.¹

ner, 31 Vt. 249. See also *Kaler v. Hise*, 79 Ind. 304; *Randolph v. Fleming*, 59 Ga. 776; *People's Bank v. Pearsons*, 30 Vt. 711; *Christner v. Brown*, 16 Iowa 130; *Preston v. Henning*, 6 Bush (Ky.) 556; *Hunt v. Postlewait*, 28 Iowa 427; *Merchants' Ins. Co. v. Hanck*, 83 Mo. 21; *Dunham v. Downer*, 31 Vt. 249; *Rose v. Williams*, 5 Kan. 483; *Cheek v. Glass*, 3 Ind. 286; *Walters v. Swallow*, 6 Whart. (Pa.) 446; *Scott v. Saffold*, 37 Ga. 384; *Bagley v. Buzzell*, 19 Me. 88; *Lime Rock Bank v. Mallett*, 34 Me. 547; 56 Am. Dec. 673; *Flynn v. Mudd*, 27 Ill. 323; *Dubuisson v. Folkes*, 30 Miss. 432; *Kerns v. Ryan*, 26 Ill. App. 177; *Post v. Losey*, 111 Ind. 74; 60 Am. Rep. 677; *Boring's Appeal* (Pa. 1887), 9 Cent. Rep. 394; *Dennis v. Piper*, 21 Ill. App. 169; *Warner v. Campbell*, 26 Ill. 282; *Wright v. Bartlett*, 43 N. H. 548; *Maher v. Lanpene*, 86 Ill. 513; *Woodburn v. Carter*, 50 Ind. 376; *Hamilton v. Winterrowd*, 43 Ind. 393; *Jarvis v. Hyatt*, 43 Ind. 163; *Starret v. Burkhalter*, 86 Ind. 439; *Chute v. Pattee*, 37 Me. 102; *Blazer v. Bundy*, 15 Ohio St. 57; *Fowler v. Brooks*, 13 N. H. 240.

1. Thus in *Citizens' Bank v. Moorman*, 38 Mo. App. 484, it was held that proof that after the maturity of a promissory note the maker paid interest thereon to the holder, and that such interest was paid in advance for a definite period, does not of itself establish a binding agreement for an extension of the payment of the note, so as to discharge the surety. See also *Vilas v. Jones*, 10 Paige (N. Y.) 76; *Lowman v. Yates*, 37 N. Y. 601; *Gahn v. Niemcewicz*, 11 Wend. (N. Y.) 312; *Reynolds v. Ward*, 5 Wend. (N. Y.) 501; *Hosea v. Rowley*, 57 Mo. 357; *Coster v. Mesner*, 58 Mo. 549; *Freeman's Bank v. Rollins*, 13 Me. 202; *Williams v. Smith*, 48 Me. 135. In *Haydenville Sav. Bank v. Parsons*, 138 Mass. 53, the court, by Holmes, J., said: "It has been held repeatedly in this Commonwealth, that receipt of interest in advance upon an overdue promissory note from the maker does not of itself import such a giving of time as will discharge the sureties." Citing *Oxford Bank v. Lewis*, 8 Pick. (Mass.) 457; *Blackstone Bank v. Hill*, 10 Pick. (Mass.) 129; *Central Bank v. Willard*, 17 Pick. (Mass.) 150; 28 Am. Rep. 284; *Agricultural Bank v. Bishop*, 6 Gray

(Mass.) 317. See also *Woolford v. Dow*, 34 Ill. 424; *Crossman v. Wohlleben*, 90 Ill. 537; *Abel v. Alexander*, 45 Ind. 523; 15 Am. Rep. 270.

A parol agreement by the principal to pay interest for a year at eight per cent. is not a good consideration for an agreement by the holder of a note with the principal, to extend the time of payment one year after it became due, and such an agreement, based on such a consideration, does not discharge a surety on the note. *Turner v. Williams*, 73 Me. 466.

An agreement by the promisee of a maturing note to extend the time of payment at the rate of interest specified in the note, upon the payment of a certain sum per month upon the principal, is not valid, and will not discharge the surety. *Woolford v. Dow*, 34 Ill. 424.

The taking of interest for a definite period in advance of the time when the note fell due, is not evidence of a promise by the creditor which suspends his right of action against the maker, and is not sufficient to take the case to the jury upon the question as to whether the surety is discharged. *Russell v. Brown*, 21 Mo. App. 51.

Indorsement, on a note overdue, of a payment more than enough to pay the interest then due, does not necessarily imply an agreement between maker and payee for an extension of time, such as will discharge a surety. (1876), *Vore v. Woodford*, 29 Ohio St. 245.

A gave a note secured by mortgage, and then sold the land to B, who agreed with A to pay the debt. The mortgagee, without A's knowledge, extended the time of payment, in consideration of interest paid by B in advance. Held, that A was not discharged from liability beyond the extent of the actual loss to him by reason of the extension. *Teeters v. Lamborn*, 43 Ohio St. 144.

The holder of a promissory note agreed as follows: "I hereby agree to continue or extend the final payment for three years. That is also required that the said Walsh (the maker) shall pay, when requested all interest now due." It was further provided that the holder should apply a portion of the interest towards the extinguishment of the principal. Held, that the

A partial payment upon a note before maturity is a good consideration for an agreement to extend the time for payment of the balance, and consequently discharges a surety.¹ But a partial payment by the maker, on account of an overdue note, is not a valid consideration for a promise of forbearance as to the residue, so as to discharge the indorser.²

c. EXTENSION IN CONSIDERATION OF THE PAYMENT OF USURY.—A promise to pay usury in the future is not a sufficient consideration upon which to base an agreement for an extension of time so as to relieve the surety;³ but where the agreement

agreement was without consideration, and that surety was not discharged. *Wilson v. Powers*, 130 Mass. 127. See also *Aultman v. Taylor Co.* (Mich. 1891), 49 N. W. Rep. 486.

1. Partial Payments.—*Newsam v. Finch*, 25 Barb. (N. Y.) 175; *Vestal v. Knight*, 54 Ark. 97; *Austin v. Dorwin*, 21 Vt. 38; *Greely v. Dow*, 2 Met. (Mass.) 176; *Uhler v. Applegate*, 26 Pa. St. 140.

2. *Halliday v. Hart*, 30 N. Y. 474; *Davis v. Stout*, 126 Ind. 12; *Hall v. Bardwell*, 1 C. P. Rep. (Pa.) 23; *Roberts v. Stewart*, 31 Miss. 664; *King v. State Bank*, 9 Ark. 185; 47 Am. Dec. 739; *Caldwell v. McVicar*, 9 Ark. 418; *Jenkins v. Clarkson*, 7 Ohio 72; *Mathewson v. Strafford Bank*, 45 N. H. 104; *Petty v. Douglass*, 76 Mo. 70; *Ingels v. Sutliff*, 36 Kan. 444.

Payment of part of a debt after it is due, is not a sufficient consideration for a promise to give time to the principal debtor to make it a binding engagement which will discharge his surety. *Mathewson v. Strafford Bank*, 45 N. H. 104.

Where a creditor gives time to the principal debtor, upon a valid consideration, without the consent of the surety, the surety is discharged; but part payment of the debt does not constitute such valid consideration. *King v. State Bank*, 9 Ark. 185; *Caldwell v. McVicar*, Ark. 418.

Payment by the principal of a part of the debt due, in consideration of a promise to delay enforcing the collection of the balance, is *nudum pactum*, and, therefore, does not discharge the surety. *Holliday v. Poole*, 77 Ga. 159.

A promise to pay interest at the rate specified in the note, or to pay the principal in installments, is not a sufficient consideration for an agreement to extend the time such as would release the surety. *Hume v. Mazelin*, 84 Ind. 574. See also *Hughes v. Southern*

Warehouse Co. (Ala. 1891), 10 So. Rep. 133.

The performance of an unqualified legal obligation by the payment of part of the amount due upon a promissory note, is not a valid consideration to support an agreement for the extension of payment of the remainder, so as to discharge sureties on the note. *Halliday v. Hart*, 30 N. Y. 474.

3. In *Hartman v. Danner*, 74 Pa. St. 36, Hartman lent money to Duphorn for a year at 8 per cent. on a note, stated to be at six per cent., with Danner as surety. About maturity, Hartman agreed to an extension for a year, upon Duphorn paying 2 per cent. usury, and in the same way for a third year. The usury was paid after the maturity of the note. Danner had no knowledge of the usury or the extension. *Held*, that the contract for usury was not binding on Hartman. See also *Lewis v. Brown*, 14 S. E. Rep. 881; *Harrington v. Findlay*, 15 S. E. Rep. 483; *Meiswinkle v. Jung*, 30 Wis. 361; 11 Am. Rep. 572; *Brown v. Prophit*, 53 Miss. 649; *Roberts v. Stewart*, 31 Miss. 664; *Cox v. Mobile, etc., R. Co.*, 27 Ala. 320; *Kyle v. Bostick*, 10 Ala. 589; *Gilder v. Jeter*, 11 Ala. 256; *Burgess v. Dewey*, 33 Vt. 618; *Smith v. Hyde*, 36 Vt. 303; *Polkinghorne v. Hendricks*, 61 Miss. 366; *Payne v. Powell*, 14 Tex. 600; *Duncan v. Reed*, 8 B. Mon. (Ky.) 382; *Green v. Lake*, 2 Mackey (D. C.) 162; *Wild v. Howe*, 74 Mo. 551; *Calvert v. Good*, 95 Pa. St. 65; *May v. Shepherd*, 1 Mackey (D. C.) 430; *Mann v. Brown* (Tex.), 9 S. W. Rep. 111; *Offutt v. Glass*, 4 Bush (Ky.) 486; *Wilson v. Lanford*, 5 Humph. (Tenn.) 320.

In *Tudor v. Goodloe*, 1 B. Mon. (Ky.) 322, it was held that an agreement by the creditor to extend the time for payment on a promise by the principal debtor to pay a usurious rate of interest for the forbearance, did not dis-

has been executed and usurious interest has actually been paid by the principal to the creditor, the surety is discharged from his liability.¹

d. WHERE THE CREDITOR RESERVES HIS RIGHTS AGAINST THE SURETY.—If, at the time the extension is granted to the principal, the creditor explicitly reserves his remedies against the surety, the latter will not be discharged from his liability.²

charge the surety, for the reason that as the promise of the debtor to pay usury was void, there was no consideration for the promise of the creditor to forbear, and consequently no binding contract for time. See also *Scott v. Hall*, 6 B. Mon. (Ky.) 285; *Wilson v. Langford*, 5 Humph. (Tenn.) 320.

In *Abel v. Alexander*, 45 Ind. 523, it was held that an agreement by the principal to continue to pay the same rate of interest specified in a promissory note, though greater than the legal rate, is not a sufficient consideration to sustain a promise to extend the time of payment, and an extension upon such consideration, without the knowledge or consent of the surety does not discharge the surety.

As an agreement to forbear must be binding and as, in *Indiana*, usurious interest can be entirely recovered back, the payment of it there is not such a binding consideration as will discharge a surety. *Shaw v. Binkard*, 10 Ind. 227.

The payment of interest on a note up to the day it is paid at a greater rate of interest than the party is legally bound to pay, without any other proof, does not show an agreement to extend the time of payment so as to release a surety. *Stearns v. Sweet*, 78 Ill. 446.

1. In *Kenningham v. Bedford*, 1 B. Mon. (Ky.) 325, usury was paid at the time the creditor promised to forbear; and the court held that the surety was discharged; that although the contract was void as to the debtor, it was valid as to the creditor; and if he should sue before the expiration of the stipulated forbearance, the other party might have an action for damages. It was likened to a contract between an adult and an infant, where the adult is bound, though the infant is not. See also *Wittmer v. Ellison*, 72 Ill. 301; *Myers v. First Nat. Bank*, 78 Ill. 257; *Danforth v. Semple*, 73 Ill. 170; *Montague v. Mitchell*, 28 Ill. 481; *Kennedy v. Evans*, 31 Ill. 258; *Cross v. Wood*, 30 Ind. 378; *White v. Whitney*, 51 Ind. 124; *Calvin v. Wiggain*, 27 Ind. 489; *Harbert v. Dumont*, 3 Ind. 346; *Lem-*

mon v. Whitman, 75 Ind. 318; 39 Am. Rep. 150; *Coriell v. Allen*, 13 Iowa 289; *Billington v. Wagoner*, 33 N. Y. 31; *Church v. Maloy*, 70 N. Y. 63; *Patton v. Shanklin*, 14 B. Mon. (Ky.) 13; *Camp v. Howell*, 37 Ga. 312; *Duncan v. Reed*, 8 B. Mon. (Ky.) 382; *Draper v. Trescott*, 29 Barb. (N. Y.) 401; *Blazer v. Bundy*, 15 Ohio St. 57; *Wood v. Newkirk*, 15 Ohio St. 295; *Glenn v. Morgan*, 23 W. Va. 467; *Denick v. Hubbard*, 27 Hun (N. Y.) 347; *Osborn v. Low*, 40 Ohio St. 347.

In *Mississippi*, an agreement between the holder and principal maker of a note, that the latter may retain the sum due for a definite period of time, upon his promise to pay usurious interest, will discharge a surety on said note, not consenting to such contract of forbearance. *Brown v. Proffit*, 53 Miss. 649.

An executed agreement between a creditor and his principal debtor, for forbearance to sue in consideration of the payment of an usurious premium, operates in equity a release of the sureties of the debtor. *Armistead v. Ward*, 2 Patt. & H. (Va.) 504.

2. In *Oriental, etc., Corp. v. Overend, L. R.*, 7 Ch. 142, Lord Hatherly said: "It is competent to the creditors to reserve all their rights against the surety, in which case the surety is not discharged; and for this reason, that the contract made with the principal is then preserved, because the creditors have engaged with the principal not to sue him for a given time, but subject to the proviso that the creditors shall be at liberty to sue the surety, and so turn the surety upon the principal without any breach of the engagement with the principal." See *Russell v. Brown*, 21 Mo. App. 51; *Jones v. Sarchett*, 61 Iowa 520.

In *Hutchinson v. Wright*, 61 N. H. 108, defendant was surety on notes executed to plaintiff by a copartnership. The partnership made a written agreement of compromise with their creditors, which provided for an extension of time to pay its debts, including such

c. WHERE THE SURETY CONSENTS TO THE EXTENSION.—If the surety consents to the extension of time granted to the principal he is not discharged; but the consent of the surety to one extension of time, will not justify the creditor in granting a second extension without the express consent of the surety.¹

notes, and a discharge from all indebtedness of the copartnership, personally, on payment of fifty per cent. Both plaintiff and defendant signed such agreement. *Held*, that this was an assent by defendant to the extension, and that he was not discharged thereby.

In *Calvo v. Davies*, 73 N. Y. 217; 29 Am. Rep. 130, Andrews, J., said: "Where in an agreement between a creditor and the principal debtor extending the time of payment, the remedies against the surety are reserved, the agreement does not operate as an absolute, but only as a qualified and conditional suspension of the right of action. The stipulation in that case is treated in effect as if it was made in express terms, subject to the consent of the surety, and the surety is not thereby discharged."

In *Hagey v. Hill*, 75 Pa. St. 108; 15 Am. Rep. 583, the holder of a note agreed in writing with the drawers upon a consideration to give them time, with the proviso, "that no delay of demand shall interfere with any claim I may have upon the indorsers of the said note." *Held*, that the indorsers were not discharged.

In *Wyke v. Rogers*, 1 De G. M. & G. 408, the creditor took from the principal a promissory note, but afterwards in consequence of the insolvency of the debtor, sued the surety on the bond. The surety then filed his bill to restrain the action. The case was referred to a master who reported that though there was not any written or any distinct parol agreement between the parties yet there was a general understanding that the giving of the note was not to affect the bond. The court held that the bill should be dismissed.

In *Sohler v. Loring*, 6 Cush. (Mass.) 537, it was held that a composition deed, whereby the holder of a bill of exchange gives time to the acceptor, and agrees to discharge him on receiving a portion of the debt, reserving the holder's remedies against other parties to the bill, does not discharge the drawer and indorsers.

In *Morgan v. Smith*, 70 N. Y. 537, a

lease contained a clause that the lessees would not assign it, or let or under-let the premises without the consent of the lessor. The latter, subsequent to the execution of the lease and taking possession thereunder by the lessor, agreed with the lessee to rent the premises for them at their risk, crediting to them any receipts for rent, with a condition that the agreement should not impair or alter the relations of the parties, the covenants of the lease, or the security for the rent. The court held that the agreement did not operate to release the sureties. For other cases see *Kearsley v. Cole*, 16 M. & W. 128; *Boaler v. Mayor*, 19 C. B. N. S. 76; 115 E. C. L. 76; *Viele v. Hoag*, 24 Vt. 46; *Claggett v. Salmon*, 5 Gill & J. (Md.) 314; *Hunt v. Knox*, 34 Miss. 655; *Rucker v. Robinson*, 38 Mo. 154; 90 Am. Dec. 412; *Wright v. Bartlett*, 43 N. H. 548; *Ourn v. Homan*, 13 Beav. 106; *Rockville Nat. Bank v. Holt*, 58 Conn. 526; *Boulton v. Stubbs*, 18 Ves. 20.

1. In *Wolf v. Finks*, 1 Pa. St. 435; 44 Am. Dec. 141, one of two sureties on a promissory note assented to an extension of time, and the other dissented. In a suit upon the note, it was held that an award in favor of the dissenting surety unappealed from, did not operate to the release and discharge of the other surety.

In *Furber v. Bassett*, 2 Duv. (Ky.) 433, a surety gave his consent to a stay of execution until a certain date, and longer if the principal requested it. A stay of execution was granted for four years, the principal requesting extensions from time to time. The court held, that when execution was finally issued, the surety was not discharged. See also *Lime Rock Bank v. Mallett*, 34 Me. 547; 56 Am. Dec. 673; *Treat v. Smith*, 54 Me. 112; *Osgood v. Miller*, 67 Me. 174; *Stewart v. Parker*, 55 Ga. 656.

In *Bangs v. Strong*, 10 Paige (N. Y.) 11, an agreement was obtained from the creditor by the principal, upon the false representation that the surety had authorized him to make it. The surety afterwards refused to assent

If the surety agrees to pay the debt, after time has been given to the principal, he will be bound by his agreement, although no new consideration has passed to him.¹

f. THE EXTENSION MUST BE DEFINITE IN TIME.—The time for which the extension is granted to the principal must be definite and fixed, otherwise the surety is not discharged.² The reason for the rule is that if no definite time is fixed, the creditor may proceed at any time.

to the agreement. The court held that the creditor would be at liberty to repudiate it, in which case the surety would not be discharged, unless the creditor proceeded to act under the agreement after notice that it was entered into without authority of the surety, and that the surety had refused to assent to it.

See also as to the effect of the creditor's consent to the extension, *Hagey v. Hill*, 75 Pa. St. 108; 15 Am. Rep. 583; *Ex parte Glendenning*, Buck. 517; *Boulbee v. Stubbs*, 18 Ves. 20; *Kearsley v. Cole*, 16 M. & W. 127; *Viele v. Hoag*, 24 Vt. 46; *Morse v. Huntington*, 40 Vt. 488; *Rice v. Isborn*, 4 Abb. App. Dec. (N. Y.) 37.

But an agreement to extend the time of payment "until the summer," or "until the fall," is sufficiently definite. *Abel v. Alexander*, 45 Ind. 523; 15 Am. Rep. 270; and also "until after thrashing." *Moulten v. Posten*, 52 Wis. 169.

In *Jarvis v. Hyatt*, 43 Ind. 163, it was held that where there is an agreement for an extension generally, for no definite time, and interest has been paid, but not in advance, no agreement to extend the time of payment for any particular length of time can be implied.

See also *Clark Co. v. Covington*, 26 Miss. 470; *Hamilton v. Prouty*, 50 Wis. 592; 36 Am. Rep. 866; *Freeland v. Compton*, 30 Miss. 424; *Berry v. Pullen*, 69 Me. 101; 31 Am. Rep. 248; *Winne v. Colorado Springs Co.*, 3 Colo. 155; *Hayes v. Wells*, 34 Md. 512; *Gardner v. Watson*, 13 Ill. 347; *Cates v. Thayer*, 93 Ind. 156; *Jenkins v. Clarkson*, 7 Ohio 72; *Rufert v. Grant*, 6 Smed. & M. (Miss.) 433; *Thornton v. Davney*, 23 Miss. 559; *Parnell v. Price*, 3 Rich. (S. Car.) 121; *Waters v. Simpson*, 7 Ill. 570; *People v. McHatton*, 7 Ill. 638; *Deal v. Cochran*, 66 N. Car. 269; *Harbert v. Dumont*, 3 Ind. 346; *Grove v. Hoppock*, 26 N. J. L. 191; *Roberts v. Stewart*, 31 Miss. 664; *Beach v. Zimmerman*, 106 Ind. 495;

Morgan v. Thompson, 60 Iowa 280; *Kelrn v. Andrews*, 59 Miss. 39; *Jarvis v. Hyatt*, 43 Ind. 163; *Rochester Sav. Bank v. Chick*, 64 N. H. 410; *Gardner v. Watson*, 13 Ill. 347.

1. *Ellis v. Bibb*, 2 Stew. (Ala.) 63; *Porter v. Hodenpuy*, 9 Mich. 11; *Bank v. Whitman*, 66 Ill. 331; *Rockwell N. Bank v. Holt*, 58 Conn. 526; *Rindskopf v. Doman*, 28 Ohio 516; *Smith v. Winter*, 4 M. & W. 454. In *Fowler v. Brooks*, 13 N. H. 240, the court, by *Parker, C. J.*, said: "The right of discharge in such case from the mere fact of the extension of time is a personal privilege of the surety, which he may waive, and he does so emphatically, if, with knowledge of the fact, he notwithstanding renews his promise."

2. *Truesdell v. Hunter*, 28 Ill. App. 292; *Menifee v. Clark*, 35 Ind. 304; *Jenkins v. Clarkson*, 7 Ohio 72; *Rupert v. Grant*, 6 Sm. & M. (Miss.) 433; *Hayes v. Wells*, 34 Md. 512; *Woolfolk v. Plant*, 46 Ga. 422; *Morgan v. Thompson*, 60 Iowa 280; *Vary v. Norton*, 6 Fed. Rep. 808.

In *Miller v. Stem*, 2 Pa. St. 286, the court, by *Sergeant, J.*, said: "The main point of the case is, whether sufficient was proved to authorize the court to leave it to the jury to say that the plaintiff made an agreement to give time, and which had the effect to discharge the defendant. The principle of law, as settled by the recent authorities is, that if the creditor make an express agreement with the principal, upon sufficient consideration, or on taking a new security, to give a further time for payment, the surety is thereby discharged. But mere consent to forbear, for a loose and uncertain period, does not tie up the creditor's hands, and an agreement without a sufficient consideration is *nudum pactum*. *Chitty on Bills*, 412-414; 3 Penna. Rep. 440. The evidence in the case before us is defective in these essential particulars. Boas, the chief witness, who speaks to the point, says he does not remember for what

g. GIVING TIME TO ONE OF SEVERAL SURETIES.—Giving time to one of several sureties will not discharge the others.¹

h. THE CREDITOR'S ACCEPTANCE OF NEW NOTE OR COLLATERAL SECURITY.—Where there is a novation of the debt by the acceptance of a new note for an extended period, which will prevent the creditor from suing on the first obligation, the surety will be discharged.² It has been held that the mere fact that a creditor takes a note payable after the maturity of the original

length of time it was for; he expected the Northampton Bank would be good in July; he told the plaintiff if so, he could pay him almost any time then; the plaintiff was to wait until some time in the summer. This is not only vague as to proving an express agreement by the plaintiff to wait, but the time was indefinite and uncertain. To take away from the plaintiff a just debt, in order to relieve a surety, justice requires there should be a clear, distinct agreement by the creditor, placed beyond reasonable doubt for a time certain, or total forbearance, or forbearance for a reasonable time."

An extension "until after harvest" is too indefinite. *Findley v. Hill*, 8 Oregon 247; 34 Am. Rep. 578.

1. *Dunn v. Slee*, Holt N. P. 399; *Draper v. Weld*, 13 Gray (Mass.) 580.

If a judgment against two co-sureties on a note be stayed at the instance of one, without the procurement of the other, the latter will not be exonerated and the stayer will not be liable, except in default of both sureties. *Sharp v. Embry*, 1 Swan (Tenn.) 254.

An extension of the time of payment, granted by the payee of a note to one of two joint makers, without the knowledge or consent of the other, who is in fact a surety but not known as such to the payee, does not release the non-consenting joint maker. *Mullendore v. Wertz*, 75 Ind. 431; 39 Am. Rep. 155.

Giving time to one of two sureties on a promissory note does not discharge the other, although the first has signed his name on the face, and the other on the back of the note. *Draper v. Weld*, 13 Gray (Mass.) 580.

If a judgment creditor extends the time for payment as to one of two judgment debtors, the creditor knowing the other to be surety for the one to whom the extension is given, the surety is released. *Gipson v. Ogden*, 100 Ind. 20.

Though giving time to the principal will discharge the surety, yet if two jointly bind themselves by a written contract for the sale and purchase of property to pay the purchase-money, it cannot, in a suit at law against both, be shown that one was merely surety for the other; and giving time to the latter does not discharge the former. *Yates v. Donaldson*, 5 Md. 389.

In *Ide v. Churchill*, 14 Ohio St. 372, it was held that the other sureties would not be discharged from the active debt, but only from the part of the debt which the surety, to whom the extension is granted, would be bound to pay. See also *Gosserand v. LaCour*, 8 La. Ann. 75.

2. In *Hubbard v. Gurney*, 64 N. Y. 457, the court, by Church, C. J., said: "The proof of this case shows that the original loan for which the note in suit was given was made to the principal for a short period, and the plaintiff desiring the money, a new note was given by the principal debtor, payable at thirty days, and indorsed by the plaintiff, upon which the money was obtained and paid to the plaintiff. When this note became due a small payment was made and a new note given for thirty days, upon which \$200 was afterwards paid, leaving a balance of \$700 unpaid. It is quite obvious that here was an implied agreement by which the time of payment of the original note was extended, and this being done without the knowledge or assent of the defendant, who was a surety, his rights were thereby affected. If the plaintiff had prosecuted and sought to enforce the collection of the old note before either of the other notes became due, it would have been a valid defense that he had received his money, that the time of payment had become extended, and that he was not in a position to maintain an action which would be practically demanding double payment. There was no agreement between the plaintiff and the principal debtor that

the new note was only taken as collateral to the old one, or that the latter was to be retained as security for the note, and the fact that the original note was not surrendered does not change the legal effect or real character of the contract to be implied from the transaction. No such surrender was required to be made to render the contract extending the time valid and effective." See also *First Nat. Bank v. Leavitt*, 65 Mo. 562; *Greene v. Bates*, 74 N. Y. 333; *Robinson v. Offutt*, 7 T. B. Mon. (Ky.) 540; *Norton v. Roberts*, 4 T. B. Mon. (Ky.) 491.

In *Burson v. Andes*, 33 Va. 445, a deed of trust of the separate property of a married woman, made by her and her husband to secure against loss an indorser upon a note of the husband for \$500, contained a provision that if the husband should pay the \$500 within twelve months, then the deed should be void. The note of the husband so indorsed was renewed three times during the twelve months, when the indorser lent the husband money with which to pay it, and took from him a note of a partnership of which the husband was a member for the same amount; and afterwards lent the husband a like amount on another similar note. Both partnership notes were payable after the expiration of the twelve months mentioned in the deed. *Held*, that the extension of the time of payment beyond that period, and the taking of the partnership note therefor, operated as a release of the trust property.

Taking a new bill, in place of one which has been protested for non-payment, without a surrender thereof, amounts to a discharge of an indorser on the protested bill, who is not a party to the renewal. *Maples v. Hicks*, *Bright*. (Pa.) 56.

If the holder of a note, on the day of its maturity, accept from the maker the check of his firm, post dated six days thereafter, to be in full satisfaction of the note, if duly paid, this amounts to a suspension of the remedy against the maker, and discharges an indorser. *Okie v. Spencer*, 2 *Whart.* (Pa.) 253; 30 *Am. Dec.* 251.

If the holder of a note, indorsed by a second indorser, for the accommodation of the first, receive from the latter, who is unable to pay, another note at thirty days, the accommodation indorser is discharged. *Walters v. Swallow*, 6 *Whart.* (Pa.) 446.

If a principal debtor give the creditor his note for the debt, payable one day after date, the surety is thereby discharged. *Fellows v. Prentiss*, 3 *Den.* (N. Y.) 512; 45 *Am. Dec.* 484. In this case the court, by *Walworth, Ch.*, said: "The extension of the credit for a single day without the consent of the surety would discharge him as effectually as a novation to which he was a party. It is a general rule that the giving a promissory note for a pre-existing debt is only a payment *sub modo*, unless there is an express agreement that it shall be received in payment. And the plaintiff at the trial may recover for the original indebtedness, upon producing and canceling the note, provided that he was the owner of such note at the time of the commencement of the suit. But if the creditor takes the bill or note of his debtor, payable at a future day, it is an extension of credit; and he cannot legally commence and sustain a suit for the original indebtedness until such bill or note becomes due and payable."

In *Myers v. Welles*, 5 *Hill* (N. Y.) 463, a note had been indorsed for the accommodation of the maker, who transferred it to a merchant as collateral security for the payment of the price of goods thereafter to be furnished. Goods were accordingly furnished, and on a settlement of accounts some months after the note fell due, the maker was found indebted in a large amount, for which the merchant took his notes, payable at a future day. It was held by the supreme court of *New York*, that this suspended the merchant's rights to sue the maker of the first note until the last-mentioned notes fell due. The ruling was distinctly placed upon the ground that the taking of the new notes implied an agreement to give time on the old. See also as to open accounts, *Lee v. Sewall*, 2 *La. Ann.* 940; *Howell v. Jones*, 1 *C. M. & R.* 97; *Welley v. Thompson*, 9 *Met.* (Mass.) 329.

In *Reed v. Cramb*, 22 *Ill. App.* 34, it was held that where a third person has deposited collateral as a pledge for the payment of a note, an extension of the note will release the pledge.

The acceptance of a judgment note from the maker of a promissory note will discharge an indorser. *Hanbest v. Krans*, 4 *Phila.* (Pa.) 119. But the taking a new note from the maker payable on demand does not discharge an

debt, raises no implication in law that he agrees to give time for the payment of the original debt; and that the agreement to give time must be proved as a fact.¹ But the weight of authority holds the surety discharged by the mere acceptance of such a note.²

indorser. *Bark v. Fulton*, 1 W. N. C. (Pa.) 110.

Taking a negotiable promissory note, payable in terms at the same time as, and, adding the days of grace, three days later than, the time stipulated in a bond with sureties for the payment of the debt, discharges the sureties. *Appleton v. Parker*, 15 Gray (Mass.) 173.

Where the renewal note is a forgery, the surety will not be discharged. In *Hubbard v. Hart*, 71 Iowa 668, the maker of a note signed by a surety renewed it by giving another, to which he had forged the surety's name. *Held*, that as the surrender of the original note and the extension of time were obtained by fraud, the note was not extinguished by the surrender, nor the surety discharged by the extension of time. See also *Ritter v. Singmaster*, 73 Pa. St. 400.

For other cases illustrating the general principle, see *Rees v. Barrington*, 2 Ves. Jr. 540; *Hart v. Hudson*, 6 Duer (N. Y.) 294; *Andrews v. Merrett*, 58 Me. 539; *Monton v. Noble*, 1 La. Ann. 192; *Morgan v. Creditors*, 1 La. 527; 20 Am. Dec. 285; *Bangs v. Mosher*, 23 Barb. (N. Y.) 478; *Armistead v. Ward*, 2 Patt. & H. (Va.) 504; *Weed Sewing Mach. Co. v. Oberreicht*, 38 Wis. 325; *Smarr v. Schnitter*, 38 Mo. 478; *Edwards v. Bedford Chair Co.*, 41 Ohio St. 17; *Slagle v. Pow*, 41 Ohio St. 603; *Kane v. Cortesy*, 100 (N. Y.) 132; *Hayes v. Wells*, 34 Md. 512; *Pinckney v. Pomeroy*, 52 Barb. (N. Y.) 460; *Paine v. Voorhees*, 26 Wis. 522; *Van Etten v. Troudden*, 67 Barb. (N. Y.) 342; *Chickasaw Co. v. Pitcher*, 36 Iowa 594; *Rhodes v. Hart*, 51 Ga. 320; *Rittenhouse v. Kemp*, 37 Ind. 258; *Remsen v. Graves*, 41 N. Y. 471; *Lee v. Sewall*, 2 La. Ann. 940; *Norton v. Roberts*, 4 T. B. Mon. (Ky.) 491; *Follows v. Prentiss*, 3 Den. (N. Y.) 512; *Bangs v. Mosher*, 23 Barb. (N. Y.) 478; *New Hampshire, etc., Bank v. Downing*, 16 N. H. 187; *U. S. v. Hodge*, 6 How. (U. S.) 279; *Mobile, etc., R. Co. v. Brewer*, 76 Ala. 135; *Hutchinson v. Woodwell*, 107 Pa. St. 509; *Riddle v. Thompson*, 104 Pa. St. 330; *Delaware, etc., R. Co. v. Burkhard*, 36 Hun (N. Y.) 57; *Continental L. Ins. Co. v. Barber*, 50 Conn. 567.

Postmaster-General v. Reeder, 4 Wash. 678; *Winston v. Rives*, 4 Stew. & P. (Ala.) 269; *Seamans v. White*, 8 Ala. 656; *Ladd v. Wiggins*, 35 N. H. 421; *Wilborne v. Com.*, 5 J. J. Marsh. (Ky.) 617; *Brooks v. Shepherd*, 4 Bibb (Ky.) 572; *Sparks v. Hall*, 4 J. J. Marsh. (Ky.) 35; *Newman v. Hazelrigg*, 1 Bush (Ky.) 412; *Hardesty v. Sturges*, 12 La. Ann. 231; *La Farge v. Herter*, 3 Den. (N. Y.) 157; *Howe v. Buffalo, etc., R. Co.*, 37 N. Y. 297; *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398; *Scanland v. Settle*, Meigs (Tenn.) 169; *Cruger v. Burke*, 11 Tex. 694; *Com. v. Shryock*, 15 S. & R. (Pa.) 69; *Thomas v. Cleaveland*, 33 Mo. 126; *Wade v. Staunton*, 5 How. (Miss.) 631; *Bell v. Martin*, 18 N. J. L. 167; *Headlee v. Jones*, 43 Mo. 235; *Wolf v. Fink*, 1 Pa. St. 435; *Thurston v. James*, 6 R. I. 103; *Green v. Warrington*, 1 Desaus. (S. Car.) 430; *Shubrick v. Russell*, 1 Desaus. (S. Car.) 315.

1. In *Shaw v. First Associated, etc., Church*, 39 Pa. St. 226, the court, by Strong, J., said: "There is no implication that the creditor agrees to give time for the payment of the original debt, arising out of the fact that he takes a note payable at a future day on account of it. They [the cases] maintain that the law raises no such agreement, and if there be one, it is to be proved as a fact, dependent for its existence on the understanding of the parties at the time when the security is given." In *Weakly v. Bell*, 9 Watts (Pa.) 273; 36 Am. Dec. 116, the court, by Kennedy, J., said: "Taking a new note for the same debt mentioned in the old, without any agreement to give time to the drawer, or to deliver up the old note to him, or that the new shall be taken in satisfaction of the old note, has ever been considered a mere collateral security which does not affect or alter the original liabilities of the parties on the old note, in any respect whatever." See also *Pring v. Clarkson*, 2 B. & C. 14; *Bank of Pennsylvania v. Potius*, 10 Watts (Pa.) 150; *Ripley v. Greenleaf*, 2 Vt. 129; *U. S. v. Hodge*, 6 How. (U. S.) 279; *Wade v. Staunton*, 5 How. (Miss.) 631; *Elwood v. Diefendorf*, 5 Barb. (N. Y.) 298.

2. *Myers v. Welles*, 5 Hill (N. Y.)

The acceptance by the creditor of collateral security which does not mature until after maturity of the original obligation, will not discharge the surety.¹

2. EXTENSION AFTER JUDGMENT.—After a judgment has been obtained against principal and surety, and both become equally liable for the debt, the relation of principal and surety still continues between them, and an extension of time to the principal based on a valid consideration will discharge the surety.²

3. STATUTORY EXTENSION OF TIME.—Where a statute grants to a public officer an extension of time within which he must settle his account, it has been held that the sureties on his bond are not relieved from liability.³

463; *Hubbard v. Gurney*, 64 N. Y. 457; *Putnam v. Lewis*, 8 Johns. (N. Y.) 389; *First Nat. Bank v. Leavitt*, 65 Mo. 562; *Greene v. Bates*, 74 N. Y. 333; *Walton v. Mascal*, 13 M. & W. 452; *Baker v. Walker*, 14 M. & W. 465; *Price v. Price*, 16 L. J. Ch. N. S. 232; *Fellows v. Prentiss*, 3 Den. (N. Y.) 518; 45 Am. Dec. 484; *Stuart v. Lancaster*, 84 Va. 772; *Simmons v. Guise*, 46 Ga. 473; *Bellingham v. Freer*, 1 Moore's Priv. Con. Cas. 333; *Chickasaw Co. v. Pitcher*, 36 Iowa 593; *Dixon v. Spencer*, 59 Md. 246.

1. *Remsen v. Graves*, 41 N. Y. 471; *Sigourney v. Wetherell*, 6 Met. (Mass.) 553; *Fireman's Ins. Co. v. Wilkinson*, 35 N. J. Eq. 160; *Austin v. Curtis*, 31 Vt. 64; *Bank of Pennsylvania v. Potius*, 10 Watts (Pa.) 148; *Meguiar v. Groves*, 1 Fed. Rep. 279; *Cruger v. Burke*, 11 Tex. 694; *Twopenny v. Young*, 3 B. & C. 208; 10 E. C. L. 54; *Wade v. Staunton*, 5 How. (Miss.) 631; *Brengle v. Bushey*, 40 Md. 141; 17 Am. Rep. 586; *Thurston v. James*, 6 R. I. 103; *Van Etten v. Troudden*, 67 Barb. (N. Y.) 342.

In *German Ins., etc., Inst. v. Vahle*, 28 Ill. App. 557, it was held that a surety is not discharged by the mere fact that the creditor takes as collateral another note secured by a mortgage which matured at a later date than the original note.

In *Clarke v. Birley*, 41 Ch. Div. 422, it was held that the mere acceptance, from one of several co-sureties, of additional security, not accompanied by any agreement to give further time which could be enforced against the creditor, cannot release other sureties not parties to the transaction.

In *Merriman v. Barker*, 121 Ind. 74, the plaintiff accepted from the principal a note due one day after date, with

a warrant of attorney authorizing entry of judgment on the note. The court held that such acceptance did not show an extension of time that would release the surety. But see *Hanbest v. Krans*, 4 Phila. (Pa.) 119.

2. *Blazer v. Bundy*, 15 Ohio St. 57; *Clippinger v. Creps*, 2 Watts (Pa.) 45; *Gustine v. Union Bank*, 10 Rob. (La.) 412; *Sherraden v. Parker*, 24 Iowa 28; *Moss v. Pettingill*, 3 Minn. 217; *Morley v. Dickinson*, 12 Cal. 561; *Pilgrim v. Dykes*, 24 Tex. 383; *Gipson v. Ogden*, 100 Ind. 20; *Wingate v. Wilson*, 53 Ind. 78.

A valid agreement between the creditor and the principal debtor, for delay, without the consent of the surety, after judgment is recovered, will not discharge the surety, unless the surety shows some sufficient reason for not resorting to his statutory remedies. *Williams v. Wright*, 9 Humph. (Tenn.) 493.

In *Hazel v. Sinex* (Del. 1886), 6 Atl. Rep. 625, the judgment creditor of a principal and surety issued execution against the principal and levied upon his goods, of value sufficient to pay the debt, and subsequently directed the sheriff to stay the writ, which was done; and about two years afterwards allowed the principal to sell the goods so levied upon. Held, that the surety was discharged in equity, and the creditor should be perpetually enjoined from proceeding against him on the judgment.

3. *Smith v. Com.*, 25 Gratt. (Va.) 780; *State v. Carleton*, 1 Gill (Md.) 249; *State v. Swinney*, 60 Miss. 39. But it has also been held that a statutory extension of time in favor of a public officer will release the sureties. *State v. Roberts*, 68 Mo. 234; 30 Am. Rep. 788; *Johnson v. Hacker*, 8 Heisk. (Tenn.) 388.

3. By Alteration of Contract—*a. IN GENERAL.*—Any material alteration in the terms of the contract of a suretyship will release the surety if he has not consented to the change.¹

1. In *Hibbs v. Rue*, 4 Pa. St. 348, a person entered into a recognizance with sureties to appear and plead at the next term to a declaration in ejectment. An amicable action of ejectment was commenced at the third term succeeding the date of the recognizance. The court held that a recovery in the amicable action was not evidence against the surety, since there had been a material alteration of the contract. The court, by Coulter, J., said: "The contract by which a surety becomes bound, is voluntary on his part without profit or advantage, and without having in view the prospect of gain. It is an act of benevolence to the obligor, and of convenience to the obligee, and of emphatic use to both. The obligations of social duty require, therefore, that he should be dealt with in fairness and in a spirit of the utmost good faith. The obligor and the obligee are bound to know, that if they find it convenient to change or vary the terms of the original contract, they must seek the assent of the surety, because it is his contract as well as theirs. And if they will not do so, they take upon themselves the hazard, and thus loosen the bonds of the surety. . . . The question then occurs as to the sufficiency of that proceeding to fix the surety. I am totally at fault in perceiving its competency. It was certainly not the proceeding in contemplation of the parties at the time they entered into the contract; because a different one, the one provided by law, is mentioned and stipulated for in its terms. We ought to look at the situation of the surety. He had a right to inspect the record; and we may presume he did, for all men are desirous of avoiding difficulty or loss. If he examined, he found nothing done at the first or second term which conduced to his liability. Had he not a right, therefore, to conclude, that all intention of holding him responsible was waived and abandoned by the plaintiff? Could he have supposed that he was bound *ad libitum*, contrary to the terms of his engagement? Certainly, we think not."

Examples.—In *U. S. v. Corwine*, 1 Bond (U. S.) 339, a number of persons entered into a contract with the

United States to construct a ship-canal twenty feet deep, and maintain it at that depth for a number of years after the work had been accepted by the government. The canal was finished to a depth of eighteen feet, and in this condition was accepted by the government. The contractors failed to maintain the canal at a depth of eighteen feet, and it was held that their sureties were not liable, since the terms of the contract had been varied.

In *Warden v. Ryan*, 37 Mo. App. 466, defendant was surety on a building contract, which was altered by agreement between the principal parties without defendant's knowledge by adding to the consideration of the contract to be paid defendant's principal. *Held*, that the contract was so changed as to discharge defendant.

In *Weir Plow Co. v. Walmsley*, 110 Ind. 242, the defendant became surety on a contract whereby the principal agreed to sell on commission goods of plaintiff, which were to be shipped to him as ordered, and to remit the cash received on sales in accordance with the terms of the contract. Subsequently, and without the knowledge or consent of defendant, the contract was so extended as to cover a large quantity of goods which the principal had previously purchased from plaintiff. *Held*, that the contract was thereby materially altered, and defendant was released from liability thereon.

An interlineation was made in a bond after its execution, without the knowledge of the surety, by which additional duties were to be performed by the principal. The court held that the surety was not responsible for money subsequently collected by his principal, and which he failed to pay over, even as to duties stated in the bond before the interlineation. *Miller v. Stewart*, 9 Wheat. (U. S.) 680.

In *Bowers v. Cobb*, 31 Fed. Rep. 678, the condition of a bond was to save harmless two sureties for a trustee on a bond in the probate court. One of the sureties on the probate bond executed a guaranty to the other without the knowledge of the sureties in the indemnifying bond. The court held that the sureties on the indemnifying bond were discharged.

In *Roberts v. Donovan*, 70 Cal. 108, defendants became sureties for the faithful performance by the principal of his duties as agent of the plaintiffs. Subsequently the plaintiffs and the principal materially altered the terms of the contract of agency without the knowledge of defendants, and the plaintiffs continued the principal in their employ after knowledge that he had misappropriated money coming into his hands as agent. The court held that the defendants were released from liability for the subsequent default of the principal.

In *Simonson v. Grant*, 36 Minn. 439, plaintiffs were sureties on a building contract. They also agreed to furnish materials to be used on the building. After the work had commenced, and the first installment had been paid, the principal defaulted in the application of the payment. The creditor so far departed from the terms of the contract, that he undertook to make payments to divers persons on the order of the contractors in disregard of the contract, and in anticipation of the installments due thereunder. The court held that the plaintiffs were discharged as sureties.

In *Ludlow v. Simond*, 2 Cal. Cas. (N. Y.) 1; 2 Am. Dec. 291, it was held that if a surety engage to make good the deficiency arising from a sale of goods at a given place, and consigned to the person to whom the surety is given, who has the whole control of the adventure, a sale by the assignee, at another place, releases the surety.

In *Paine v. Jones*, 76 N. Y. 274, the owner of lands upon which he had given a mortgage containing a clause reserving to himself the privilege of requiring from the mortgagee a release of a portion of the premises on making certain payments, conveyed the lands subject to the mortgage, which the grantee assumed and covenanted to pay. Subsequently the holder of the mortgage by an agreement with the grantee, and without the knowledge and consent of the grantor, abrogated this clause in the mortgage. The court held that the abrogation of a clause would be such an alteration of the contract as to relieve the grantor from liability on his bond.

In *Johnston v. May*, 76 Ind. 293, it was held that where a surety executes a note in pursuance of an agreement between the principal and payee that the note shall be applied to a specified

purpose, and afterwards, without the surety's consent, such note is applied to another and different purpose, the surety is discharged.

A surety on a building contract where the principal is to be paid by installments, is discharged if the principal is paid faster than the contract provides. *General Steam Nav. Co. v. Rolt*, 6 C. B. N. S. 550; 95 E. C. L. 550; *Calvert v. London Dock Co.*, 2 Keen 638.

A surety for a partnership which is to continue for a specified period, is discharged if the partnership is continued for a longer time than that prescribed in the contract. *Small v. Currie*, 5 DeG. M. & G. 141.

It is a material alteration of the contract of suretyship, where the debt is to be paid in bills on New York, and the mode of payment is changed to bills on London. *Edmonston v. Drake*, 5 Pet. (U. S.) 624.

Where a person becomes surety for the payment of a certain sum as alimony, and subsequently the court makes another order increasing the amount to be paid by the husband, the surety is discharged. *Sage v. Strong*, 40 Wis. 575.

Where in a building contract a certain number of stories is provided, and subsequently the owner and the contractor enter into an agreement, without the consent of the surety, for the erection of an additional story, the surety is discharged. *Judah v. Zimmerman*, 22 Ind. 388.

Upon a contract to guaranty a bill for a given sum, the guarantor will not be liable to that extent on a bill given for a larger sum. *Philips v. Astling*, 2 Taunt. 206, pr. *Mansfield, C. J.*

In *Allen v. O'Donald*, 28 Fed. Rep. 17, it was held that where the creditor proceeds in other than the method provided in the contract between himself and the surety, the burden of proof is on the creditor to show that the surety has not been injured by the transaction. See *Gillet v. Rachel*, 9 Rob. (La.) 276; *Truesdell v. Hunter*, 28 Ill. App. 292.

In *Claggett v. Salmon*, 5 Gill & J. (Md.) 314, it was held that the surety is discharged if the creditor advances to principal a sum different in amount from that for which the surety agreed to become liable. See also *Watriss v. Pierce*, 32 N. H. 560; *Ryan v. Shawneetown*, 14 Ill. 20; *Curtis v. Hubbard*, 6 Met. (Mass.) 186.

For other examples, see *Whelen v. Boyd*, 114 Pa. St. 228; *Cornell v. Eagan*, 13 Daly (N. Y.) 505; *Miller v. Herlich*, 5 N. Y. St. Rep. 909; *Tull v. Serrill*, 1 W. N. C. (Pa.) 373; *Bedford v. Jones*, 5 Leg. Gaz. (Pa.) 230; *Brez v. Warner*, 9 W. N. C. (Pa.) 45; *Wheelwright v. DePeyster*, 4 Edw. Ch. (N. Y.) 232; *Mayhew v. Boyd*, 5 Md. 102; 59 Am. Dec. 101; *Shaver v. Allison*, 11 Grant's Ch. 355; *Miller v. Stewart*, 9 Wheat. (U. S.) 680; *Grant v. Smith*, 46 N. Y. 93; *Brown v. Proffit*, 53 Miss. 649; *Ryan v. Morton*, 265 Tex. 258; *Wherton v. Hall*, 5 B. & C. 369; *Bangs v. Strong*, 4 N. Y. 315; *Worthan v. Brewster*, 30 Ga. 112; *Bragg v. Shain*, 49 Cal. 131; *Truckee Lodge v. Wood*, 14 Nev. 293; *Ide v. Churchill*, 14 Ohio St. 372; *Carson Opera House Assoc. v. Miller*, 16 Nev. 327; *Gower v. Holloway*, 13 Iowa 154; *Gardiner v. Harback*, 21 Ill. 129; *Grieve v. Smith*, 23 Up. Can. Q. B. 23; *Strong v. Lyon*, 63 N. Y. 172; *People v. Vilas*, 36 N. Y. 459; 93 Am. Dec. 520; *American Bank v. Baker*, 4 Met. (Mass.) 164; *Wright v. Johnson*, 8 Wend. (N. Y.) 512; *Archer v. Hudson*, 7 Beav. 551; *Coleman v. Lamb*, 15 Wend. (N. Y.) 329; *Brigham v. Wentworth*, 11 Cush. (Mass.) 123; *Victor Sewing Mach. Co. v. Scheffler*, 61 Cal. 530; *Farmers', etc., Bank v. Kercheval*, 2 Mich. 504; *Moline Plow Co. v. Gilbert*, 3 Dakota 239; *Hamblen v. Knight*, 60 Tex. 36; *Burt v. McFadden*, 58 Ill. 479; *St. Albans Bank v. Dillon*, 30 Vt. 122; 73 Am. Dec. 295; *Blakey v. Johnson*, 13 Bush (Ky.) 197; *Lemay v. Williams*, 32 Ark. 166; *Walrath v. Thompson*, 6 Hill (N. Y.) 540; *Brickhead v. Brown*, 5 Hill (N. Y.) 634; *Eckert v. Louis*, 84 Ind. 99; *Berryman v. Manker*, 56 Iowa 150; *Jones v. Bangs*, 40 Ohio St. 139; *Batchelder v. White*, 80 Va. 103; *Robinson v. Berryman*, 22 Mo. App. 509; *Walla Walla Co. v. Ping*, 1 Wash. 339; *Stayner v. Joice*, 82 Ind. 35; *Jackson v. Johnson*, 67 Ga. 167; *Fulmer v. Seitz*, 68 Pa. St. 237; *Bowser v. Rendell*, 31 Ind. 128; *Hart v. Clouser*, 30 Ind. 210; *Greenawalt v. McDowell*, 65 Pa. St. 464; *Britton v. Dierker*, 46 Mo. 591; *Neff v. Horner*, 63 Pa. 327; *Hanson v. Crawley*, 41 Ga. 303; *Moore v. Potter*, 9 Bush (Ky.) 357; *Huff v. Cole*, 45 Ind. 300; *Atlanta Nat. Bank v. Douglass*, 51 Ga. 205; *Kincaid v. Yates*, 63 Mo. 45; *Smith v. Shelden*, 35 Mich. 42; *Marsh v. Griffin*, 42 Iowa 403; *Blakey v. Johnson*, 13 Bush (Ky.) 197; *Mer-*

chants', etc., Bank v. Evans, 9 W. Va. 375; *First Nat. v. McKenney*, 67 Me. 272; *Voiles v. Green*, 43 Ind. 374; *Lockname v. Emerson*, 11 Bush (Ky.) 69; *Jackson v. Boyles*, 64 Iowa 428; *Hall v. Weaver*, 34 Fed. Rep. 104; *Hayden v. Cook*, 52 N. W. 165; *Clark v. Cunningham* (Tex.), 19 S. W. Rep. 798.

When Surety Not Discharged.—Payments made by the owner to the contractor for the erection of a building, in advance of the times called for in the contract, will not, in the absence of a stipulation to that effect in the contract, operate to so change the contract as to discharge the sureties for the contractor. *Haone v. Dambach*, 4 Pa. Co. Ct. Rep. 833.

The fact that plaintiffs, owners of land on which buildings were erected, paid the contractors partly by a note, instead of money, as agreed, does not relieve the sureties on the contractor's bond conditioned for the protection of the property from mechanics' liens. *Foster v. Gaston*, 123 Ind. 96.

For other cases see *McLennan v. Wellington* (Kan.), 30 Pac. Rep. 183; *Henoricus v. Englert* (N. Y. 1892), 17 N. Y. Supp. 235; *Brooks v. Whitmore*, 142 Mass. 399; *Greenawalt v. McDowell*, 65 Pa. St. 464; *Dickson v. Wolf*, 5 W. N. C. (Pa.) 37; *Barns v. Carney*, 6 W. N. C. (Pa.) 448; *Flanigan v. Rossiter*, 7 W. N. C. (Pa.) 180; *Mayor, etc., of N. Y. v. Sibberns*, 3 Abb. App. Dec. (N. Y.) 266; *Fox v. Parker*, 44 Barb. (N. Y.) 541; *Wallace v. Exchange Bank*, 126 Ind. 265; *Crompton's Estate*, 9 Pa. Co. Ct. Rep. 134; *Dorsey v. McGee*, 30 Neb. 657; *Moore v. Fountain* (Miss. 1891), 8 So. Rep. 509; *Conn v. State*, 125 Ind. 514; *State v. Findley*, 101 Mo. 368; *Coats v. McKee*, 26 Ind. 223; *Harrison v. Seymour*, L. R., 1 C. P. 518; *Skillett v. Fletcher*, L. R., 1 C. P. 217; L. R., 2 C. P. 469; *Sanderson v. Astor*, L. R., 8 Exch. 73; *Kirby v. Studebaker*, 15 Ind. 45; *Preston v. Huntington*, 67 Mich. 139; *Lionberger v. Krieger*, 88 Mo. 160; *Allen v. O'Donald*, 28 Fed. 17; *Leonard v. Jackson Co. Ct.*, 25 W. Va. 45; *Baker v. Elliot*, 73 Me. 392; *Witte v. Wolfe*, 16 S. Car. 256; *Pascault v. Cochran*, 34 Fed. Rep. 358; *Boynton v. Phelps*, 52 Ill. 210; *Mount v. Tappy*, 7 Bush (Ky.) 617; *Claiborne v. Birge*, 42 Tex. 98; *Roach v. Summers*, 20 Wall. (U. S.) 165; *David v. Malone*, 48 Ala. 428; *Parham Sewing Mach. Co. v. Brock*, 113 Mass. 194.

b. CHANGES IN NOTES AND BONDS.—A material alteration in a note or bond will discharge the surety.¹ Thus, if the date of a note is changed without the surety's consent, he is released from liability.² He will also be discharged if the amount is changed;³

1. *Angle v. Northwestern Mut. L. Ins. Co.*, 92 U. S. 330; *Draper v. Wood*, 112 Mass. 315; 17 Am. Rep. 92; *Wood v. Steele*, 6 Wall. (U. S.) 80; *Waterman v. Vose*, 43 Me. 504; *Selser v. Brock*, 3 Ohio St. 302; *Huff v. Cole*, 45 Ind. 300; *Newlan v. Harrington*, 24 Ill. 206; *Kincaid v. Yates*, 63 Mo. 45; *Eckert v. Louis*, 84 Ind. 99; *Martin v. Thomas*, 24 How. (U. S.) 315; *Heath v. State*, 14 Tex. App. 213; *Pigot's Case*, 11 Rep. 26b; *Master v. Miller*, 4 T. R. 320; *Burchfield v. Moore*, 3 E. & B. 683; 77 E. C. L. 483; *Stout v. Cloud*, 5 Litt. (Ky.) 205; *Pankey v. Mitchell*, 1 Ill. 383; *Crockett v. Thomason*, 5 Sneed (Tenn.) 342; *Simmonson v. Grant*, 36 Minn. 439; *Ryan v. Morton*, 65 Tex. 258; *Whelen v. v. Boyd*, 114 Pa. St. 228; *Cornell v. Eagan*, 13 Daly (N. Y.) 505; *Singer Mfg. Co. v. Hibbs*, 21 Mo. App. 574; *People's Ins. Co. v. McDonnell*, 41 Ohio St. 650; *U. S. v. O'Neil*, 19 Fed. Rep. 567; *Farnsworth v. Coots*, 46 Mich. 117; *Johnston v. May*, 76 Ind. 293; *Bailey v. Boyd*, 75 Ind. 125; *Victor Sewing Mach. Co. v. Langham*, 9 Biss. (U. S.) 183; *Victor Sewing Mach. v. Scheffler*, 61 Cal. 530; *Warren v. Fant*, 79 Ky. 1; *Weir Plow Co. v. Walmsley*, 110 Ind. 242; *Simmonson v. Grant*, 36 Minn. 439; *First Nat. Bank v. Gerke*, 68 Md. 449; *Simmonson v. Guise*, 46 Ga. 473; *Vose v. Florida R. Co.*, 50 N. Y. 369; *Grant v. Smith*, 46 N. Y. 93; *U. S. v. Corwine*, 1 Bond (U. S.) 339; *Andrews v. Marrett*, 58 Me. 539; *Bragg v. Shain*, 49 Cal. 131; *Sage v. Strong*, 40 Wis. 575; *Middleton v. First Nat. Bank*, 40 Iowa 29; *State v. Churchill*, 48 Ark. 426.

2. *Change of Date.*—In *Miller v. Gill-eland*, 19 Pa. St. 119, it was held that the alteration of the date of a note from 1836 to 1838, avoided the note as to the surety. The court, by Gibson, J., said: "The alteration of the date, in this instance, did not retard the day of payment, and consequently did not discharge the defendant as a surety, by giving time to the principal; but it is not easy to imagine how the alteration of the date of a security for money may not be detrimental to the debtor. If the day of payment be accelerated by it, the debtor loses a part of the

time for which he stipulated, and the computation of interest is affected by it; if it be retarded, the starting of the Statute of Limitations, or the presumption of payment from lapse of time, is also retarded by it; and such alterations have been made to evade the one or the other. As the plaintiff in this case brought suit within six years of the true date, the defendant could not be prejudiced in that respect, further than the risk and expense incurred in showing the truth, which is certainly a substantive injury to him, but the inquiry has regard to the possible effect of the alteration when it was made, and not to its present effect, as things have turned up. If the note was avoided by it, and no one can doubt it, it is still void; and so the jury ought to have been directed."

A surety was discharged where a note was changed from July 25 to July 26. *Stephens v. Graham*, 7 S. & R. (Pa.) 505; 10 Am. Dec. 485, where the date was changed to make the note fall due one year later. *Wyman v. Yeomans*, 84 Ill. 403; where the figure 4 in the promissory note, originally dated in 1834, was altered by the holder, without the consent of the maker, into a 6. *Hacker v. Jamison*, 2 W. & S. (Pa.) 438; where the time of payment was changed from "one day" to "one year," *Stayner v. Joice*, 82 Ind. 35; where the date of the note was changed from June 9, 1798, to June 19, 1798; *U. S. Bank v. Russell*, 3 Yeates (Pa.) 391. See also *Britton v. Dierker*, 46 Mo. 591; 2 Am. Rep. 553; *Bank of Commonwealth v. McChord*, 4 Dana (Ky.) 191; 2 Am. Dec. 388; *Pelton v. Prescott*, 13 Iowa 567.

3. *Change of Amount.*—In *Wade v. Whittington*, 1 Allen (Mass.) 561, the defense that a note for one hundred dollars had been fraudulently altered after it had been signed, by inserting the words "and forty," was sustained. In *Goodman v. Eastman*, 4 N. H. 455, a note for twenty dollars was altered by one of two makers, after it had been signed by the other, and before it was delivered to the payee, by inserting the words "one hundred and" before "twenty." It was held that the other maker was not liable upon it.

or if there are any words added which relate to the rate or the time of paying interest;¹ or where the word "surety"

In *Portage Co. Branch Bank v. Lane*, 8 Ohio St. 405, a surety signed a note for \$3,000. The principal subsequently presented the note for discount to the payee, who refused to discount it for \$3,000, but wrote the following across its face: \$2,000. This note was discounted for \$2,000, which amount is due upon it." The court held that the surety was discharged.

In *Worrall v. Gheen*, 39 Pa. St. 388, the case stated for the opinion of the court was as follows: A printed blank note was filled up by the maker, by inserting "50" at a little distance from the mark \$, and by writing "fifty" near the end of a blank line and close to the word "dollars," and in this condition was signed by the maker and indorsed by the payee. The maker then took the note away, and fraudulently altered its amount from \$50 to \$150, by adding the figure 1 between "5" and "50" and the words "one hundred &" before the word "fifty." The fraud was so well executed that the appearance of the note was not such as to excite the suspicions of a man in the ordinary business, although on inspection a difference might be perceived in the color of the ink with which the words "one hundred &" were written. The note as thus altered was discounted by the plaintiff, who had it regularly protested at maturity, and sued the indorser thereon. It was held that he could not be charged upon the note in its altered form.

In *Agawam Bank v. Sears*, 4 Gray (Mass.) 95, it was held that a surety on a promissory note by permitting his principal to take the note to a bank to be discounted does not, upon the principal's offering the note for a larger amount, render himself liable to the bank for such larger amount. The court, by Dewey, J., said: "The position assumed by the plaintiffs, that the sureties, by permitting the principal to take the note to the bank to be discounted, gave confidence to him, and must suffer for his misconduct in altering the note, is untenable. The principle sought to be applied is not applicable in this case. The sureties assume a certain definite obligation, the extent of which is clearly stated in the writing they sign. To that extent, they give confidence and credit to the principal, but no farther. In the

ordinary course of business, such a note, obtained by the principal for his own use and benefit, passes into his hands, to be disposed of by him. The party receiving a note gives the confidence and trust to the party from whom he receives it. This applies to every part of the note, as much to the amount as to the genuineness of the signatures. The surety may safely stipulate as such, for a certain stated amount and limit his liability to that sum. He does so, when he puts his name to an instrument wholly filled up. It is otherwise when he puts his name to a blank piece of paper, or to a promissory note or bill of exchange the amount of which is still blank. In such a case he gives confidence to the principal, and must suffer for the misconduct of the principal in the manner of filling the blank.

In *Hastings v. Clendaniel*, 2 Del. Ch. 165, a surety was discharged where a blank in a bond was filled for a larger sum than he stipulated to become liable for.

In *People v. Kneeland*, 31 Cal. 288, the penalty of a bond was erased and double the amount inserted. The court held that the sureties were discharged. In *People v. Brown*, 2 Dougl. (Mich.) 9, it was held that the sureties were discharged if the penalty was reduced.

For other cases see *Mitchell v. Burton*, 2 Head (Tenn.) 613; *Ogle v. Graham*, 2 P. & W. (Pa.) 132; *Merchants', etc., Bank v. Evans*, 9 W. Va. 373; *Patton v. Shanklin*, 14 B. Mon. (Ky.) 13; *Morrall v. Gheen*, 39 Pa. St. 388; *Busjahn v. McLean* (Ind. 1892), 29 N. E. Rep. 494.

1. *Changes as to Interest.*—In *McGrath v. Clark*, 56 N. Y. 34, it was held that where a note in this form,

"\$175 Whitehall, N. Y. Nov. 27, 1868. — after date I promise to pay Wm. McGrath or bearer \$175 at," was signed by the maker and indorsed by the payee, and the maker afterwards, and before its delivery to the indorsee, filled the blanks by inserting "six months" at the beginning, and by adding at the end "the National Bank of Poughkeepsie with interest," the addition of the words "with interest" was an authorized alteration which invalidated the note as against the indorser.

In *Neff v. Horner*, 63 Pa. St. 327; 3

is added;¹ or where there is an addition providing that the note shall be paid in gold;² or an addition which provides for the payment of the note at a particular place;³ or an addition to a non-negotiable note of the words "to order;"⁴ and in general any change in a note or bond which affects the contract between the parties as it was originally contemplated by them, will discharge the surety.⁵ The addition of a new party to the note will discharge the surety, if a note has been signed by the surety, and subsequently another surety signs it, the first surety will be discharged.⁶

Am. Rep. 555, Pennington, and others as his sureties, executed a sealed note to Horner; when brought to Horner he would not receive it unless "interest semi-annually" were added. Pennington inserted these words above the signatures, without the knowledge of the sureties. *Held*, that the whole note was avoided as to the sureties.

In *Fulmer v. Seitz*, 68 Pa. St. 237; 8 Am. Rep. 172, in a suit against the surety on a note, the plaintiff testified that about two months after the note was signed he called the maker's attention to the fact that the note was a non-interest-bearing note, and that the maker said to him: "You just add the words 'Int. payable, semi-annually,' and that it would be all right. The plaintiff did this in the presence of the maker of the note." The court held that the sureties were discharged.

In *Kountz v. Hart*, 17 Ind. 329, it was held that the addition of the words "with interest from date" to a non-interest-bearing note, discharges the surety. So also does the addition of the words "after maturity" to a note bearing interest "per annum." *Franklin L. Ins. Co. v. Courtney*, 60 Ind. 134.

See also *Hart v. Clouser*, 30 Ind. 210; *Locknane v. Emerson*, 11 Bush (Ky.) 69; *Glover v. Robbins*, 49 Ala. 219; 20 Am. Rep. 272; *Jones v. Bangs*, 40 Ohio St. 139; 48 Am. Rep. 664; *Dewey v. Reed*, 40 Barb. (N. Y.) 16; *Boalt v. Brown*, 13 Ohio St. 364; *Marsh v. Griffin*, 42 Iowa 403.

1. *Robinson v. Reed*, 46 Iowa 219; *Chappell v. Spencer*, 23 Barb. (N. Y.) 584.

2. *Hanson v. Crawley*, 41 Ga. 303; *Church v. Howard*, 17 Hun (N. Y.) 5; *Bogarth v. Breedlove*, 39 Tex. 561.

3. **Place of Payment.**—In *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391; 10 Am. Dec. 239, a promissory note was made and indorsed for the

accommodation of the maker, dated at Albany where the parties resided. After indorsing the note in blank, the indorser returned to the maker, who, without the knowledge or consent of the indorser, wrote in the margin: "Payable at the Bank of America, J. K.;" and presented it at the Bank of America, in the city of New York, for discount (in renewal of a former note drawn or indorsed by the same parties, or discounted for the benefit of the maker), where it was accordingly discounted. When the note became due, payment was demanded at the Bank of America, and notice of non-payment was regularly given to the indorser at Albany. *Held*, in an action brought by the bank against the indorser that the memorandum in the margin of the note by the maker was a material alteration of the contract, which discharged the indorser from his liability.

The addition of the words "payable at 53 Lake Street" is a material alteration. *Pohlman v. Taylor*, 75 Ill. 629. See also *Simpson v. Stockhouse*, 9 Pa. St. 186; 49 Am. Dec. 554; *Hill v. Cooley*, 46 Pa. St. 259; *Sturges v. Williams*, 9 Ohio St. 443; 75 Am. Dec. 473; *Southward Bank v. Gross*, 35 Pa. St. 80.

4. *Haines v. Dennett*, 11 N. H. 180.

5. *Newlan v. Harrington*, 24 Ill. 206; *Bell v. Mahin*, 69 Iowa 408; *Evans v. Lawton*, 34 Fed. Rep. 233.

6. In *Gardner v. Walsh*, 5 E. & B. 82; 85 E. C. L. 83, Barton, being indebted to the plaintiff, agreed to obtain two sureties, defendant and Clarke to join in a note to the plaintiff. Barton and defendant signed the note together and gave it to the plaintiff. The evidence tended to show that when defendant signed the note plaintiff and Barton both intended that Clarke should afterwards sign it, but that defendant was not informed of this. A verdict was returned for the defendant.

c. CHANGE IN LEASE.—A surety on a lease is discharged by any material alteration of the contract without his consent.¹

On a rule for a new trial it was held that the addition of Clarke's name was a material alteration, and if made after note was issued, would avoid it.

See also *Bowers v. Briggs*, 20 Ind. 139; *Henry v. Coats*, 17 Ind. 161; *Berryman v. Manker*, 56 Iowa 150; *Bank of Limestone v. Pennick*, 2 T. B. Mon. (Ky.) 98; 15 Am. Dec. 136; *Hall v. McHenry*, 19 Iowa 521; 87 Am. Dec. 451; *Wallace v. Jewell*, 21 Ohio St. 163; 8 Am. Rep. 48; *Miller v. Fenley*, 26 Mich. 249; 12 Am. Rep. 306.

1. In *Holme v. Brunskill*, 3 Q. B. Div. 495, the plaintiff having agreed to let to G. B., as yearly tenant, a farm, including certain hill pastures and a flock of 700 sheep, the defendant gave the plaintiff a bond to secure the redelivery to him at the end of the tenancy of the flock in good order and condition. In November the plaintiff gave G. B. a notice to quit, which was ineffectual to determine the tenancy at the expiration of the then current year. G. B. objected to the insufficiency of the notice, and on the 8th of April entered into an agreement with the plaintiff that G. B. should surrender a field to the plaintiff, that G. B.'s rent should be reduced £10, and the notice to quit should be withdrawn. G. B. then continued tenant on the farm, less the field, at the reduced rent. In October, 1876, the plaintiff gave G. B. notice to quit on the 10th of April, 1877. On giving up the farm it was ascertained that the flock was reduced in number and deteriorated in quality and value, and the plaintiff sued the defendant on his bond. *Held*, that the contract of the surety was that the flock should be delivered up in good condition, together with the farm as originally demised, to the tenant; that the surety ought to have been asked to decide whether he would assent to the variation in the terms of the letting, and not having been asked to assent, he was discharged from liability.

In *Nichols v. Palmer*, 48 Wis. 110, a landlord agreed before the expiration of the lease to receive a certain sum and accept a surrender of the premises. The court held that the surety was discharged. But in a somewhat similar case, where the surrender was made after the premises had been destroyed by fire, it was held that the surety was not discharged from the payment of the

rent which had accrued prior to the cancellation of the lease.

In *Farrar v. Kramer*, 5 Mo. App. 167, the premises were leased upon the condition that the premises should be surrendered in as good condition as when received. At the time the lease was executed the lessor agreed to remodel the building before the lessee took possession. It did not appear that the surety knew of this agreement. The court held that the surety was discharged.

In *Penn v. Collins*, 5 Rob. (La.) 213, the landlord took back a portion of the premises and reduced the rent on the remainder. The court held that the surety was discharged.

In *Morgan v. Smith*, 70 N. Y. 537, a lease contained a clause that the lessees would not assign it, or let or underlet the premises without the consent of the lessor. The latter, subsequent to the execution of the lease and taking possession thereunder by the lessor, agreed with the lessee to rent the premises for them at their risk, crediting to them any receipts for rent, with a condition that the agreement should not impair or alter the relations of the parties, the covenants of the lease, or the security for the rent. *Held*, that the agreement did not operate to discharge the sureties, although they had no knowledge or notice of it; that the agreement, without the condition, was no more in effect than a consent that the lessees might underlet; and that, under the condition, the rights of the sureties, and consequently their liability, were in no wise affected.

An obligor, jointly liable for the payment of the rent under a lease, upon a default by the lessees, is not discharged by an agreement, to which he was not a party, to reduce the rent, subsequently entered into by the lessors with the lessees. *Preston v. Huntingdon* (Mich.), 34 N. W. Rep. 279.

Where a lease has been given for one year, with a privilege of renewal for five years, and a third party binds himself as surety for the lessee, and the lease is renewed at the expiration of the year, the surety is not bound on the extended lease, unless it is shown that he consented to the extension. *Fasnacht v. Winkelman*, 21 La. Ann.

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d. CHANGE IN COMPENSATION OF PRINCIPAL.—If the salary or compensation which the principal is to receive is not an essential ingredient of the contract of suretyship, the surety is not discharged if the principal's compensation is increased or decreased.¹ But if there is a re-employment at a different salary,² or a material change in the manner of payment,³ the surety will be discharged.

See also on this subject, *Shufeldt v. Gustin*, 2 E. D. Smith (N. Y.) 57; *White v. Walker*, 31 Ill. 422; *Miller v. Stewart*, 9 Wheat. (U. S.) 680; *Rathbone v. Warren*, 10 Johns. (N. Y.) 587; *McKenzie v. Farrell*, 4 Bosw. (N. Y.) 192; *Craig v. Parker*, 40 N. Y. 181; *Coe v. Vogdes*, 71 Pa. St. 383; *Burnham v. Hubbard*, 36 Conn. 539; *Ogden v. Roe*, 3 E. D. Smith (N. Y.) 312.

1. In *Frank v. Edward*, 8 Exch. 214, the salary of an assistant overseer of a parish was £16 a year. The vestry reduced the salary to £14 a year. The court held that the surety of the assistant overseer of the parish was not discharged. *Parke, B.*, said: "The condition of the bond does not contain any stipulation by which the sureties are to be exempted from their liability under the bond, in case there shall be a reduction in the salary. If the sureties had thought that the amount of the salary was an essential ingredient in the contract, they ought to have taken care to have had a stipulation inserted in the condition of the bond that they would be liable only so long as the overseer was continued at the same salary. That they have not done, and it therefore follows that the assistant overseer still continued in his office under the old appointment, but at reduced salary."

In *Mutual L. Ins. Co. v. Sedgwick*, 110 Mass. 163, an insurance company appointed an agent, to be paid by certain commissions, with a guaranty that they should amount to a specified sum monthly, the agency to be terminated by either party at three months' notice. The agent gave bond conditioned faithfully to conform to all the instructions of the company, and to remit to them all sums received, less his commission. The sureties on the bond knew the terms of the appointment. Subsequently the agent and the company agreed, without the knowledge of the sureties, that he should receive increased commissions, but give up all claim on the guaranty. *Held*, that this change in the mode of compensation

did not discharge the sureties. See also *Domestic Sewing Mach. Co. v. Webster*, 47 Iowa 357.

2. In *Bamford v. Iles*, 3 Exch. 380, it was held where the principal is re-employed at an increased salary, the surety is not liable for a subsequent default.

3. In *Northwestern R. Co. v. Whinray*, 1 H. & G. 77, the defendant, as surety, executed a bond to a railway company, which, after reciting that the company had agreed to appoint L as their clerk or agent, for the purpose of selling coal, at a yearly salary of £100, was continued for the due accounting by L of all moneys received by him for the use of the company. L performed the duties of such clerk or agent at the above salary until May, 1851, when it was agreed between L and the company to substitute for such salary a commission of 6d. per ton on all coal for which he should obtain orders. From that time L was paid for his services by such commission, which amounted to a larger sum than the fixed salary. In 1852, L was indebted to the company for sums which he did not pay over, and the company having sued the defendant on the bond, held, that the surety was discharged.

Where an insurance company appointed an agent, to be paid by certain commissions, which it guaranteed should amount to a specific sum monthly, the agency to be terminated by either party at three months' notice, and the agent gave bond conditioned faithfully to conform to all instructions of the company and to remit to them all sums received, less his commissions, and the sureties on the bond knew the terms of the appointment, and subsequently the company and the agent agreed, without the knowledge of the sureties, that the agent should receive increased commissions, but give up all claim on the guaranty, the change in the mode of compensation will not discharge the sureties. *Amicable, etc., Ins. Co. v. Sedgwick*, 110 Mass. 163.

c. CHANGE IN DUTIES OR RESPONSIBILITIES OF THE PRINCIPAL.¹

4. **By Discharge of the Principal.**—If the principal is released by the creditor, and discharged from his liability, the surety is also discharged unless the creditor at the time reserved his remedies against the surety.²

1. See *supra*, this title. *Scope of the Contract*; *infra*, this title, *Bonds of Public Officers*. See also OFFICERS (PRIVATE CORPORATIONS), vol 17, p. 39.

2. In *Lewis v. Jones*, 4 B. & C. 506; 10 E. C. L. 393, which was action upon a promissory note against a party who had indorsed it for the accommodation of the maker, it appeared that the plaintiff, the indorser, had signed an agreement to accept from the maker of the note 5s. in the pound in full of his demand, in having a collateral security for that sum from a third person. It further appeared that the agent of the maker had represented to the plaintiff before he signed the agreement that the defendant would continue liable for the residue of the debt secured by the note, and that the agreement would be void unless all the creditors signed. *Held*, that the surety was discharged. See also *Band v. Holt*, 58 Conn. 526; *Grundy v. Meighan*, 7 Irish Law Rep. 519; *Trotter v. Strong*, 63 Ill. 272; *Paddleford v. Thacher*, 48 Vt. 574; *Brown v. Ayer*, 24 Ga. 288; *Crawford v. Beall*, 21 Md. 208; *State v. Parker*, 72 Ala. 181; *Bridges v. Phillips*, 17 Tex. 128; *Cook v. Com.* (Pa. 1887), 11 Atl. Rep. 574; *Jones v. Ward*, 71 Wis. 152; *Bull v. Coe*, 77 Cal. 54.

Cancellation of an official bond, as it discharges the principal, also releases the surety. *Lockwood v. Penn*, 22 La. Ann. 29. If a creditor who has obtained judgment discharges the lien of the judgment against the principal, he also releases the surety. *Hollingsworth v. Turner*, 44 Ga. 11. Where a creditor agrees with the principal to discharge him if he will give security for a portion of the debt, the surety on the original debt is discharged. *Trotter v. Strong*, 63 Ill. 272. If the creditor does any act by which he is prevented from suing the principal, the surety will be discharged. Thus if the principal and the creditor marry, the surety will be released from liability. *Govan v. Moore*, 30 Ark. 667.

Release of Maker of Note.—If the holder of a note releases the maker, he also releases the other parties to the note, and discharges them as sureties. "It is a settled principle that if the holder of a bill or note compounds with the acceptor or the maker, without the assent of the other parties to it, he thereby releases them from his liability." *Lynch v. Reynolds*, 16 Johns. (N. Y.) 41. In *Brown v. Williams*, 4 Wend. (N. Y.) 360, it was held that the rule which governs as to the effect of a discharge or the varying the contract of a principal debtor by a creditor, without the concurrence of the surety, applies to the discharge of a prior indorser; the subsequent indorsers are discharged in cases where the surety would be discharged.

Even after judgment is obtained against the principal and the surety, if the creditor releases the principal, the surety is discharged. *Anthony v. Capel*, 53 Miss. 350; *Ames v. Maclay*, 14 Iowa 281; *Miller v. Gaskins*, 1 Smed. & M. (Miss.) 524; *Dickason v. Bell*, 13 La. Ann. 249; *Beall v. Cochran*, 18 Ga. 38; *State Bank v. Robinson*, 13 Ark. 214; *Farmers', etc., Bank v. Kingsley*, 2 Dougl. (Mich.) 379.

If a principal debtor is discharged, the sureties or co-obligors are also discharged; and it is immaterial by whom the debt is discharged. *Blackburn v. Beall*, 21 Md. 208.

A judgment obtained against the surety cannot be enforced, if the principal has been released from the same debt by a judgment in his favor, annulling the contract which gave rise to the obligation. *Dickason v. Bell*, 13 La. Ann. 249.

A release of the principal on a promissory note will discharge the surety; but one surety may be discharged, without prejudice to an action against the others, to the extent that they would be liable in a suit for contribution between themselves. *Dodd v. Winn*, 27 Mo. 501.

The exoneration of a principal to a note, on a plea of *non est factum*, will

Where the principal is discharged in bankruptcy or under insolvent laws, the surety is not discharged.¹

If the original debt between principal and creditor is illegal, the surety cannot be held liable;² but where there is a mere legal incapacity on the part of the principal to contract, this will not

not, *per se*, exonerate his surety, if judgment against him is authorized by the sheriff's return. *Dillingham v. Mudd*, 1 Bush (Ky.) 102.

The release of a principal debtor operates as a discharge of his sureties, but the release of a surety does not discharge the principal debtor. *Bridges v. Phillips*, 17 Tex. 128.

The discharge, by the secretary of the treasury, of the principal, in a bond to the *United States*, who is imprisoned under a *ca. sa.* issued against him, and who has assigned all his property for the use of the *United States*, does not affect the right of the *United States* to proceed against the sureties for the amount due on the judgment, and unpaid. *U. S. v. Stansbury*, 1 Pet. (U. S.) 573.

In an action against the principal and his sureties on an official bond the principal failed to defend, but no judgment was taken against him. On the trial, the evidence being held insufficient against the sureties, and the court being about to direct a verdict in their favor, the plaintiff consented that the principal should be included therein. *Held*, that the consent verdict in favor of the principal worked a discharge of the sureties, even though the court was in error in its rulings as to the sufficiency of the evidence against them. *U. S. v. Mattoon*, 5 Mackey (D. C.) 565.

1. **Bankruptcy of Principal.**—Thus under the U. S. Rev. Sts., § 5118, the discharge in bankruptcy of the principal does not release the surety on a bond. *Cochrane v. Cushing*, 124 Mass. 219; *Wolf v. Stix*, 99 U. S. 1.

In *Phillips v. Solomon*, 42 Ga. 192, the court said: "The discharge of the principal which discharges a surety must be a discharge by some act or neglect of the creditor, and a discharge by operation of law being, as it is, against the consent and beyond the power of the creditor, does not discharge the surety." See also *Ray v. Brenner*, 12 Kan. 105; *Noble v. Scofield*, 44 Vt. 281; *Moore v. Paine*, 12 Wend. (N. Y.) 123; *Jones v. Hagler*, 6 Jones (N. Car.) 542; *Ray v. Brenner*, 12 Kan. 105.

In *Sharpe v. Speckenagle*, 3 S. & R.

(Pa.) 463, it was held that a discharge under the insolvent act of a defendant in prison under a *capias ad satisfaciendum*, does not discharge his surety for stay of execution. The court, by Tilghman, C. J., said: "It is not pretended that the insolvent act discharged Oellers from the debt; it only discharged him from imprisonment. But the counsel for the defendant contends that the arrest of Oellers on the *capias ad satisfaciendum* was, in itself, a satisfaction of the debt, and therefore it amounted to a discharge of the recognizance. That the arrest on a *capias ad satisfaciendum* is, in itself, a satisfaction of the debt, is a position not to be maintained, unless the plaintiff consented to the discharge; then indeed the debt is gone. But if the defendant escapes, after arrest on a *capias ad satisfaciendum*, either with or without the consent of the sheriff, he may be retaken by the plaintiff (unless he also had consented), which could not be if the debt were satisfied. If two persons are bound in an obligation, jointly and severally, and sued severally, each may be taken in execution, or one may be taken on a *capias ad satisfaciendum*, and the property of the other levied upon by a *feri facias*, which could not be, if the debt was satisfied by taking one in execution; for there can be but one satisfaction for one debt, although one hundred persons are bound for it; but if one makes actual satisfaction by the payment of the money, all the rest are discharged."

2. In *Ferry v. Burchard*, 21 Conn. 597, the court, by Storrs, J., said: "It is a corollary, from the very definition of the contract of suretyship, that the obligation of the surety being accessory to the obligation of the principal debtor or obligor, it is of its essence that there should be a valid obligation of such principal, and that the nullity of the principal obligation necessarily induces the nullity of the accessory. Without a principal there can be no accessory. Nor can the obligation of the surety, as such, exceed that of the principal." See *Miller v. Gaskins*, 1

relieve the surety.¹ The release of the principal debtor without the consent of the surety and without payment of the debt, does not release the surety if he is fully indemnified.²

5. By Fraud and Misrepresentation.—If the creditor induces the surety to enter into the contract of suretyship by any fraudulent device or misrepresentation as to material facts, the surety is released from liability.³ But if the false representation is made

Smed. & M. Ch. (Miss.) 524; *Swift v. Beers*, 3 Den. (N. Y.) 70; *Dickason v. Bell*, 13 La. Ann. 249; *Crum v. Wilson*, 61 Miss. 233.

Where a judgment is recovered against principal and sureties, and the principal subsequently succeeds in having the judgment reversed against himself, the sureties are discharged. *Ames v. Maclay*, 14 Iowa 281; *Beall v. Cochran*, 18 Ga. 38; *State Bank v. Robinson*, 13 Ark. 214.

1. Incapacity of Principal.—In *Wiggins' Appeal*, 100 Pa. St. 155, a married woman holding shares in a building association prior to the enabling act of April 10, 1879, Pamph. L. 16, borrowed money from the association on her shares, and gave to secure the loan a mortgage on her individual property, and her husband's bond conditioned for the payment of the sum borrowed with interest, fines, premiums, and monthly dues. Default being made by her in her payment of premiums and dues, judgment was entered against her husband on the bond. *Held*, that though the wife was not liable by reason of her coverture, this fact constituted no defense on the part of the husband, who had become his wife's surety in view of her disability.

In *Winn v. Sanford*, 145 Mass. 303, the court, by Devens, J., said: "Where one becomes a surety for the performance of a promise made by one person incompetent to contract, his contract is not purely accessorial, nor is his liability necessarily ascertained by determining whether the principal can be made liable. Fraud, deceit in inducing the principal to make his promise, or illegality thereof, all of which would release the principal, would release the surety, as these affect the character of the debt; but incapacity of the principal party promising to make a legal contract, if understood by the parties, is the very defense on the part of the principal against which the surety assures the promisee. *Yale v. Wheelock*, 109 Mass. 502. . . .

The cases in which it has been held

that the coverture of the principal promisor at the time of making her promise, will not discharge the surety, when such coverture was known to him, are numerous, and have arisen on many descriptions of contract. *Smyley v. Head*, 2 Rich. (S. Car.) 590; 45 Am. Dec. 750; *Kimball v. Newell*, 7 Hill (N. Y.) 116; *Nabb v. Koontz*, 17 Md. 283; *Jones v. Crosthwaite*, 17 Iowa 393; *Weed Sewing Mach. Co. v. Maxwell*, 63 Mo. 486; *St. Alban's Bank v. Dillon*, 30 Vt. 122; 73 Am. Dec. 295; *Davis v. Statts*, 43 Ind. 103; 13 Am. Rep. 382; *Stillwell v. Bertrand*, 22 Ark. 375."

2. *Jones v. Ward*, 71 Wis. 152.

3. In *Ham v. Greve*, 34 Ind. 18, a surety was induced to sign a note by the creditor who represented that the note was to be used in payment for goods. The note, however, was really used to pay a pre-existing debt due by the principal to the creditor. The court held that the surety was not bound.

In *Trammell v. Swan*, 25 Tex. 473, the surety was induced to believe that the note was given for the payment of goods, but as a matter of fact there was no sale. It was held that the surety was not liable.

In *Frisch v. Miller*, 5 Pa. St. 310, it was held that false recital in a bond, of a fact within the knowledge of the obligee, avoids it as to a surety.

In *Mendelson v. Stout*, 37 N. Y. Super. Ct. 408, a person desiring to sell real estate made false representations concerning it to the purchaser and his surety. The purchaser did not rescind the contract, but it was held that the surety was discharged.

In *Drabek v. Grand Lodge*, 24 Ill. App. 82, it was held that a bond, conditioned for the faithful performance of the duties of an officer of a society, is void as to his sureties if delivered when such officer was already in default, this fact being fraudulently concealed from the sureties by the president of the society, from whom they made inquiry.

In *Fishburn v. Jones*, 37 Ind. 119, it

was held that a statement by the creditor that the surety would be liable for \$500, when in fact his liability amounted to \$1,500, would discharge the surety.

In *Waterbury v. Andrews*, 67 Mich. 281, defendant, by false representations, sold a patent to plaintiff's husband, who, repeating the representations to plaintiff, induced her to sign a note and mortgage for the purchase-money. *Held*, that the rule that false representations by a creditor to a surety make the suretyship void, applied.

In *Bleat v. Brown*, 4 De G. F. & J. 367, corn factors supplied flour on credit to a baker, on his executing to them, with a surety, a bond, the condition of which, after reciting that the baker had entered into a contract for the supply of bread to the army, was that the bond was to be void if the baker should deliver to the corn factors his bills on the government as he drew them, and if he and the surety should make good the amounts to become due to the corn factors. The corn factors supplied flour, but not of the quality specified in the government contract, which was vacated on that account. *Held*, that the corn factors could not against the surety allege ignorance of the terms of the contract, and that the surety was discharged.

If a banking company agree that, upon receiving the guarantee of a particular person, they will advance a certain sum of money for the purpose of securing to the creditors of a trader a composition, and setting up the trader in business again; and at the same time the company, being themselves creditors of the trader, enter into a secret arrangement with him, by which they secure to themselves repayment of the difference between their composition and the full amount of their debt; this is a fraud upon the guarantor and upon the creditors who execute the composition deed on the faith of the ostensible agreement, and the guarantor may sustain a bill in equity to set aside the guarantee. *Pendlebury v. Walker*, 4 Y. & C. 424.

Where the surviving obligee in joint and several bonds extended the time of payment of the bonds for three years, and, on a further advance, took a collateral security, reserving his right against the executors of the deceased obligee, but the arrangement was concealed from them, *held*, that by such indulgence they were discharged. *Oakeley v. Pasheller*, 4 C. & F. 207.

One who becomes a surety for another must ordinarily be presumed to do so in the belief that the transaction between the principal parties is one occurring in the usual course of business of that description, subjecting him only to the ordinary risks attending it. To receive a surety well known to be acting on this belief, the party receiving him well knowing that there are such circumstances, having a suitable opportunity to make them known and withholding them, is a legal fraud by which the surety will be relieved from his contract. *Franklin Bank v. Cooper*, 36 Me. 179.

Fraudulent representations made to a principal, and not sufficient to discharge him, will not discharge the surety. *Bryant v. Crosby*, 36 Me. 562.

Where one fraudulently assigned a bond contrary to agreement, and permitted judgment to be recovered against him by the assignee by default, *held* that the guarantor was discharged. *Reed v. Garvin*, 12 S. & R. (Pa.) 100.

Plaintiff, holding an overdue note given by S, on which defendant was surety, was induced by the false representation of S, and with knowledge that he was about to make an assignment, to surrender and cancel the note, and accept a new one, signed by S alone, embracing the amount of the old note and other debts of S payable in five years, and secured by an insufficient mortgage. Defendant was informed that the note on which he was surety had been canceled, and new security obtained from S. The next day S assigned, and plaintiff then learned that the mortgage was not adequate security; whereupon it compelled the assignee to accept a release of the mortgage, but for nearly five months it did not notify defendant of the fraud, nor offer to transfer the mortgage to him. All the parties lived in the same city, and the mortgaged property and records were situated there. *Held*, that plaintiff's conduct, discharged defendant from liability. *Struss v. Masonic Sav. Bank* (Ky. 1889), 11 S. W. Rep. 769.

For other cases of fraud or misrepresentations, see OFFICERS OF PRIVATE CORPORATIONS, vol. 17, p. 74. *Coleman v. Bean*, 3 Keys (N. Y.) 94; *Cooke v. Nathan*, 16 Barb. (N. Y.) 342; *Wooley v. Louisville Banking Co.*, 81 Ky. 527; *McWill-*

by the principal or a stranger and without the creditor's knowledge, the surety will not be discharged from liability.¹

6. By Failure of Creditor to Perform Conditions.—If the surety signs the obligation upon the understanding that certain conditions shall be performed, and the creditor knows of these conditions,

Williams v. Mason, 31 N. Y. 294; *Easter v. Minard*, 26 Ill. 494; *Armstrong v. Cook*, 30 Ind. 22; *Young v. Ward*, 21 Ill. 223; *Hawkins v. Humble*, 5 Coldw. (Tenn.) 531; *Gillett v. Whitmarsh*, 8 Q. B. 966; 55 E. C. L. 964; *Wason v. Wareing*, 15 Beav. 151; *Hamilton v. Watson*, 12 C. & F. 109; *Espey v. Lake*, 16 Jur. 1106; *Willis v. Willis*, 14 Jur. 404; *Allan v. Inman*, 7 Jur. 433; *Owen v. Homan*, 17 Jur. 861; *Wythes v. Labouchere*, 3 De G. & J. 593; *Pledge v. Buss*, 6 Jur. N. S. 695; *Davies v. London, etc., Marine Ins. Co.*, 8 Ch. Div. 469; *Burks v. Wouterline*, 6 Bush (Ky.) 20; *Monroe v. Anderson Bros. Mfg., etc., Co.*, 65 Iowa 692; *State v. Dunn*, 11 La. Ann. 549; *Vose v. Florida R. Co.*, 50 N. Y. 369; *Putnam v. Schuyler*, 4 Hun (N. Y.) 166; *Anderson v. Bellenger*, 87 Ala. 334; *Conger v. Bean*, 58 Iowa 159; *Holliday v. Poole*, 77 Ga. 159; *Coleman v. Waller*, 3 Younge & Jer. 212; *Molsom Bank v. Tinley*, 8 Ont. (Can.) 293; *Marchman v. Robertson*, 77 Ga. 411; *Johnson v. Lawson*, 29 Ill. App. 146; *Reusch v. Keenan*, 42 La. Ann. 419.

Evidence.—In *Reusch v. Keenan*, 42 La. Ann. 419, it was held that charges that the surety on a note was induced, by fraudulent representations, to obligate himself, must be established by irrefutable affirmative proof implicating the creditor, to upturn the otherwise unequivocal and absolute agreement. See also *Tiffany v. Crawford*, 14 N. J. Eq. 278. It is well established that parol evidence may be admitted to show the circumstances under which the surety signed the agreement. *Campbell v. Gates*, 17 Ind. 126; *Port v. Robbins*, 35 Iowa 208.

1. Fraud by Principal.—That the surety has been misled by the principal as to the extent of the obligation is not a defense if the obligee had no knowledge of the fraud. *Lucas v. Owens*, 113 Ind. 521.

The ignorance of the sureties, when they executed the bond, of the real nature of the administration, is not available as a defense in an action upon the bond; nor is the fact that they were misled or deceived by those at whose

request they executed it, as against one who was in no way connected with the deception. *Casoni v. Jerome*, 58 N. Y. 315.

In *Rothermal v. Hughes*, 134 Pa. St. 510, it was held that where a note was given for a valid consideration, the fact that the principal debtor therein procured the signatures of sureties by means of a fraud upon them, will not invalidate the note, without evidence that the payees had notice of the fraud.

In *Wallace v. Wilder*, 13 Fed. Rep. 707, the court, by Colt, J., said: "Even where fraudulent representations are made by the principal, it has been held the surety cannot be permitted to show them as a defense against the obligee." See also *McWilliams v. Mason*, 31 N. Y. 294; *Graves v. Tucker*, 10 Smed. & M. (Miss.) 9; *George v. Tate*, 102 U. S. 564; *Ladd v. Trustees*, 80 Ill. 233; *Anderson v. Warne*, 71 Ill. 20; 22 Am. Rep. 83; *Davis Sewing Mach. Co. v. Buckles*, 89 Ill. 237; *Western New York L. Ins. Co. v. Clinton*, 66 N. Y. 326; *Dair v. U. S.*, 16 Wall. (U. S.) 1; *Griffith v. Reynolds*, 4 Gratt. (Va.) 46; *Quinn v. Hard*, 43 Vt. 375; 5 Am. Rep. 284. The surety is not relieved if the false representations are made by a third person. *Mason Lumber Co. v. Buchtel*, 101 U. S. 633; *Sooy v. State*, 39 N. J. L. 135; *Brown v. Davenport*, 76 Ga. 799.

Cases Where Surety Is Not Discharged.

—Where the creditor makes a misrepresentation as to an unexecuted intention, it seems that the surety will not be discharged. In *Benham v. United Guarantee, etc., Ins. Co.*, 7 Exch. 744, the defendants granted to the plaintiff, the treasurer of a literary institution, a policy of guarantee against loss occasioned by the want of integrity of W, the secretary of the institution. The policy recited, that, as the basis of the contract for such guaranty the plaintiff had lodged at the office of the defendants a certain statement in writing, containing a declaration, signed by the plaintiff, of the truth of the answers thereby given to the questions therein contained. This statement contained

the surety will not be bound if the conditions are not complied with.¹ If at the time the surety signs the contract of suretyship he expressly stipulates that another person shall sign it as surety,

(amongst others) the following questions and answers: "First. Is the applicant at present in your employment, and, if so, in what capacity; and has he hitherto performed the duties of his situation faithfully and to your satisfaction? He is secretary of the Marylebone Literary Institution. Thirdly. In what capacity do you intend to employ the applicant? and with reference to this question, state, as far as circumstances will permit, (A) the nature of his intended duties and responsibilities? (A) He is secretary of the Marylebone Literary Institution, of which I am treasurer. (C) The check, which will be used to secure accuracy in his accounts, and when and how often they will be balanced and closed? (C) Examined by finance committee every fortnight. (D) The salary or emolument, and when it will be paid to him, and how and when it will be paid? (D) 80 pounds a year at present." *Held*, that the statements that the accounts would be examined by the finance committee every fortnight did not amount to a warranty, but was a mere representation of the intention of the plaintiff; and consequently, that he was entitled to recover in respect of a loss arising from the want of integrity of W, although such loss was occasioned by the neglect to examine the accounts in the manner specified.

In *Barbe v. Hansen*, 40 La. Ann. 707, A sold land to B for a certain sum, for which B gave a note signed by sureties, and consented to a special mortgage and vendor's lien on the land to secure the note. In a suit against the sureties, held, that it was no defense that A bought the land for less than the amount for which he sold it to B, contrary to the understanding of the sureties, it not appearing that the land was worth less than the price charged B for it.

In *Lombard v. Mayberry*, 24 Neb. 674, it was held that the fact that the names of certain sureties on a bond were forged, will not release one who signs as surety under such names, in the belief that such signatures were genuine, where the obligee or his agent accepted the bond without knowledge of the forgery. See *York, etc., Ins. Co. v. Brooks*, 51 Me. 506; *Stern v. People*,

102 Ill. 540; *Selser v. Brock*, 3 Ohio St. 302; *State v. Pepper*, 31 Ind. 76.

A debtor induced a lady, to whom he was engaged, to become security for a debt. After the marriage, she insisted that she had been imposed upon. *Held*, that the only duty of the creditor (who was aware of the relation between the parties) towards the lady was, to see that she had proper professional assistance, and that any fraud or misrepresentation of the debtor in the transaction, of which the creditor had no notice, did not affect his security. *Cobbett v. Broch*, 20 Beav. 524.

1. In *Hickock v. Farmers', etc., Bank*, 35 Vt. 476, a surety signed a promissory note upon the payee's promising that as soon as the note became due he would immediately proceed against the principal. The note became due and for over a year the payee failed to sue the principal or notify the surety, and the principal became insolvent. The court held that the surety was discharged. See also *Lawrence v. Walsley*, 12 C. B. N. S. 799; 104 E. C. L. 797.

In *Jones v. Keer*, 30 Ga. 93, a creditor promised as an inducement for the sureties to sign a note, that he would assign a judgment and execution which he had against the principal. Instead of doing so, he brought suit on the note. The court held that the sureties were discharged.

In *Caldewell v. Heitshu*, 9 W. & S. (Pa.) 51, it was held that the issuing of a writ of summons, although returned not served, is a suit brought; and would release the grantor of a bond who had stipulated in consideration of total forbearance.

In *Gillett v. Whitmarsh*, 8 Q. B. 966; 55 E. C. L. 964, to an action on a promissory note for £150, by payee against maker, defendant pleaded that W was indebted to plaintiff in £3,612 10s., and was unable to pay in full; whereupon it was agreed between plaintiff, defendant and W, that plaintiff should accept a composition, to wit, £1,500, in satisfaction and discharge of the £3,612 10s., and in consideration of the premises, and that plaintiff would accept the £1,500, in satisfaction and discharge, defendant should make the note in part payment, and on account of the £1,500, and that plaintiff should

and the creditor knows of this condition, the surety will not be bound if the other person fails to sign the obligation.¹

7. By Creditor Releasing Security—*a. RELEASE OF LIEN.*—A surety is released when the creditor parts with a lien for the payment of the principal's debt, to which the surety has the right of subrogation.² The release or surrender of the lien or security

not enforce or attempt to enforce, or in any way claim or demand, payment of any further sum than the £1,500; that defendant made the note upon the terms of the agreement, and that there never was any other consideration; that W afterwards, and before the note was due, became bankrupt; yet plaintiff, without defendant's consent, proved in the bankruptcy for the full amount of the £3,612 10s. *Held*, a good plea.

Upon the eve of a sale by a sheriff, a surety gave a written guarantee for payment of the judgment debts by installments, in consideration of the judgment creditors consenting to postpone the sale under the execution. It turned out that the consent of another person was necessary in order to prevent the sale, and in consequence the sale took place. The surety gave notice that the consideration having failed, the guarantee was at an end. Representations were made on behalf of the judgment creditors when they took the guarantee, that they had power to stop the sale, and it would be stopped. *Held*, that the surety was entitled to have the guarantee delivered up to be cancelled. *Cooper v. Joel*, 1 De G. F. & J. 240.

See also in general, on this subject, *Bacon v. Chesney*, 1 Stark. 192; *Cunningham v. Wrenn*, 23 Ill. 64; *Lynch v. Colegate*, 2 Har. & J. (Md.) 34; *Clay v. Edgerton*, 19 Ohio St. 549; 2 Am. Rep. 422; *Talmadge v. Williams*, 27 La. Ann. 653; *Linn Co. v. Farris*, 52 Mo. 75; 14 Am. Rep. 389; *Whetsell v. Mebane*, 64 N. Car. 345; *Hall v. Hoadley*, 4 N. & M. 515; *Sheldon v. Reynolds*, 14 La. Ann. 703; *Bouser v. Cox*, 4 Beav. 379; *Robinson v. Epping*, 24 Fla. 237; *Milliken v. Callahan Co.*, 69 Tex. 205.

See also *supra*, this title, *Discharge of Surety—Alteration of Contract*.

1. One of two intended co-sureties executed a deed for the repayment of moneys to be advanced to the principal debtor, on the understanding that the money would not be advanced until the deed was executed by the other surety. The deed was never executed by the

other surety, and no notice of his failure to execute was ever given by the creditor to the executing surety, until after the principal debtor had made default and become insolvent. *Held*, that the executing surety was entitled to be discharged in equity from every part of the debt. *Evans v. Bremridge*, 8 De G. M. & G. 100.

See also *Miller v. Stem*, 12 Pa. St. 383; *Evans v. Daughtry*, 84 Ala. 68; *Cowan v. Baird*, 77 N. Car. 201; *Read v. McLemore*, 34 Miss. 110; *Bivins v. Helsley*, 4 Metc. (Ky.) 78; *Belleville Sav. Bank v. Bornman*, 124 Ill. 200; *Campbell v. Powell* (Tex.), 14 S. W. R. 245; *Richards v. Whitaker* (Pa.), 19 Atl. Rep. 501; *Gibbs v. Johnson*, 63 Mich. 671; *Guild v. Thomas*, 54 Ala. 345; *State v. Allen* (Miss.), 10 So. Rep. 473; *U. S. v. Hammond*, 4 Biss. (U. S.) 283; *Huron v. Armstrong*, 27 Up. Can. (Q. B.) 533; *Smith v. Kirkland*, 81 Ala. 345; *Owens v. Dague*, 29 N. E. Rep. 784. See also *supra*, this article, *Delivery*.

2. *Ex parte Wilson*, 11 Ves. 410; *Schock v. Miller*, 10 Pa. St. 401; *Holt v. Bodey*, 18 Pa. St. 207; *Everly v. Rice*, 20 Pa. St. 297; *Neff's Appeal*, 9 W. & S. (Pa.) 36; *American Bank v. Baker*, 4 Met. (Mass.) 177; *Cummings v. Little*, 45 Me. 187; *Baker v. Briggs*, 8 Pick. (Mass.) 129; 19 Am. Dec. 311; *Hencken v. McGlathery*, 8 Pa. Co. Ct. Rep. 267; *Crim v. Fleming*, 123 Ind. 438; *New England Mut. L. Ins. Co. v. Randall*, 42 La. Ann. 260; *Kirkpatrick v. Hawk*, 80 Ill. 122; *Moore v. Gray*, 26 Ohio St. 525; *Hurd v. Spencer*, 40 Vt. 581; *Dillon v. Russell*, 5 Neb. 484; *Willis v. Davis*, 3 Minn. 17; *Succession of Pratt*, 16 La. Ann. 357; *Armor v. Amis*, 4 La. Ann. 192; *Barrow v. Shields*, 13 La. Ann. 57; *Polak v. Everett*, 1 Q. B. Div. 669; *Kennedy v. Bossiere*, 16 La. Ann. 445; *Springer v. Toothaker*, 43 Me. 381; 69 Am. Dec. 61; *Cummings v. Little*, 45 Me. 183; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119; 41 Am. Dec. 685; *Lewis v. Armstrong*, 80 Ga. 42; *Hubbell v. Carpenter*, 5 Barb. (N. Y.) 520; *Underhill v. Palmer*, 10 Daly (N. Y.) 478;

Payne v. Commercial Bank, 6 Smed. & M. (Miss.) 24; Ives v. Bank of Lansingburg, 12 Mich. 361; Sample v. Cochran, 84 Ind. 594; Ferguson v. Turner, 7 Mo. 497; Lucas Co. v. Roberts, 49 Iowa 159; Guild v. Butler, 127 Mass. 386; Otis v. Von Storch, 15 R. I. 41; Greenlee v. Lowing, 35 Mich. 63; First Nat. Bank v. Homesley, 99 N. Car. 531; Third Nat. Bank v. Shields (Supreme Ct.), 8 N. Y. Supp. 298; Kendt's Appeal, 102 Pa. St. 441; Allen v. O'Donald, 23 Fed. Rep. 573; Pickens v. Finney, 20 Miss. 468; McGee v. Metcalf, 20 Miss. 535; Somerville v. Marbury, 7 Gill & J. (Md.) 275; Blydenburgh v. Bingham, 38 N. Y. 371; Neff's Appeal, 9 W. & S. (Pa.) 36.

In Hayes v. Ward, 4 Johns. Ch. (N. Y.) 129; 8 Am. Dec. 554, the court, by Kent, Ch., said: "The surety, by his very character and relation as surety, has an interest that the mortgage taken from the principal debtor should be dealt with in good faith, and held in trust, not only for the creditor's security, but for the surety's indemnity. A mortgage so taken by the creditor is taken and held in trust, as well for the secondary interest of the surety, as for the more direct and immediate benefit of the creditor; and the latter must do no willful act, either to poison it, in the first instance, or to destroy or cancel it afterwards."

In Wharton v. Duncan, 83 Pa. St. 40, Wharton to procure a line of discount for the firm of which he and his brother were the members, executed to a bank a mortgage of his individual real estate. The security of this mortgage being deemed insufficient, the mother of Wharton executed a mortgage of her real estate to provide further protection to the bank. The bank subsequently satisfied Wharton's mortgage. The court held that his mother as surety was discharged from liability on her mortgage.

In Bank of Monroe v. Gifford, 79 Iowa 300, it was held, that where a note is given for a prior debt, for which the creditor holds bonds as collateral security, such bonds cannot be surrendered without the consent of the surety on the note.

In Wheelwright v. De Peyster, 4 Edw. Ch. (N. Y.) 232, it was held, that if the holder of two mortgages, one of which is surety for the other, purchase the equity of redemption of the principal mortgagor, and pay him the pur-

chase-money, instead of crediting it in the mortgage, and the mortgage merges by the conveyance, the other mortgagor is discharged.

In Guild v. Butler, 127 Mass. 386, it was held that a surety is entitled, in equity, to the benefit of any collateral security received by the creditor from the principal debtor, and if the creditor knowing the relation between the debtors, surrenders part of such security, without the consent of the surety, the surety is exonerated to the amount so surrendered, although the relation of the debtor does not appear on the face of the debt, and first became known to the creditor after the debt was contracted. One who makes a promissory note for the accommodation of another is a surety, within this rule.

In Re Cator, 14 Lea (Tenn.) 408, it was held, that if the holder of a note surrenders to the maker collaterals placed in his hands by the maker as indemnity, the surety therein is discharged.

In Burr v. Boyer, 2 Neb. 265, it was held, that if the principal debtor executes a chattel mortgage upon his property for the security of the creditor, and the latter, through neglect to have it recorded, permits and allows the debtor to convey the mortgaged property to bona fide purchasers, and thereby loses the security, the surety will be discharged.

In Hutchinson v. Woodwell, 107 Pa. St. 509, there was a contract between A and B, on which C was surety for B, in which it was provided that, in case of breach by B, A should retain in his hands certain property of B, and, after a reasonable time, sell the same at public or private sale, and a breach having occurred, A caused said property in his hands to be sold at sheriff's sale under a judgment for another debt due by B. Held, that the surety was discharged.

In Brown v. Rathburn, 10 Oregon 158, a surety was discharged because the creditor relinquished a lease of a farm and live stock, which he held as collateral for the debt. In Port v. Robbins, 35 Iowa 208, property subject to a chattel mortgage was released and the surety was discharged.

In Third Nat. Bank v. Shields, 55 Hun (N. Y.) 274, it was held that where a creditor releases a portion of his debtor's property, which was mortgaged to him as security for the debt-

will not, however, discharge the surety absolutely from all liability, but only to the extent of the loss which his action will cause the creditor.¹ But if the creditor, in relinquishing the security for the debt, at the same time materially alters the contract, the surety is absolutely relieved from paying any portion of the debt.²

or's indorsed notes, without the consent of the sureties thereon, they will have a defense *pro tanto* in an action on the notes.

1. In *Everly v. Rice*, 20 Pa. St. 297, the court, by Black, C. J., said: "When the creditor has in his hands the means of paying his debt and he does not use it, but gives it up, the surety is discharged. But the discharge does not extend to the whole debt, if the means of payment was only of part. It is said that this mortgage was security for the whole debt. Whatever it was technically, it was in truth and fact security for as much as it would pay; and to that extent the defendant was allowed for its loss."

In *Lewis v. Armstrong*, 80 Ga. 402, a defendant, upon suing out a writ of error to a judgment against him, gave a *supersedeas* bond with a surety. Upon affirmance of the judgment, without the knowledge or consent of such surety, he procured an injunction to restrain further proceedings on the judgment. *Held*, that a release by the plaintiff of the surety on the bond given to obtain the injunction operated as a release of the surety on the *supersedeas* bond, at least to the extent of the property owned by the surety on the injunction bond.

A creditor's release to the principal debtor of a portion of the securities without the surety's consent only discharges the surety to the extent to which he is thereby actually injured. *Saline Co. v. Buie*, 65 Mo. 63.

2. In *Polak v. Everett*, 1 Q. B. Div. 669, N was indebted to the plaintiffs, and by deed agreed, first, to pay them £3400 on the 15th of February, 1874, secondly, within a certain time after allotment of shares in a company to which he was about to assign his business, to transfer to them shares in it to the nominal value of £600 and redeem them at par within twelve months from the 1st of January, 1874; and, fourthly, it was agreed between him and the plaintiffs that the book-debts due to him, to the nominal amount of £8000, should be collected and one-half paid

to the plaintiffs, to be applied towards the redemption of the shares, and when they had received a sum equal to, or a multiple of, the amount of a share, they were to deliver to him shares at par equivalent to the amount so received. The defendant guaranteed the performance of this agreement by N so far as concerned the redemption of the shares of the value of £6000. Subsequently an arrangement was made between the plaintiffs and N, by which, for an equivalent in shares and cash, they released to him their interest in the book-debts, that he might dispose of them to the company. The defendant having been sued on his guaranty for a deficiency of £2250 in the amount of shares. *Held*, that the new arrangement was such a variation of the rights of the defendants as surety as to discharge them.

In *Watts v. Shuttleworth*, 7 H. & N. 353, by articles of agreement H agreed with W (the plaintiff) to complete certain fittings for a warehouse for £3450, to be paid by installments during the progress of the work.

The contract contained a stipulation, "That W (the plaintiff) shall and may insure the fittings from risk by fire, at such time and for such amount as the architects may consider necessary, and deduct the costs of such insurance for the time during which the works are unfinished from the amount of the contract." By agreement reciting in part the contract, the defendant agreed with the plaintiff to guaranty the due performance of the works by H. The plaintiff advanced £1800 to H during the progress of the works; after which the fittings to the value of £2300, while still unfinished, were destroyed by accidental fire in the workshop of H. The plaintiff had not insured the fittings. H became insolvent and never repaid the £1800 or any part of it. The plaintiff was compelled to pay a sum greater by £340 than the original contract price, to complete the work contracted for. *Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer),

b. RELEASE OF LEVY AND ATTACHMENT.—Where a creditor in the course of legal proceedings based upon his claim, obtains by execution or attachment a lien on the property of the principal, the surety is entitled to insist that the creditor shall not voluntarily release the lien so obtained, and if he does so, and the property is released from the levy or attachment, the surety is discharged to the extent that he is injured by such action of the creditor.¹ If the execution itself does not create a lien, but a levy is necessary for that purpose, and the creditor causes the

that the plaintiff was bound to insure the fittings, and that his omission to do so in equity discharged the defendant's liability, not merely to the extent of the benefit he would have derived from the insurance, if effected, but *in toto*.

1. Mayhew v. Crickett, 2 Swanst. 185; Williams v. Price, 1 S. & S. 581; Maquokata v. Willey, 35 Iowa 323; Houston v. Hurley, 2 Del. Ch. 247; Irick v. Black, 17 N. J. Eq. 189; Lumsden v. Leonard, 55 Ga. 374; Miller v. Dyer, 1 Duv. (Ky.) 263; Hollingsworth v. Turner, 44 Ga. 11; Robeson v. Roberts, 20 Ind. 155; 83 Am. Dec. 308; Bank v. Edwards, 20 Ala. 512; Shannon v. McMullen, 25 Gratt. (Va.) 211; Baird v. Rice, 1 Call (Va.) 18; 1 Am. Dec. 497; Hurd v. Spencer, 40 Vt. 581; Mulford v. Estudillo, 23 Cal. 94; Freavor v. Yingling, 37 Md. 491; Nelson v. Williams, 2 Dev. & B. Eq. (N. Car.) 118; Wright v. Knepper, 1 Pa. St. 361; Johnson v. Young, 20 W. Va. 614; Doll v. Reed (Ky. 1890), 13 S. W. Rep. 1081; Morrison v. Citizens' Nat. Bank, 65 N. H. 253; Jenkins v. McNeese, 34 Tex. 189; Winston v. Yeargin, 50 Ala. 340; Lumsden v. Leonard, 55 Ga. 374; Sterne v. Vincennes Bank, 79 Ind. 549; Knight v. Charter, 22 W. Va. 422; Templeton v. Shakley, 107 Pa. St. 370; Brown v. Chambers, 63 Tex. 131; State Bank v. Edwards, 20 Ala. 512; Sherraden v. Parker, 24 Iowa 28; Ferguson v. Turner, 7 Mo. 497; McKenzie v. Wyley, 27 W. Va. 658; Wyley v. Stanford, 22 Ga. 385; Finn v. Stratton, 5 J. J. Marsh. (Ky.) 364; Union Bank v. Govan, 10 Smed. & M. (Miss.) 333; Concord Bank v. Rogers, 16 N. H. 9; Barney v. Clark, 46 N. H. 514; Bank of Montpelier v. Dixon, 4 Vt. 587; Sawyer v. Bradford, 6 Ala. 572; Hetherington v. Branch Bank, 14 Ala. 68; Royston v. Howie, 15 Ala. 309; Stringfellow v. Williams, 6 Dana (Ky.) 236; Miller v. Porter, 5 Humph. (Tenn.) 294; Alcock v. Hill, 4 Leigh (Va.) 522; Humphrey v. Hitt,

6 Gratt. (Va.) 509; Barker v. McClure, 2 Blackf. (Ind.) 14; Boice v. Main, 4 Den. (N. Y.) 55; Palethorp v. Leshner, 2 Rawle (Pa.) 272; Morrison v. Hartman, 14 Pa. St. 55; White v. Brown, 4 Humph. (Tenn.) 292; Morley v. Dickinson, 12 Cal. 561; Curan v. Colbert, 3 Ga. 239; Brown v. Riggins, 3 Ga. 405; Glass v. Thompson, 9 B. Mon. (Ky.) 235; State v. Hammond, 6 Gill & J. (Md.) 157; Boughton v. Bank of Orleans, 2 Barb. Ch. (N. Y.) 458; Comegys v. Cox, 1 Stew. (Ala.) 262; English v. Darley, 3 Esp. 49; O'Key v. Sigler, 47 N. W. Rep. 911; Holt v. Bodey, 18 Pa. St. 207; Jerauld v. Trippet, 62 Ind. 122; Hogshead v. Williams, 55 Ind. 145; Fleming v. Odum, 59 Ga. 362; Lower v. Buchanan Bank, 78 Mo. 67; Manice v. Duncan, 12 La. Ann. 715; Summerhill v. Tapp, 52 Ala. 227; Evans v. Raper, 74 N. Car. 639; Storms v. Thorn, 3 Barb. (N. Y.) 314; Sharp v. Fogar, 3 Sneed (Tenn.) 541; Wright v. Knepper, 1 Pa. St. 361; Adams v. Logan, 27 Gratt. (Va.) 201; Sasscer v. Young, 6 Gill & J. (Md.) 243; Thomas v. Cleveland, 33 Mo. 126.

In Com. v. Vanderslice, 8 S. & R. (Pa.) 452, judgment was obtained against Lebo and the sureties in his official bond. A *feri facias* was issued, on which Lebo's personal property was levied; and on this, six successive writs of *venditioni exponas* were issued and returned; on the last of which, the plaintiff and Lebo, without consulting the sureties, or obtaining their assent, came to an agreement that the writ should be stayed, that an *alias feri facias* should be issued and levied on Lebo's real property which was to be considered as having been condemned, and that the plaintiff should be at liberty to sell it at the succeeding term. By this agreement, Lebo's personal property was effectually released, as it was left in his possession, and it seems, afterwards disposed of by him. The court, by Gibson, J., said: "It is

execution to be returned without a levy, the surety is not discharged,¹ but if the execution itself becomes a valid lien without a

necessary to recapitulate the learning on the subject; the whole matter lies in a very narrow compass. Under the subsequent arrangement, the levy was neither at law nor in equity satisfactory, as regards Lebo, the principal. But there is no clearer rule in equity than that where the creditor has the means of satisfaction in his hands, and chooses not to retain it, but suffers it to pass into the hands of the principal, the surety can never be called on. Here, there was a levy on personal property belonging to the principal, and that was satisfaction *pro tanto*, as regards the sureties; of the benefit of which nothing could deprive them, except an assent, on their part, to the arrangement by which the property was released. That, however, is not pretended."

The surety on a prison bounds' bond, in *South Carolina*, is discharged by an order of the plaintiff to the sheriff to "stay proceedings" against the defendant. *Walton v. Oswald*, 4 McCord (S. Car.) 501.

It is a good defense to a suit against a surety, that the plaintiff, knowing him to be such, on his request, commenced a suit against the principal, attached property enough to cover the debt, and afterwards voluntarily dismissed the suit, and gave up his lien. *Bank of Missouri v. Matson*, 24 Mo. 333.

Where one of the joint makers of a promissory note has signed as surety for the others, the release of an attachment of the property of the principals, sufficient to secure the note made in a suit against all the makers, will not operate as his discharge. *Shriver v. Lovejoy*, 32 Cal. 574.

A surety in a bond for the appearance of an insolvent debtor to render his schedule, etc., is not liable, if the debtor appear and obtain his discharge, although it be fraudulently obtained, provided the surety be not a party to the fraud. *Davis v. Cathey*, 1 Stew. (Ala.) 402.

In *Spring v. George*, 50 Hun (N. Y.) 227, it was held that when a creditor in the course of legal proceedings based upon the claim, once gets hold, by attachment or execution, of property of the principal which is applicable to the payment of the debt, the surety is entitled to insist that the creditor shall not voluntarily let the property go, and

if he does so, and the claim subsequently proves to be collectible from the principal, the surety is discharged.

In *Holt v. Bodey*, 18 Pa. St. 207, the defense was that the creditor had released the lien of his judgment on the principal's real estate. The court was requested to charge "that if the jury believe that at the time Jesse Holt executed the release given in evidence, dated April 1, 1845, the property released was subject to liens to a greater amount than it was worth, such release will not discharge Henry Bodey, even if he was security, nor prevent the plaintiff from recovering in this action." The court refused the request. On writ of error the court, by Lowrie, J., said: "The court below could not properly affirm the sixth point of the plaintiff; but they instructed the jury that the question was, did the release so operate as to discharge from the lien of the judgment, property which was then available for the satisfaction of the judgment, and to what extent? This was quite as favorable as the plaintiff had a right to ask; and, when the court added, 'to the extent that said release did not discharge such property, the plaintiff may recover,' when they added this they conceded too much to the plaintiff; for it was telling the jury that though the property released would have satisfied the judgment, yet if there is any which can still be made available the surety is, *pro tanto*, not discharged. Such a rule throws all the risks arising from the plaintiff's act, and the uncertainty of the evidence and the fallibility of the jury, on the surety, instead of on the party whose acts gave rise to them. If there be still enough of the principal's property left, the creditor need not care that the surety is discharged. If this is doubtful, it was the creditor that made it so, and he should take the risk of it. If he has discharged any of the principal's property, the very least that can be expected of him is, that he should make it perfectly clear that it could not have been made available at all, or not beyond a certain amount; for, by this act, he has prevented the application of the certain test afforded by judicial process."

1. *Hetherington v. Branch Bank*, 14 Ala. 68.

levy, the creditor cannot have it returned without any levy having been made without discharging the surety.¹

c. RELEASE OF CO-SURETY.—Where one of several sureties for the same debt is released and the contract is materially altered, all the other sureties are entirely released from their liability.² If, however, the release of one surety is not accompanied by any material alteration of the contract, the remaining sureties are relieved only to the extent that the surety who has been released would have been liable to contribute to his co-sureties.³

d. LOSS OF SECURITY.—Where a creditor has property of the principal in his hands to secure the debt, and he negligently loses it or makes it ineffectual as a security, the surety is discharged to the extent that he is injured.⁴

1. *Robeson v. Roberts*, 20 Ind. 155; 83 Am. Dec. 308.

2. *Mitchell v. Burton*, 2 Head (Tenn.) 613; *Stockton v. Stockton*, 40 Ind. 225; *Martin v. Taylor*, 8 Bush (Ky.) 384.

3. *Schock v. Miller*, 10 Pa. St. 401; *Ex parte Gifford*, 6 Ves. 805; *Jemison v. Governor*, 47 Ala. 390; *Smith v. State*, 46 Md. 617; *Glasscock v. Hamilton*, 62 Tex. 143; *Jemison v. Governor*, 47 Ala. 390; *Stirling v. Forrester*, 2 Bligh 575; *Hodgson v. Hodgson*, 2 Keen 704; *Surety Co. v. Thurber* (N. Y.), 23 N. E. Rep. 1129; *Thompson v. Adams*, 1 Freem. Ch. (Miss.) 225; *Chipman v. Todd*, 60 Me. 283; *Massey v. Brown*, 4 S. Car. 85; *Clapp v. Rice*, 15 Gray (Mass.) 557; *In re Wolmershausen*, 62 Law T. 541; *Anthony v. Capel*, 53 Miss. 350; *Hood v. Hayward* (N. Y.), 26 N. E. 331; *Thomason v. Clark*, 31 Ill. App. 404.

In *Klingensmith v. Klingensmith*, 31 Pa. St. 460, it was held that where the obligation of sureties is joint and several, the discharge of one of them does not release the other from the payment of his proportion of the claim. But in *Collins v. Prosser*, 1 B. & C. 682; 8 E. C. L. 287, it was said that "where parties enter into a joint and several bond, for payment of an entire sum of money, whatever discharges one of the obligors may discharge them all."

4. In *City Bank v. Young*, 43 N. H. 457, the court, by Bellows, J., said: "If the creditor chooses to accept such securities, the law will imply that he undertakes to hold them in trust for the parties interested, and to use ordinary diligence in the care of them, and upon payment of the debt by the surety, he is bound to transmit them unimpaired

to him. If he relinquish such securities to the principal, it is well settled that he exonerates the surety at least to the extent of their value."

In *Grisard v. Hinson*, 50 Ark. 229, the maker of a promissory note, on which defendant was surety, in order to secure its payment, executed to the payee a mortgage of a crop of corn. On maturity of the note defendant stood passively by until the corn was consumed, without taking any steps to compel the mortgagee to foreclose his mortgage or proceed against the maker, and without attempting to take control of the mortgage. *Held*, that he was not entitled, because of the loss of the security, to be exonerated from any part of his liability to pay the note.

In *Strange v. Fooks*, 4 Giff. 408, a creditor, whose debt was secured by the bond of the debtor and his surety as well as by a mortgage of the equitable life interest of the debtor and his wife in certain real estate and policies of assurance, assigned his debt, without notice by himself or the assignee, to the trustees of the settlement, who sold under a power. *Held*, that the surety was discharged to the amount of the security lost. The vice-chancellor said: "It is perfectly established in this court that, if through any neglect on the part of the creditor, a security to the benefit of which a surety is entitled, is lost, or is not properly perfected, the surety is discharged."

In *Stratton v. Rastall*, 2 T. R. 366, it was held that where an annuity bond granted by two became void by the neglect of the grantee, in not registering a memorial under the statute, he cannot receive back any part of the consideration money from the one known to be the only surety who had received

no part of it, though both joined in a receipt.

In *Wulff v. Jay*, L. R., 7 Q. B. 756, the plaintiffs lent to B and P, who were traders, £300 for the repayment of which the defendant became surety. At the time of the loan B and P assigned by deed dated the 25th of August, 1870, to the plaintiffs, as security for the debt, the lease of their business premises and plant, fixtures, and things thereon. The deed provided for the repayment of the loan upon the 25th of August, 1871, and stipulated, that until default in payment of either the principal or interest, B & P should continue in possession of the property assigned to the plaintiffs; and that upon such default the plaintiffs should not sell without giving B & P one month's notice in writing. This deed was not registered under 17 and 18 Vict., ch. 36. B & P failed to pay interest upon the 25th of February, but the plaintiffs did not enter into possession. About a week before the 5th of August, the plaintiffs received notice that B & P were insolvent, but they allowed them to continue in possession, and on that day B & P filed a petition for liquidation under the Bankruptcy Act, 1869, and were adjudged bankrupts. The trustee under the bankruptcy seized and sold the goods and chattels assigned by the deed. *Held*, that the plaintiffs, by their omission both to register the deed and to seize the property assigned to them on default of payment of the interest, had deprived themselves of the power to assign the security to the surety, and that owing to their laches he was discharged to the amount that the goods were worth.

In *Watson v. Allcock*, 4 De G. M. & G. 241, by an agreement between bankers, a customer, and a surety, the surety guaranteed the balance due or to become due from the customer, subject to a limit and a proviso empowering the surety at any time to determine by notice his liability as to subsequent dealings. The customer afterwards obtained a loan from the bank beyond the limit of the guaranty on a warrant of attorney, and simultaneously with it a second agreement was entered into between the bankers, the customer and surety that the warrant of attorney should not prejudice or affect the former agreement, and that the bank would, at any time when requested by the surety, enter up judgment and issue execution. The bank omitted to file the warrant of

attorney, and the customer became bankrupt. *Held*, that by the omission to file the warrant of attorney the surety was discharged.

In *Freoner v. Yingling*, 37 Md. 491, it was held that the surety may be exonerated from liability, to the extent to which he is prejudiced by the positive act of the creditor in parting with legal or equitable securities which the latter might have held for the benefit and protection of the surety, although he may not have known of the existence of the securities held by the creditor, or though they may have been taken subsequently to the date of the contract of suretyship.

In *Burr v. Boyer*, 2 Neb. 265, it was held that a surety will be discharged by the neglect of the creditor to have a chattel mortgage recorded, made to him by the debtor to secure the debt, if such neglect occasions a loss of the security.

In *Ramsey v. Westmoreland Bank*, 2 P. & W. (Pa.) 203, it was held that when a creditor has it in his power to receive a part of his debt out of the estate of the principal debtor, who is deceased, and does not avail himself of it, the surety will be thereby discharged *pro tanto*.

In *Watts v. Shuttleworth*, 5 H. & N. 235, by articles of agreement H agreed with W (the plaintiff) to complete certain fittings for a warehouse for £3,450, to be paid by installments during the progress of the work. The contract contained a stipulation, "That W (the plaintiff) shall and may insure the fittings from risk by fire at such time and for such amount as the architects may consider necessary, and deduct the costs of such insurance for the time during which the works are unfinished from the amount of the contract." By agreement, reciting in part the contract, the defendant agreed with the plaintiff to guaranty the due performance of the works by H. The agreement was to be signed, and was in fact signed, at the office of the architects, and the defendant stated that a clerk of the architect's told him that he incurred no risk in consequence of the stipulation as to the insurance, and that therefore he signed the guaranty. The plaintiff advanced £1,800 to H during the progress of the work, after which the fittings to the value of £2,300, while still unfinished, were destroyed by accidental fire in the workshop of H. The plaintiff had not insured the fittings. H became insolvent and never repaid the £1,800

XV. SURETIES ON BONDS REQUIRED IN COURSE OF JUDICIAL PROCEEDINGS—1. Attachment Bonds.—Where a bond is given to procure the discharge of an attachment which is void for want of jurisdiction of the court, the surety cannot be held liable, as the whole proceeding is a nullity.¹ Sureties on an attachment bond

or any part of it. The plaintiff was compelled to pay a sum greater by £340 than the original contract price to another person to complete the work contracted for. *Held*, that the plaintiff ought to have insured the fittings, and having omitted to do that which his duty towards the defendant required him to do, and which, if he had done, the defendant would have been relieved to the extent of the insurance, the defendant was discharged.

For other examples of release of surety by loss of security, see *Law v. East India Co.*, 4 Ves. 824; *Phares v. Barbour*, 49 Ill. 370; *Port v. Robbins*, 35 Iowa 208; *Brown v. Gibbons*, 37 Iowa 654; *Sherraden v. Parker*, 24 Iowa 28; *Beach v. Bates*, 12 Vt. 68; *Jenkins v. National Village Bank*, 58 Me. 275; *Saulet v. Trepagnier*, 2 La. Ann. 427; *Gillespie v. Darwin*, 6 Heisk. (Tenn.) 21; *Hayes v. Little*, 52 Ga. 555; *Succession of Pratt*, 16 La. Ann. 357; *Vance v. English*, 78 Ind. 80; *Teaff v. Ross*, 1 Ohio St. 469; *Kirkpatrick v. Hawk*, 80 Ill. 122; *Graves v. McCall*, 1 Call (Va.) 414; *Bank of Monroe v. Gifford*, 78 Iowa 300; *Small v. Hicks*, 81 Ga. 691; *Bank of St. Albans v. Smith*, 30 Vt. 148; *Parker v. Alexander*, 2 La. Ann. 188; *Lang v. Brevard*, 3 Strobb. Eq. (S. Car.) 59; *Gilbert v. Marsh*, 12 Hun (N. Y.) 519; *Appeal of Neel* (Pa. 1887), 11 Atl. Rep. 636; *Mathews v. Everett*, 84 Ga. 472; *Bank of Monroe v. Gifford*, 78 Iowa 300; *Phares v. Barbour*, 49 Ill. 370; *Wright v. Austin*, 56 Barb. (N. Y.) 13; *Voss v. German American Bank*, 83 Ill. 599; *Hall v. Hoxsey*, 84 Ill. 616; *Otis v. Von Storch*, 15 R. I. 41; *Clow v. Derby Coal Co.*, 98 Pa. St. 432; *Bixby v. Barklie*, 26 Hun (N. Y.) 275; *Lafayette Bank v. Hill*, 76 Ind. 223; *Underhill v. Palmer*, 10 Daly (N. Y.) 478; *Day v. Ramey*, 40 Ohio St. 446; *Kaufman v. Loomis*, 13 Ill. App. 124; *Brown v. Rathburn*, 10 Oregon 158; *Adams v. Dutton*, 57 Vt. 515; *Crim v. Fleming*, 101 Ind. 154; *Wendell v. Highstone*, 52 Mich. 552; *Black River Bank v. Page*, 44 N. Y. 453; *Alcorn v. Com.*, 66 Pa. St. 172; *Hughes v. Rankin*, 7 Phila. (Pa.) 175; *Philbrook*

v. McEwen, 29 Ind. 347; *Russell v. Ballard*, 16 B. Mon. (Ky.) 201; *Taylor v. Jeter*, 23 Mo. 244; *Driskell v. Ma-teer*, 31 Mo. 325; *Bangs v. Strong*, 10 Paige (N. Y.) 11; *Hubbell v. Carpenter*, 5 Barb. (N. Y.) 520; *Holt v. Bodey*, 18 Pa. St. 207; *Folk v. Cruikshanks*, 4 Rich. (S. Car.) 243; *Mitchell v. Burton*, 2 Head (Tenn.) 615; *McCullum v. Hinckley*, 9 Vt. 143; *Ashby v. Smith*, 9 Leigh (Va.) 164; *Loomis v. Fay*, 24 Vt. 240; *Wilson v. Green*, 25 Vt. 450; *Perrine v. Fireman's Ins. Co.*, 22 Ala. 575; *Springer v. Toothaker*, 43 Me. 381; *Cummings v. Little*, 43 Me. 183; *Baker v. Briggs*, 8 Pick. (Mass.) 122; *Payne v. Commercial Bank*, 6 Smed. & M. (Miss.) 24; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119; *Com. v. Miller*, 8 S. & R. (Pa.) 452; *Neff's Appeal*, 9 W. & S. (Pa.) 36; *Smith v. McLeod*, 3 Ired. Eq. (N. Car.) 118; *Griswold v. Jackson*, 2 Edw. (N. Y.) 461; *Cullum v. Emanuel*, 1 Ala. 23; *Bank of Gettysburg v. Thompson*, 3 Grant Cas. (Pa.) 114; *Everly v. Rice*, 20 Pa. St. 297; *Richards v. Com.*, 40 Pa. St. 146; *Hurd v. Spencer*, 40 Vt. 581; *Pearl St. Congregational Soc. v. Imlay*, 23 Conn. 10; *Stone v. Furber*, 22 Mo. App. 498; *Ruble v. Norman*, 7 Bush (Ky.) 584; *First Nat. Bank v. Whitman*, 66 Ill. 331; *Neimcewicz v. Gahn*, 3 Paige (N. Y.) 614; *Holleday v. Brown* (Neb.), 50 N. W. Rep. 1042; *Harrison Mach. Works v. Templeton* (Tex.), 18 S. W. Rep. 601; *Flagler v. Newcombe*, 13 N. Y. S. 299; *Nichols v. Burch* (Ind.), 27 N. E. Rep. 737; *McShane v. Howard Bank*, 73 Md. 135; *Crem v. Fleming*, 123 Ind. 438; *Bank of Monroe v. Gifford*, 79 Iowa 300; *Logan v. Mitchell*, 67 Mo. 524.

1. In *Pacific Nat. Bank v. Mixer*, 124 U. S. 721, it was held that no attachment can issue from a circuit court of the *United States*, in an action against a national bank before final judgment in the cause; and if such an attachment is made on *mesne* process and is then dissolved by means of a bond with sureties conditioned to pay to plaintiff the judgment which he may recover, given in accordance with the provisions of the law of the state

are not liable where the attachment is subsequently dissolved;¹ and they are also not liable where the amount of the claim is increased after the bond is given,² or if a new defendant is brought into the suit.³

The surety on an attachment bond is not liable as a trespasser for a seizure of property attached by the sheriff, even if the bond is void.⁴

A surety on a release bond in an attachment proceeding is

in which the action is brought, the bond is void, and the sureties are under no liability to plaintiff.

In *Homan v. Brinckerhoff*, 1 Den. (N. Y.) 184, a constable, upon an attachment, which was void, for the reason that no sufficient bond had been given, seized property, which was claimed by a stranger, who procured the same to be given up upon executing the bond required in such case. *Held*, that the plaintiff, being a trespasser in taking the property, could not maintain an action on such bond. See also *Coleman v. Bean*, 32 How. Pr. (N. Y.) 370; *Cadwell v. Colgate*, 7 Barb. (N. Y.) 253.

1. In *Fernau v. Butcher*, 113 Pa. St. 292, A issued an attachment against B under the Act of March 17, 1869, P. L. 9. B gave bond with sureties, as provided for by section 3 of said act. On application to the court by B, after hearing, the attachment was dissolved. B, having been personally served, A prosecuted his claim to judgment. An execution having been issued and returned, "*nulla bona*," A brought an action of debt on the bond. *Held*, that it would not lie, for when the attachment was dissolved the bond fell with it.

2. In *Prince v. Clark*, 127 Mass. 599, an action of contract was brought against the sureties on a bond to dissolve an attachment. It appeared that Barrett sued Prince for a merchandise account, and Prince sued Barrett in an action of contract and attached Barrett's goods, and the bond in suit was given to dissolve the attachment. By mistake Prince was defaulted and judgment was entered against him. Subsequently he was allowed to amend the declaration in his action against Barrett, by adding the amount paid by him on the judgment against himself. No notice was served upon the sureties on Barrett's bond, nor did they give their consent to the amendment. Judgment was then entered against Prince. The

sureties had no knowledge of the entry of judgment nor of the amendment. The court held that the sureties were discharged by the amendment. *Warren v. Lord*, 131 Mass. 560; *Cutter v. Richardson*, 125 Mass. 72.

3. In *Richard v. Storer*, 114 Mass. 101, it was held that a surety upon a bond given to dissolve an attachment is discharged by the plaintiff's discontinuing as to one of the defendants and summoning in a new defendant, without notice to the surety, although the defendant as to whom the action was discontinued was not a party to the bond. The court, by Ames, J., said: "It would be impossible to sustain these exceptions without overruling the decision in the recent case of *Tucker v. White*, 5 Allen (Mass.) 322. In that case, as in this, the plaintiff, in the original action, of his own motion, and without notice to the surety, discontinued against one of two defendants, and upon summoning in a new joint defendant, took judgment against him and the remaining original defendant. The bond declared on is for the payment of the judgment which the plaintiffs should recover in the original action. The judgment actually rendered was against a new party, and is entirely different from any assumed, and the law has not imposed upon him any obligation to pay the amount of that judgment. It is immaterial that by the terms of the payment of the bond William S. Gibbs was the party promising to make the payment. The judgment which the bond describes is not the judgment which the plaintiffs recovered, and consequently there has been no breach of the condition of the bond. The plaintiffs, therefore, cannot maintain their action. In *Leonard v. Speidel*, 104 Mass. 356, the decision in *Tucker v. White*, 5 Allen (Mass.) 322, is affirmed." See also *Andre v. Fitzhugh*, 18 Mich. 93.

4. *McDonald v. Felt*, 49 Cal. 354.

concluded by judgment regularly rendered against his principal.¹

2. Appeal Bonds.—A surety in an appeal bond is discharged if the judgment on appeal is affirmed by a court other than that mentioned in the bond.² He is also discharged if the parties to the suit are changed,³ or if his risk is in any way increased.⁴ Where an appeal bond is conditioned merely that the principal shall prosecute the appeal, the surety is liable only in case the appeal is not prosecuted. He is not liable for the debt if the

1. *Fusz v. Trager*, 39 La. Ann. 292.

2. In *Sharp v. Bedell*, 10 Ill. 88, a bond was conditioned that the surety should pay whatever judgment might be rendered by the circuit court of Hancock county. An appeal was taken, but a change of venue was had to another county, and it was held that the surety was discharged.

In *Smith v. Huesman*, 30 Ohio St. 662, the case was heard on appeal in the common pleas instead of the district court, and it was decided that the surety was discharged.

In *Hinckley v. Kreitz*, 58 N. Y. 583, it was held that the sureties in an undertaking given on an appeal from the special to the general term of the court of common pleas, conditioned that the appellant will pay all costs and damages which may be awarded against him on said appeal, are not liable for the costs of an appeal by their principal to the court of appeals from a judgment of affirmance of the general term. See also *Myres v. Parker*, 6 Ohio St. 501.

But if the bond is conditioned generally for the payment of the judgment if affirmed on appeal, the sureties are liable to whatever court the appeal is taken, and even if there are successive appeals. *Robinson v. Plimpton*, 25 N. H. 484; *Smith v. Crouse*, 24 Barb. (N. Y.) 433. In *Jordan v. Agawam Woolen Co.*, 106 Mass. 571, a defendant in the circuit court of the *United States* gave bond, with a surety, conditioned to keep and perform the final decree in the cause and pay all sums which might therein and thereby be decreed to be paid by him. The circuit court rendered a final decree against him for damages and costs, from which he appealed to the Supreme Court of the *United States* and gave bond with a different surety to pay all costs as that court should decree to be paid to the plaintiff upon affirmance of the decree of the circuit court. The Supreme Court

affirmed that decree, with costs and interest; and, pursuant to its mandate, the circuit court decreed that its own former decree be affirmed, with costs and interest. *Held*, that this was the final decree in the cause. See also *Winston v. Rives*, 4 Stew. & P. (Ala.) 269; *Dolby v. Jones*, 2 Dev. (N. Car.) 109; *Smith v. Falconer*, 11 Hun (N. Y.) 483; *Smith v. Crouse*, 24 Barb. (N. Y.) 435; *Humerton v. Hay*, 65 N. Y. 380; *Gardner v. Barney*, 24 How. Pr. (N. Y.) 467; *Doolittle v. Dininny*, 31 N. Y. 350; *Letson v. Dodge*, 61 Barb. (N. Y.) 125; *Tibbles v. O'Connor*, 28 Barb. (N. Y.) 538; *Traver v. Nichols*, 7 Wend. (N. Y.) 434; *Pearl v. Wellman*, 11 Ill. 352; *Nofsinger v. Hartnett*, 84 Mo. 549; *Harrison v. Bank of Kentucky*, 3 J. J. Marsh. (Ky.) 375; *Gove v. Lawrence*, 6 Lans. (N. Y.) 89; *Norwood v. Cobb*, 37 Tex. 141; *Seacord v. Morgan*, 17 How. Pr. (N. Y.) 394; *Butterworth v. Brown*, 7 Yerg. (Tenn.) 467; *Morrow v. Mason*, 7 J. J. Marsh. (Ky.) 370; *Brahan v. Johnson*, 1 Stew. (Ala.) 189; *Sanders v. Rovers*, 3 Stew. (Ala.) 109; *Fisse v. Einstein*, 5 Mo. App. 78; *Murray v. Winham*, 3 Tenn. Ch. 336; *Culver v. Leovy*, 27 La. Ann. 58; *Trent v. Rhomberg*, 66 Tex. 249; *Powers v. Chabot* (Cal.), 28 Pac. Rep. 1070; *Sullivan v. Skagit Co.*, 28 Pac. Rep. 1039; 2 Wash. 681; *Chester v. Broderick* (N. Y.), 30 N. E. Rep. 507; *Freeman v. Hill* (Kan.), 25 Pac. Rep. 870.

3. *Thomas v. Cole*, 10 Heisk. (Tenn.) 411; *Irwin v. Sanders*, 5 Yerg. (Tenn.) 287. But if the appeal is affirmed as to one of the defendants and not as to the others, the surety is liable. *Alber v. Froehlich*, 39 Ohio St. 245; *Ives v. Hulce*, 17 Ill. App. 35; *Seacord v. Morgan*, 3 Keyes (N. Y.) 636. The surety is not discharged by the death of the principal and substitution of the principal's administrator. *Piercy v. Piercy*, 1 Ired. Eq. (N. Car.) 214.

4. *Horner v. Lyman*, 4 Keyes (N. Y.) 237; *White v. Prigmore*, 29 Ark. 208.

judgment is affirmed on the appeal.¹ A surety on an appeal bond is released where the principal is discharged in bankruptcy, and no final judgment is rendered against the principal.² Where the principal and creditor consent to the affirmance of the judgment on appeal, it has been held that the surety is discharged.³

3. Injunction Bonds.—A surety in an injunction bond is entitled to have his bond strictly construed in his favor.⁴ Thus where a judgment was stated in the bond to have been recovered in a certain term, when in fact it was recovered in another term of the same year, the surety is discharged.⁵

An injunction bond cannot be affected by a law passed subsequent to its execution.⁶ Suit cannot be maintained upon such a bond until the final termination of the suit in which the injunction was issued, because until the suit is disposed of it cannot be known that the injunction was wrongfully issued.⁷

1. *Hawkins v. Thornton*, 1 Yerg. (Tenn.) 146; *Albertson v. M'Gee*, 7 Yerg. (Tenn.) 106.

2. *Odell v. Wooten*, 38 Ga. 224; *Martin v. Kilbourn*, 12 Heisk. (Tenn.) 331.

3. *Johnson v. Flint*, 34 Ala. 673; but see *contra Ammons v. Whitehead*, 31 Miss. 99; *Chase v. Beraud*, 29 Cal. 138.

4. *Hall v. Williamson*, 9 Ohio St. 17; *Ovington v. Smith*, 78 Ill. 250; *Morgan Blackiston*, 5 Har. & J. (Md.) 61; *Langdon v. Gray*, 22 Hun (N. Y.) 511; *Cummings v. Mugge*, 94 Ill. 186; *Ashby v. Tureman*, 3 Litt. (Ky.) 6; *Lewis v. Leahey*, 14 Mo. App. 564; *Carter v. Mulrein*, 82 Cal. 167.

5. *Morgan v. Blackiston*, 5 Har. & J. (Md.) 61.

6. *Mix v. Vail*, 86 Ill. 40.

7. *Thompson v. McNair*, 64 N. Car. 448; *Dowling v. Polack*, 18 Cal. 625; *Goodbar v. Dunn*, 61 Miss. 624; *Penny v. Holberg*, 53 Miss. 567; *Bemis v. Gannett*, 8 Neb. 236; *Loomis v. Brown*, 16 Barb. (N. Y.) 325.

What constitutes the final termination of a suit for an injunction was discussed in *Large v. Steer*, 121 Pa. St. 30. In that case it was held that a decree made upon an agreement of the parties to a bill for an injunction, that the bill be dismissed without prejudice to the right of either party to proceed at law or otherwise is not such a final determination, as will fix the liability of the sureties upon the bond. The court, by Paxson, C. J., said: "Was this agreement of counsel dismissing the bill, such a final determination of the cause as fixed the liability of the sureties on the injunction bond? The question is a novel one. We have not been referred

to any *Pennsylvania* case having any bearing upon it. I see no difficulty, however, in disposing of it upon principle. The sureties in an injunction bond assume certain obligations. At the same time they have rights which must be respected, and of which they cannot be deprived without their consent. They are entitled to have the case against their principal tried according to the forms of law, and a final decree or judgment entered against him in court. Their liability consists in satisfying any judgment their principal might be condemned to pay, until there is such a final determination of the equity suit, as shows that the injunction was wrongfully issued. I do not see how an action would lie against the principal in the bond, much less against his sureties. This view is sustained by *Hilliard on Injunctions* 84; *Bank of Monroe v. Gifford*, 65 Iowa 648; *Penny v. Holberg*, 53 Miss. 567; *Bemis v. Gannett*, 8 Neb. 236. The reason of this is, that it may appear upon final hearing that the plaintiff was entitled to his injunction, although it may have been dissolved pending the bill."

In *Boynton v. Robb*, 22 Ill. 525, it was held that if there is a corrupt arrangement between the creditor and principal by which the injunction bill is dismissed, the sureties are discharged. But in *Boynton v. Phelps*, 52 Ill. 210, it was held that a mere agreement to dismiss the bill where there was no fraudulent intent, would not discharge the surety where the bill was dismissed in pursuance of the agreement.

In *Baker v. Frellsen*, 32 La. Ann. 822, it was held that the surety on an

The undertaking of the surety in an injunction bond where there are several complainants, is in law, for the principals, severally as well as jointly. That is, the surety is bound in effect, that each and all of the principals shall perform and fulfill whatever decree may be rendered in the cause against all, or either of them.¹

4. Replevin Bonds.—The verdict and judgment in the replevin suit are conclusive evidence against the sureties on the replevin bond.² If, however, the terms of the bond are varied, as, for

injunction bond was discharged by an agreement entered into without his consent, by plaintiff and defendant, to have the equity suit tried and determined in an irregular way, at chambers and after the term of the court had ended. The court, by Bermudez, C. J., said: "The consent of the parties to the trial of the matter in which Ludeling, the surety, was sought to be made liable in the manner in which it was tried, without his assent, and the appellant having selected and adopted such course, we think operates as a discharge of the liability of the surety on the injunction bond."

Where a complainant praying an injunction against collection of his note, secured by a deed of trust, has been compelled by the judge or master to give a bond conditioned for payment of the debt in the event he fails to maintain his suit, the liability of the surety becomes fixed upon the dissolution of the injunction, and a recovery may then be had against him in an action on the bond. *Billings v. Sprague*, 49 Ill. 509.

1. *Kelly v. Gordon*, 3 Head (Tenn.) 683.

2. In *Washington Ice Co. v. Webster*, 125 U. S. 426, the plaintiff in a replevin suit for ice gave a bond, with sureties, to the defendant, in the penalty of \$30,000, conditioned to prosecute the suit to final judgment, and pay such damages and costs as the defendant should recover against them, "and also return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment." The ice was stated in the bond to be of the value of \$15,000. In the suit there was a judgment for a return of the ice to the defendant, and for an amount of damages ascertained by the jury by allowing interest from the time the ice was taken, on a sum found to have been its value where and when it was taken, and also allowing the expenses of the defendant in preparing to remove the ice. The damages were paid but the

ice was not returned. In a suit on the bond, held that the finding of the jury in the replevin suit as to the value of the ice where and when it was taken, was competent and conclusive evidence, as against the obligors, of such value.

In *Tuck v. Moses*, 58 Me. 461, the market value of the replevied property had increased from the time it was replevied to the time of the judgment for a return, and it was held, in a suit on the bond, that the defendants were liable for the value of the property at the date of the judgment for a return, with interest at six per cent. from the date of that judgment to the date of the judgment on the bond.

In *Leighton v. Brown*, 98 Mass. 515, which was a suit on a replevin bond, the value of the property, at the time of the demand for its return, was greater than the penal sum of the bond. The court, by Foster, J., said: "The appraisal made in the replevin suit is conclusive against the party by whom it was made. *Parker v. Simonds*, 8 Met. (Mass.) 205. But it is not admissible in evidence against the present plaintiff, who, as defendant in the replevin action, had no agency in procuring this valuation. *Kafer v. Harlow*, 5 Allen (Mass.) 348. In the present case, the value was greater at the date of the final judgment ordering a return than at the date of the appraisal. The value at the date of a demand for the restoration of the property in compliance with the order of return is the measure of damages for which the plaintiff contends, and to which, in the opinion of the court, he is entitled. *Swift v. Barnes*, 16 Pick. (Mass.) 194. For other cases where sureties have been concluded by the judgment in the replevin suit, see *Green v. Kindy*, 43 Mich. 279; *Barry v. Frayser*, 10 Heisk. (Tenn.) 206; *Dorrington v. Meyer*, 8 Neb. 211; *Bradford v. Frederick*, 101 Pa. St. 445; *Armstrong v. Farmers' Bank* (Ind.), 30 N. E. Rep. 695.

instance, by a reference to arbitrators instead of a trial in court,¹ or by the introduction of new parties,² the surety is discharged.³

5. Indemnity Bonds.—The breach of an indemnity bond arises when the injured party recovers judgment against the officers to whom the bond was given. Although an officer is not entitled to indemnity if he knows that a seizure will be a trespass, still if he takes a bond and makes the levy, the sureties in the bond will be liable.⁴

XVI. BONDS OF PERSONS ACTING UNDER JUDICIAL CONTROL—1. Executors and Administrators—*a.* LIABILITY OF PRINCIPAL MUST BE ESTABLISHED BY SUIT.—Before a surety can be held liable on the bond of an executor or administrator, there must be a judicial ascertainment of the default of the principal. There must be a judgment against the principal, or a decree ordering payment, and on which process to collect can issue.⁵ In some cases, how-

1. In *Archer v. Hale*, 4 Bing. 464; 15 E. C. L. 42, the plaintiff and defendant in a replevin suit referred the cause to an arbitrator, and agreed, without the privity of the sureties, that the replevin bond should stand as a security for the performance of the reward. *Held*, that the sureties were discharged. See also *Moore v. Bowmaker*, 3 Price 214; *Pirkins v. Rudolph*, 36 Ill. 306.

2. *Smith v. Roby*, 6 Heisk. (Tenn.) 546. But see *Hanna v. International Petroleum Co.*, 23 Ohio St. 622.

3. See *REPLEVIN*, vol. 20, p. 1041.

4. In *Herring v. Hoppock*, 15 N. Y. 413, the court, by Paige, J., said: "The case shows that the sheriff refused to sell the safe until he was indemnified. The indemnification, therefore, must be regarded as a ratification of the levy, and as the cause of the sale. The indemnitors were the *causa causans*, inducing and requesting the sheriff to do the wrongful act. Their indemnity naturally produced the act of the wrongful sale, and must be regarded as the principal if not the sole cause of it. All persons who direct or request another to commit a trespass are liable as co-trespassers. The bonds of indemnity, in this case, were a virtual request to the sheriff to sell the safe, and the act of the sale was, in effect, done under the direction and with the advice and concurrence of the obligors in the bonds, and they are therefore equally liable with the sheriff to the plaintiff as trespasser."

In some cases it has been held that where the surety does not actually participate in the wrongful proceeding, he cannot be held liable for the officer's

tort. *McDonald v. Fett*, 49 Cal. 354; *Dawson v. Baum*, 3 Wash. Ter. 464.

5. *Gilbreath v. Manning*, 24 Ala. 418; *Fretwell v. McLemore*, 52 Ala. 124; *Irwin Co. v. Sloan*, 7 Ga. 31; *Crouch v. Edwards*, 52 Ark. 499; *Chapron v. Chapron*, 41 La. Ann. 486; *Catlett v. Carter*, 2 Munf. (Va.) 24; *Haight v. Brisbin*, 100 N. Y. 219; *Ramsey v. Cole*, 84 Ga. 147; *State v. Pare*, 28 Mo. App. 512; *Com. v. Evans*, 1 Watts (Pa.) 437; *Lining v. Giles*, 3 Brev. (S. Car.) 530.

In *Alexander v. Bryan*, 110 U. S. 414, it was held that a decree of a probate court, in *Alabama*, in 1864, finding that a distributee's share was so much, expressed in money, and had been invested in Confederate bonds, and ordering the executor to pay the amount in such bonds, was not a decree on which the executor could be sued to pay in anything but the bonds, or one on which a surety on the bond of the executor could be sued to pay in lawful money of the *United States*, and a failure of the executor to comply with such decree did not fix the liability of the surety.

In *Com. v. Fretz*, 4 Pa. St. 344, it was held that where one of two administrators absconded after a settlement of accounts, and the court, on petition of a distributee, cited the administrator residing in the county and the sureties to appear, and discharged the administrator from the citation, and confirmed the report of auditors charging both administrators with a debt not included in the inventory, an action cannot be sustained on the bond by one of the distributees against the

ever, it has been held under special circumstances that suit may be brought against the sureties without any previous suit to establish a *devastavit*. Thus where an executor or administrator has become insolvent,¹ or has left the jurisdiction,² or is dead,³ the sureties may be sued at once.

b. SURETY CONCLUDED BY SETTLEMENT AGAINST PRINCIPAL.—The decree of a probate court finding assets in the hands of an executor or administrator, and awarding such assets to distributees cannot be attacked collaterally.⁴ Where, however, the

surety alone. In such case, the administrator who may be served must be charged as with a *devastavit* before the surety is liable, for he is only liable contingently, and the law recognizes the relation of principal and surety in this case.

The Code of *West Virginia*, provides that, "where an execution on a judgment or decree, against a personal representative, is returned without being satisfied, there may be forthwith brought and prosecuted an action against the obligor in any bond given by such personal representative for the faithful discharge of his duties." In *State v. Hudkins*, 34 W. Va. 370, it was held that proof of the issue of the execution, and of its return unsatisfied, is essential to a recovery on the bond.

In *Wilbur v. Hutto*, 25 S. Car. 246, it was held that creditors have no cause of action against the sureties on an administrator's bond until after a *devastavit* established against the administrator. Such *devastavit* is not conclusively established by judgment by default against the administrator, and a return of *nulla bona*; and to render the sureties liable there must be a second action, and judgment *de bonis propriis*.

In *Com. v. Stub*, 11 Pa. St. 150, it was held that the liability of a surety in an administrator's bond being contingent, suit cannot be brought against a surety by a party in interest, whether creditor, legatee, or distributee, without proceeding in the first place against the administrator or executor, and fixing him personally for the debt; and that the settlement of a general account by an executor, disclosing a general balance in his hands, does not so fix the executor as to enable a distributee to maintain an action on the official bond.

See also *Paine v. Moffit*, 11 Pick. (Mass.) 496; *Houston v. Dougherty*, 4 Humph. (Tenn.) 505.

1. *Kaufman v. Wolf*, 77 Tex. 250.

2. *Giles v. Brown*, 60 Ga. 658. In *Com. v. Wenrick*, 8 Watts (Pa.) 159, the court, by Rodgers, J., said: "Wherever the executor absconds, conceals himself or resides without the jurisdiction of the court, suit will lie on the bond against the surety without recourse, in the first instance, to the principal. A different rule would greatly embarrass legatees and creditors; and while we protect sureties, we must take care not to throw unnecessary obstructions in the way of the recovery of debts and legacies. We must avoid the danger of a fraudulent combination between the principal surety, as the principal might be induced to withdraw from the jurisdiction of the court, or to conceal himself, for the purpose of preventing a suit against the surety. It was never supposed that a suit before a foreign jurisdiction was a prerequisite to a suit on the administration bond. Still less was it supposed that no suit could be brought when it became impracticable, in consequence of the conduct of the principal. These cases form exceptions to the general rule, which was established for the protection of the surety, where it can be done consistently with the preservation of the rights of legatees and creditors."

3. *People v. Admire*, 39 Ill. 251; *Spottswood v. Dandridge*, 4 Munf. (Va.) 289.

4. In *Stovall v. Banks*, 10 Wall. (U. S.) 588, the court, by Strong, J., said: "The decree settled that the administrator of the intestate, Alfred Eubanks, held in his hands sums of money belonging to the equitable plaintiffs in this suit, as distributees of the intestate's estate, which he had been ordered to pay over by a court of competent jurisdiction, and the record established his failure to obey the order. Thereby a breach of his administration bond was conclusively shown."

principal is not properly before the court, and the court has consequently no jurisdiction, a settlement or decree against the principal is not conclusive upon the surety.¹

c. SURETY NOT LIABLE ON ACCOUNT OF REAL ESTATE.—An executor or administrator has in general no control over the real estate of a decedent. His sureties, therefore, are not liable for the misappropriation of rents or of the proceeds of sale of real estate. Even if such funds have been erroneously introduced into the administrator's or executor's account, the surety is not liable for their proper distribution.² If, however, the will con-

Certainly the administrator was concluded. And the sureties in the bond are bound to the full extent to which their principal is bound. A principal in a bond may be liable beyond the stipulations of the instrument, independently of them, but so far as his liability is in consequence of the bond, and by force of its terms, his surety is bound with him. There may be special defenses for a surety arising out of circumstances not existing in this case, but in their absence, whatever concluded his principal as an obligor concludes him. He cannot attack collaterally a decree made against an administrator for whose fidelity to his trust he has bound himself." See also *Harrison v. Clark*, 87 N. Y. 572; *Gerould v. Wilson*, 81 N. Y. 573; *McClellan v. Downey*, 63 Cal. 520; *Tunnell v. Burton*, 4 Del. Ch. 382.

1. In *State v. Drake*, 52 Ark. 350, it was held that where a settlement of a deceased administrator's accounts, which is relied upon as a basis of the breach of his bond, is made before the appointment of his administrator, neither the principal nor his administrator is legally before the probate court at the time of the settlement, and the judgment of the court is not binding upon the sureties in the bond.

In *Loop v. Northup*, 59 Hun (N. Y.) 75, in an action against the sureties upon an administrator's bond, it appeared that the preliminary judgment against the administrator, relied on to support the action, was rendered on his failure to appear in obedience to an order of the surrogate requiring him to show cause why he should not be punished for his failure to appear in response to a citation issued on a petition for an accounting. The court held that there being no accounting before the surrogate, and no evidence of any sum due to the estate by the administrator, and the judgment being in

the nature of a punishment for the contempt of the administrator for his non-appearance, the sureties on his official bond were not liable therefor.

In *Nanz v. Oakley*, 60 Hun (N. Y.) 431, it was held that an action on an administrator's bond founded on a decree of a surrogate's court against the administrator cannot be sustained by the mere production of the decree; the plaintiff must go further, and show by the production of the record of the proceedings on which the decree was founded, that the surrogate had acquired jurisdiction of the parties or of the subject-matter.

In *Robinson v. Hodge*, 117 Mass. 222, it was held that sureties on the bond of an administrator are not liable to a creditor of the estate, for the amount of a judgment obtained by him in an action against the administrator commenced after the claim was barred by the Statute of Limitations, in which the defendant appeared and pleaded the statute and was afterwards defaulted. See also *Dowes v. Shed*, 15 Mass. 6.

2. In *Young v. People*, 35 Ill. App. 363, under an order authorizing the sale of personal property belonging to the estate of his intestate, an administrator sold a frame building, which was part of the realty. The court held that, as he had no power to make such sale, the sureties on his bond were not liable for the proceeds.

In *Com. v. Gilson*, 8 Watts (Pa.) 214, the court said: "It is a fatal objection to this action that its aim is to make the sureties, in an ordinary administration bond, liable for the proceeds of the intestate's land; a thing that cannot be done. They are irresponsible by the very words of the condition, as was held in *Reed v. Com.*, 11 S. & R. (Pa.) 441, for anything but his goods, chattels and credits, which were such at the time of his death; and they were consequently held to be irresponsible for a confession of judg-

verts the real estate into personalty by a binding direction to sell, the sureties of the executor are liable for the proper application of the proceeds of the sale of the real estate.¹

d. SUCCESSIVE BONDS.—Where an executor or administrator has assets of the estate in his hands, and gives a second bond, and subsequently converts such assets to his own use, the sureties on the second bond are liable.² It has been held also that the sureties on the old bond are likewise liable.³

e. LIABILITIES OF SURETIES ON JOINT BOND OF TWO OR MORE EXECUTORS.—Where one of two executors or administrators leaves the jurisdiction, dies, or ceases to act, the sureties on the bond are liable for the subsequent acts of the other

ment on which the real estate was sold, and the proceeds of it misapplied. The distinction betwixt these and the real assets is recognized, even by a statute which requires a separate bond for the latter, the administration of which, to avoid the uncertainty which springs from confusion, ought to appear also by a separate account." See also to the same effect, *Com. v. Hilgert*, 55 Pa. St. 236; *In re Givens*, 34 N. J. Eq. 191; *Flickinger v. Saum*, 40 Ohio St. 591; *Smith v. Bland*, 7 B. Mon. (Ky.) 21.

But in *Lindley v. State*, 115 Ind. 502, in an action by an administrator on the bond of his predecessor, it was held that a complaint is sufficient which shows that the former administrator received money from the sale of the real estate of his intestate, for which he refused to account, and that he still had the money in his hands. For other cases where sureties have been held liable on account of real estate, see *Reherd v. Long*, 77 Va. 839; *Dix v. Morris*, 66 Mo. 514; *Hood v. Hood*, 85 N. Y. 561; *Mann v. Everts*, 64 Wis. 372.

1. In *Hooper v. Hooper*, 29 W. Va. 276, it was held that if a *West Virginia* executor, who is directed by the will to sell all the personalty, wherever situated, as well as land in *Illinois*, sells and brings the proceeds into *West Virginia* and wastes them, the sureties on his official bond are liable.

2. *State v. Barrett*, 121 Ind. 92; *Owen v. State*, 25 Ind. 371. In *Foster v. Wise*, 46 Ohio St. 20, an executor gave a new bond on the motion of the sureties on his old bond to be relieved. Afterwards the executor was removed, and an administrator substituted. Prior to giving the new bond, the executor had misappropriated assets. *Held*,

that the sureties on the new bond were liable for such misappropriation.

3. In *Dugger v. Wright*, 51 Ark. 232, it was held that sureties on an executor's bond, who were such at the time of a conversion by him, and are released by the probate court from future liability, other sureties being accepted in lieu of them, are equally liable with such other sureties for the conversion, and the right of contribution exists between them, the conversion being a continuing breach.

In *Pepper v. Donnelly*, 87 Ky. 259, it was held that the giving of a new bond by order of court made on motion of the surety in the old bond does not release him from liability for acts theretofore done by the principal, notwithstanding the new bond contains a covenant indemnifying the old surety from all liability.

In *Reno v. Tyson*, 24 Ind. 56, it was held that the sureties on the first bond of an executor liable for the proceeds of land sold for the payment of debts, are bound, although a second bond has been given to secure such money.

In *Schofield v. Hustis*, 9 Hun (N. Y.) 157, a peremptory order was made upon an executor to file a bond. The court held that the sureties on this bond were liable, not only for all sums received by the executor after the giving of the bond, but also for all sums misappropriated by him before that time.

In *Beard v. Roth*, 35 Fed. Rep. 397, it was held that where the surety on an administrator's bond is discharged, and a new bond is given, the discharged surety is not liable for money subsequently found due from the administrator, unless it is shown that the breach of the bond occurred before the discharge; and such breach will not be presumed upon proof that the admin-

executor or administrator.¹ On such a bond one of the principals may sue the surety for a loss occasioned by the misconduct of the other principal.²

f. SURETIES LIABLE ONLY FOR ADMINISTRATOR'S OFFICIAL ACTS.—The sureties of an executor or administrator are only liable for his misconduct in the performance of his duties as executor or administrator. If he acts as an agent for the heirs, or as a trustee, and a loss occurs, his sureties will not be liable.³

g. GENERAL LIABILITY OF SURETIES OF EXECUTORS AND ADMINISTRATORS.—The liability of the sureties on the bond of an executor or an administrator is in general co-extensive with

istrator received funds before the discharge, where it also appears that he afterwards paid out a much larger sum.

1. *State v. Rucker*, 59 Mo. 17; *Dobyns v. McGovern*, 15 Mo. 662.

In *Veach v. Rice*, 131 U. S. 293, it was held that the judgment of a court allowing the resignation of one of two administrators upon proceedings had pursuant to statute, and discharging him after he had accounted to his co-administrator, and the latter had given a new bond, operated to exonerate the sureties upon the joint bond of both from liability for a *devastavit* committed after such order of discharge.

2. In *Nanz v. Oakley*, 120 N. Y. 84, it was held that the fact that the sole heir is appointed one of the administrators of the estate, and executes a joint and several bond with his co-administrator for the faithful discharge of their duties, does not prevent him from recovering from the sureties on the bond for a *devastavit* committed by his co-administrator. The execution of the bond as principal does not render the heir liable as surety for the default of his co-administrator. See also *Kirby v. Turner*, Hopk. (N. Y.) 309; *State v. Wyant*, 67 Ind. 25.

In *Sperb v. McCoun*, 110 N. Y. 605, it was held that an administrator, who has joined with his co-administrator in giving a bond for the faithful discharge of their duty, may maintain an action on the bond in his representative capacity to recover moneys of the estate misappropriated by his co-administrator, and duly decreed to be paid by him.

3. *Shields v. Smith*, 8 Bush (Ky.) 601; *Reeves v. Steele*, 2 Head (Tenn.) 647. In *Cluff v. Day*, 55 N. Y. Super. Ct. 460, it was held that the sureties on an executor's bond are not liable as such for his acts, after his accounts as

executor are settled and he has been appointed testamentary trustee.

In *State v. Anthony*, 30 Mo. App. 638, it was held that an order of the probate court, made upon an administrator's final settlement, directing him to hold and appropriate the balance remaining in his hands for the maintenance of the intestate's children, and not requiring him to give any bond as trustee, is erroneous, but not void. His sureties cannot be held liable for his default in discharging the trust unlawfully imposed.

In *Hebert v. Hebert*, 22 La. Ann. 308, the persons entitled to an estate agreed that the estate should be sold, and notes taken for it "indorsed to the satisfaction of the administrator." The administrator sold the estate, but failed to take responsible indorsers. The court held that the sureties of the administrator were not liable, as it was not part of his official duty to take the notes.

In *Roper v. Burton*, 107 N. Car. 526, the slaves of deceased were not needed in the administration to pay debts, and, on petition of the widow, one-half of them were set apart to her, and the others to the distributees. The latter were hired out for two years by the administrator for the distributees. Thereafter some of the next of kin filed a bill for the sale of the half of the slaves allotted to the distributees, and for partition of the proceeds, and the administrator was appointed to make the sale for the distributees. *Held*, sufficient evidence to support a finding that the sale was not made by him as administrator, but as commissioner, and hence his sureties were not liable for his failure to account for the proceeds, though he took notes of the purchasers to himself, as administrator. See also, on this subject, *Carter v. Young*, 9 Lea (Tenn.) 210; *Bennett*

that of the principal. They are liable for any misappropriation of the funds properly in his hands in his official capacity,¹ and for any profits which he may make out of any such funds.² If the executor or administrator is solvent, his sureties are liable for a debt due by him personally to the estate.³

v. Graham, 71 Ga. 211; *Gregg v. Currier*, 36 N. H. 200; *Sims v. Lively*, 14 B. Mon. (Ky.) 348.

1. In *State v. Brown*, 80 Ind. 425, the sureties of an administrator were held liable to the holders of judgments against the decedent's estate, where the administrator failed to pay such judgments.

In *State v. Wilmer*, 65 Md. 178, a testator by his will desired that his business should be continued by his nephew and a certain other person for a period of three years, and that his money invested in the business should remain in it "for their use without interest" for the same time; the capital then to be turned into the estate and settled according to the will. At the end of that period, the partners had lost the entire amount of the capital invested, but the executors of the will refused to consider the amount so lost a debt owing to the estate, and therefore also to subject the partners to its repayment, although one of these was at the time and for a considerable period afterwards able to pay back the capital. *Held*, that the bond of the executors was liable to suit for their non-collection and failure to account therefor.

In *Power v. Bermester* (Supreme Ct.), 12 N. Y. Supp. 25, after an administratrix of a supposed intestate had been appointed and given bond, and had received money as such administratrix, a will of the deceased was found and letters testamentary were issued to the executor named therein. *Held*, that on the refusal of the administratrix to pay over to the executor such money, the sureties on her bond were liable therefor, and the order of the surrogate fixing the amount of her defalcation was binding on them.

In *Forbes v. McHugh*, 152 Mass. 412; 25 N. E. Rep. 622, it was held that where an executor fails to file an inventory and his accounts, as required by his bond, an action on the bond can be maintained on behalf of a legatee though he has sustained no injury from the failure to file the inventory and accounts other than the loss of the information they would have given him.

In *Wilson v. Pearson*, 102 N. Car.

290, it was held that the failure of an administrator faithfully to administer assets constitutes a breach of his bond which can be cured only by actual payment; the cause of action on the bond is not merged in a judgment obtained against the administrator for a debt due the plaintiff.

See also, in general, *Eshleman v. Bolenius* (Pa. 1891), 22 Atl. Rep. 758; *State v. Smith*, 64 Md. 101; *Todd v. Sparks*, 10 La. Ann. 668; *Battell v. Richards* (Tex. 1891), 16 S. W. Rep. 313; *Cluff v. Day*, 124 N. Y. 195; *Pyke v. Searcy*, 4 Port. (Ala.) 52; *Hood v. Hayward*, 124 N. Y. 1; *Williams v. Stoutz* (Ala. 1891), 9 So. Rep. 155; *Power v. Speckman*, 126 N. Y. 354; *Norman v. Buckner*, 135 U. S. 500; *State v. Nolan*, 99 Mo. 569; *Ramsey v. Cole*, 84 Ga. 147; *State v. Barrett*, 121 Ind. 92; *Brown v. Davenport*, 76 Ga. 799; *Webb v. Gross*, 79 Me. 224; *State v. Grigsby*, 92 Mo. 419; *In re Connolly*, 73 Cal. 423; *Johnson v. Fuquay*, 1 Dana (Ky.) 514; *Goltra v. People*, 53 Ill. 224; *Com. v. Rogers*, 53 Ill. 224; *Com. v. Rogers*, 53 Pa. St. 470; *Small v. Com.*, 8 Pa. St. 101; *State v. Purdy*, 67 Mo. 89; *Fuller v. Connelly*, 142 Mass. 227; *Baldwin v. Dearborn*, 21 Tex. 446; *Goode v. Buford*, 14 La. Ann. 102; *Sherwood v. Hill*, 25 Mo. 391; *McKenna's Appeal*, 27 Pa. St. 237; *Harker v. Irick*, 10 N. J. Eq. 269; *Taylor v. Mygatt*, 26 Conn. 184; *Gottsberger v. Taylor*, 19 N. Y. 150; *Morrison v. Lovell*, 81 Va. 519; *State v. Drake*, 52 Ark. 350; *Donohue v. Roberts*, 1 Fed. Rep. 449; *Baines v. Barnes*, 64 Ala. 375; *Forrester v. State*, 46 Md. 154; *State v. Howarth*, 48 Conn. 207; *State v. James*, 82 Mo. 509; *Glass v. Howell*, 2 Lea (Tenn.) 50; *Polk v. Wisener*, 2 Humph. (Tenn.) 520; *Moss v. Fowlkes*, 14 Lea (Tenn.) 382; *Wood v. Washburn*, 2 Pick. (Mass.) 24; *Bean v. Parker*, 17 Mass. 591; *Scott v. State*, 2 Md. 284; *State v. Modrel*, 69 Mo. 151; *Stewart v. Moody*, 4 Watts (Pa.) 169; *Whitworth v. Oliver*, 39 Ala. 286; *Hobbs v. Middleton*, 1 J. J. Marsh. (Ky.) 176.

2. *Watson v. Whitten*, 3 Rich. (S. Car.) 224.

3. In *Piper's Estate*, 15 Pa. St. 537,

2. Guardians.—Sureties on the bond of a guardian are liable for the misappropriation of the funds of the ward's estate, or for any negligence or misconduct in the management of the estate by which the ward is injured.¹ The sureties are liable for profits which the guardian may have made out of the funds in his hands, or

the court, by Chambers, J., said: "The evidence is clear that the administrator had in his possession, within a few days after he administered, moneys belonging to himself sufficient to pay his bond to the estate which he had undertaken faithfully to administer. That he appropriated the money so received to any other debt then existing, is not established with any degree of certainty. Having money in his hands sufficient to pay the debt, ought he not to be chargeable with it, to the liability of his sureties, having, with their aid, elected to make himself collector as well as a debtor? Besides the obligation to pay, arising from his bond to the decedent, by taking upon himself the administration, he superadded the obligation arising out of his assumed trust. As he was bound to use vigilance and diligence in pursuing and collecting every claim of the estate against any other person, was he to be absolved from the obligation of applying the means he had to the discharge of his indebtedness to the estate, of which he was the only trustee, for the benefit of the parties interested. . . . A debtor is not allowed to get an advantage by administering on the estate of the decedent, to excuse himself from accounting fully and satisfactorily for all the means he had in his power of discharging his own indebtedness to that estate; and the knowledge that he is so bound to account should make sureties cautious how they are instrumental in having committed the administration trust to such debtor, unless they have full confidence in his fidelity, as well as his vigilance and attention." See also *Jacobs v. Morrow*, 21 Neb. 233.

If, however, the executor is insolvent, his sureties are not liable. In *Baucus v. Barr*, 45 Hun (N. Y.) 582, an executor was insolvent at the time of the testator's death and continued so. He owed the testator and was charged with the amount in his account. *Held*, that the sureties on his official bond were not liable for this amount.

In *State v. Gregory*, 119 Ind. 503, it was held that the sureties on an administrator's bond are not liable for the

debt of the administrator to the estate which he has failed to charge himself with and account for, where the administrator was insolvent at the time of his appointment, except in the amount which could have been saved to the estate, after his appointment, by the exercise of due diligence.

In *Lyon v. Osgood*, 58 Vt. 707, an executor indebted to the estate of his testator upon a note, included the note in his inventory and his account as available assets and distribution was decreed on that basis among the legatees, of whom he was one. His property was insufficient to pay the note, and he subsequently used or lost it all, having paid but a small part of the legacies. *Held*, that the surety on his bond, who had been induced to sign it by his false representations as to the condition of the estate, was not liable for the failure of the executor to pay his indebtedness to the estate, beyond his actual means or ability to pay, at the time the surety assumed responsibility, or afterward, during the settlement of the estate.

1. In *Clement v. Hughes* (Ky. 1891), 16 S. W. Rep. 358, a guardian at the sale by an administrator of his father's effects, purchased certain property for himself, giving a note therefor, signed not only by himself, but by four other parties. After he became guardian of his children he took up this note by receipting to the administrator of his father's estate for that much as received on account of his wards. *Held*, that it was properly charged against the sureties in an action on the guardian's bond.

In *Gillett v. Wiley*, 126 Ill. 310, a surety upon a guardian's bond released a mortgage taken by him as indemnity against loss, upon the faith of an order discharging the guardian, which the latter had procured by a receipt fraudulently obtained by him from the ward. The ward resided with the guardian, and could readily have been seen by the surety, but was not inquired of on the subject. *Held*, that the surety was guilty of negligence and was not released from his obligation as such.

for any loss occasioned by his neglect to invest within a reasonable time. The sureties, however, are not held liable for an act of the guardian not within his official duties.¹ Suit cannot be brought against the sureties on the guardian's bond without a

In *Knox v. Kearns*, 73 Iowa 286, after the guardian had spent some of the ward's money, A became surety on an additional bond, conditioned that the guardian should "faithfully discharge the office and trust of such office according to law." *Held*, that A became liable for the amount thus spent and not subsequently turned over on the settlement of the guardian's account.

In *Fogarty v. Ream*, 100 Ill. 366, A as surety signed the official bond of B, guardian of an infant. At the time A signed the bond, B had, in fact, squandered the money which belonged to the infant, and which B's accounts apparently showed to be on hand, although no falsehood was stated in the accounts, which admitted the correct balance due from B to the estate. *Held*, that this fact could not operate to relieve A from responsibility as surety. *Fogarty v. Ream*, 100 Ill. 366.

In *State v. Bond*, 121 Ind. 187, it was held that where a guardian's account on its face shows him indebted to his wards, but he has really charged himself therein with a sum, paid him by mistake by the administrator of the estate of the wards' father, greater than the amount of the indebtedness, action cannot be maintained on the guardian's bond as for money in his hands due the wards.

In *Peele v. State*, 118 Ind. 512, it was held that where in a suit the breach relied on is the failure of the guardian to account to the ward when he became of age, and it does not appear that the guardian actually received and appropriated interest, the measure of recovery, as against the sureties, is the amount due, including simple interest, to which the court may, if it deems it proper in the particular case, add the ten per cent. penalty.

A surety who gives bonds that a guardian shall pay over according to the directions of the court, is not obliged to refund a balance found against the guardian by referees appointed by such guardian and his successor, without the knowledge of the surety. *Com. v. Simonton*, 1 Watts (Pa.) 310.

Where a sum of money has been made by execution against a guardian for a debt, for a part of which only his sureties were liable, his sureties cannot claim that the sum so made should be apportioned between the parts of the debt for which they were and were not liable. *James v. Malone*, 1 Bailey (S. Car.) 334. See *GUARDIAN AND WARD*, vol. 9, p. 136.

1. Where a guardian has no authority to sell his ward's real estate, his sureties are not liable for the proceeds of such sale. In *Blauser v. Diehl*, 90 Pa. St. 350, it was held that where the real estate of a minor is sold, under an order of the orphans' court, the original sureties of the guardian are not liable for the failure of the guardian to pay over the proceeds of the sale.

In *Com. v. Pray*, 125 Pa. St. 542, the court said: "The defendant is surety on the general bond of the guardian. The only fund that came into the guardian's hands, and as to which he is in default, was from the sale of his ward's real estate, made under an order of the orphans' court. When the order of sale was made the guardian gave a special bond, with another person as surety, conditioned for faithful application of the proceeds of sale. The defendant was asked to become surety on that bond, but he refused to do so. This suit was manifestly brought on the wrong bond." In *State v. Harbridge*, 43 Mo. App. 16, it was held that where the statutes require a guardian to give a general bond when qualifying, and to give a special bond when ordered to sell his ward's land, the sureties on his general bond are not liable for the loss of moneys accruing from such sale; nor are they made liable by the fact that the guardian takes the proceeds of the sale into his general account as guardian, and charges himself with the same in his settlement before the probate court. See also *Judge of Probate v. Toothaker*, 83 Me. 195. See also *Henderson v. Coover*, 4 Nev. 429; *Potter v. State*, 23 Ind. 607; *Warwick v. State*, 5 Ind. 350; *Withers v. Hickman*, 6 B. Mon. (Ky.) 292; *Mattoon v. Cowling*, 13 Gray (Mass.) 387; *Lanier v. Griffin*, 11 S. Car. 565; *Douglass v. Ferris*, 18 N. Y. Supp. 685.

previous accounting against the guardian to ascertain the amount due from him to his ward.¹

The surety of a guardian is liable for money received by the guardian before the bond was executed.²

A contract of suretyship entered into for a guardian, which is void at law, will not be enforced in equity.³

The continuance of the guardian in his office is a sufficient consideration for the promise of a surety upon his official bond.⁴

A surety on a guardian's bond cannot escape liability on the ground that he had signed only on condition that a specified co-surety should be procured, if he delivered the bond with nothing on its face to suggest that such a condition was imposed.⁵

3. Receivers.—Sureties on the bonds of receivers are not liable to an action upon the bond, until the receiver has failed to obey some order of the court.⁶ The liability of sureties of receivers

1. In *Perkins v. Stimmel*, 114 N. Y. 359, it was held that an action at law cannot be maintained against the sureties upon the bond of a general guardian until proceedings for an accounting have been had against the guardian, and his default established therein. See, to the same effect, *Gillespie v. See*, 72 Iowa 345.

In *Covey v. Neff*, 63 Ind. 391, under an order of court, made on motion of the surety of a deceased guardian, his administrator reported that the estate was chargeable with \$311 belonging to the ward; that the estate was insolvent, and that the deceased guardian had so mingled the ward's estate with his own that it could not be identified. It was held that an order thereupon made, that the administrator pay into court, for the benefit of the ward, said sum of \$311, was erroneous; the surety having paid no part of the amount due from his principal, had no right of action.

2. *Steele v. Reese*, 6 Yerg. (Tenn.) 263; *Merrell v. Phelps*, 34 Conn. 109; *Sayers v. Cassell*, 23 Gratt. (Va.) 525; *Bryant v. Owen*, Kelly 355; *Bellune v. Wallace*, 2 Rich. (S. Car.) 80.

3. *Gosman v. Cruger*, 69 N. Y. 87.

4. *State v. Woods*, 84 Mo. 163.

5. *Brown v. Kent Co. Probate Judge*, 42 Mich. 501; *State v. Miller*, 3 Gill. (Md.) 335.

6. In *Bank of Washington v. Creditors*, 86 N. Car. 323, a bank filed a bill for dissolution and the distribution of its property among its creditors. A receiver was appointed who gave a bond with sureties. One of the creditors subsequently applied to court for leave to make the administrator of one of the

deceased sureties a party to the action, and alleged that funds in a large amount went into the hands of the receiver and were by him delivered to the deceased surety as agent for collection, and for the indemnity of himself and his co-sureties on the bond; that no account thereof had been rendered by either, or any money paid in for distribution among the creditors, and he asked that the administrator be made a party, and process issue against him for the purpose of enforcing the liability incurred by his intestate by reason thereof. The court held that the application was properly denied.

In *State v. Gibson*, 21 Ark. 140, a receiver gave a bond with sureties conditioned that "if the said Edward N. Gibson, as such receiver, shall well and faithfully perform the trust and office of receiver of the stock and business of the partnership effects of F. A. Peterson & Co., and shall account to the said Union circuit court, according to law, then the above obligation to be void, else to remain in full force." After the suit in which the receiver was appointed was dismissed, an action was brought on the bond to recover the money and property which it was claimed the receiver had misappropriated to his own use. Upon the trial the plaintiff offered to show such misappropriation, which was excluded, and the court found in favor of defendants. It was held upon appeal that this was proper; that the receiver was not discharged from his answerability to the court, by the dismissal of the suit; but that he could not be sued upon his bond until the court had adjudicated his

can only be ascertained and enforced by a suit on the bond; it cannot be established by a mere rule or order to show cause.¹ Where, after proper proceedings and a full hearing, an order or decree is made against the receiver, such order or decree is conclusive against the sureties.²

account, and made some order touching the rights of the parties to the property in his hands. See also *French v. Dauchy*, 57 Hun (N. Y.) 100; *Atkinson v. Smith*, 89 N. Car. 72.

But where the receiver dies or absconds, a suit may be brought on the bonds at once. In *Ludgater v. Channell*, 3 M. & G. 174, which was a proceeding upon the bond of a deceased receiver, the Lord Chancellor said: "But the administratrix says she is not accountable in this form of proceeding; and the sureties on their part allege that there is a positive rule of practice that the surety cannot be made to account until the receiver has been called upon, and further, that the mode of proceeding in such a case is by bill against the personal representative. I can, however, find no authority for the rule which it is thus sought to establish. The case of *Jenkins v. Briant*, 7 Sim. 171, does not apply, for the order there prayed for was very different from that sought by the present petition. Something was asked which could not be granted—namely, that an executor should account under circumstances which did not give the court jurisdiction to compel him to do so; and although something was asked at the same time which might have been granted, yet the application failed from one entire order being prayed. Now, when a receiver absconds, it becomes impracticable, or at least very difficult, to ascertain what is due from him, and the certificate gives that case as an example only, and there may be other cases which fall within the same description; but it does not seem to me that the registrar's attention was called to all the circumstances of the case now before me. The question, then, is, have the petitioners the means of ascertaining or enforcing their claim? The books of practice show that where there is not the means of pursuing the ordinary course against the receiver, the surety may be had recourse to; and the first part of the prayer of the petition is for leave to sue the sureties. Not, therefore, now deciding whether the surety shall pay, or whether the administra-

trix may or may not be called on to account in this form of proceeding, I think that the first part of the prayer of the petition must be granted."

1. *Bank of Washington v. Creditors*, 86 N. Car. 323; *Atkinson v. Smith*, 89 N. Car. 72; *Thurman v. Morgan*, 79 Va. 367. But where the funds of the estate are actually in the hands of the surety, the court may compel the surety to pay the money into court. In *Seidenback v. Denklespeil*, 11 Lea (Tenn.) 297, a receiver handed over to his surety the proceeds of a certain sale, in order to indemnify the surety. The court after hearing proof directed the surety to pay the money into court. Upon appeal this order was held proper because the court had sufficient jurisdiction of the surety by reason of his suretyship, and by reason of his intermeddling with the fund impounded in court to make upon him the order to act *in personam* for the preservation of the fund. See also *Bank of Mississippi v. Duncan*, 59 Miss. 740, where a *scire facias* against a surety was sustained under the authority of an act of the legislature.

2. In *Titus v. Fairchild*, 49 N. Y. Super. Ct. 211, a receiver's bond was conditioned that the receiver should faithfully execute his trust and make payments as directed by order of court. It was held sufficient to sustain an action for breach thereof, against the sureties, to prove orders granted against the receiver and after he had been heard, directing him to pay a certain sum, and adjudging him in contempt for failure to do so.

In *Com. v. Gould*, 118 Mass. 300, in an action by the commonwealth against the surety upon an official bond of a receiver of an insolvent insurance company, conditioned that the principal shall faithfully conduct himself in his office as receiver, faithfully perform its duties as required by law, and in obedience to the directions of the court, and truly and faithfully account for and pay over the moneys of the company coming to his hands, it was held that a previous order of a single justice of the court passed upon an application of

Where a fund has come into the hands of a receiver acting within the scope of his duties, the sureties of the receiver are liable for a misappropriation of the fund ; but, as in all other cases

the attorney-general, after due proceedings and a full hearing, that the principal is in default and that a certain sum is due from him, is competent evidence both of a breach of the bond and of the amount for which the surety is liable.

In *Ball v. Chancellor*, 47 N. J. L. 125, it was held that the surety of a receiver in chancery is concluded in a suit at law on the bond by the amount found due on an account taken in chancery, he having, by due notice, had an opportunity to intervene in the taking of such account.

But in *Thomson v. MacGregor*, 81 N. Y. 592, under the peculiar wording of the bond, the sureties were held not to be concluded by the decree. The bond was conditioned that the receiver "shall henceforth faithfully discharge the duties of his trust." The court held that the sureties had a right to show that no liability had accrued since the date of the bond. The court, by Finch, J., said: "The argument here is, that, as the receiver is the officer of the court, its mere agent or instrument to effect its purposes, his plain duty is to obey all its orders, and, therefore, when the surety contracted that the receiver should faithfully perform his duties as such, he in effect contracted to be responsible for any disobedience of his principal, and so was bound by the order disobeyed. We think, however, that the surety is not thus to be brought within the rule by inference or argument, and that, unless the language of his contract expressly and explicitly contemplates a submission to the judgment and shows that the surety must have intended to be bound by it, such rigorous liability is not to be imposed upon him by arguing it from general words having another purpose and a different aim, and so understood by him. The bond is not to be a snare in whose meshes he is caught unwittingly. The liability argued out is under the surface and concealed, and was probably unsuspected by the surety. He might have refused to sign, if a covenant to be bound by a judgment against his principal had been so expressed as to be understood by him. . . . The learned judge who wrote the opinion of the general term seems to have felt the difficulty, for he says the order and

proceedings leading to it do not comprise something that is binding upon the defendant as an adjudication, but are evidence of the facts as to violation of duty in disobeying the order, and the same ground in nearly the same language is taken by the respondent. But if not binding as an adjudication upon the surety, it becomes merely evidence, and is not conclusive. It may be rebutted. If the order was wrong, if the receiver owed no balance, if he was required to pay what was not due, then he had faithfully performed his duty as receiver, although not obeying the mandate of the court. It is said that the surety has contracted that the surety will pay. Undoubtedly; but pay what? Not any sum which the court may order, unless, indeed, the surety has bound himself by that rigorous contract, but such sum as the receiver justly owes, and, as an honest and faithful officer, ought to pay. And upon that question the surety has a right to be heard. We do not see that it avails anything to try to distinguish between an order which is binding as an adjudication, and an order which is conclusive evidence as a fact. The substantial thing remains, though the phrases are changed. The doctrine pushed to its logical results might easily make every surety for the performance of duty bound by the adjudication against his principal, or so nearly so as to practically abrogate the rule which holds him only when he has explicitly contracted to submit himself to the judgment of the court. We think the vice of the reasoning lies hid in the failure to sufficiently distinguish the relative positions of the principal and surety. As between the principal and the creditors of the fund, it is the receiver's duty to pay according to the order, for he has been heard and is bound by the adjudication. But as between the surety and such creditors, it is not the receiver's duty to pay according to an order, made without the surety's knowledge, as to which he has not been heard, and which is not against him, a binding adjudication. We cannot, therefore, affirm this judgment without holding that by the terms of his bond the surety contracted to be bound by the adjudication against his principal.

of suretyship, the contract is to be liberally construed in favor of the surety.¹

The giving of a new bond by the receiver does not necessarily discharge the surety on the first bond.²

4. Assignees.—The sureties on the bond of an assignee for the benefit of creditors cannot be held liable until after the final decree on the assignee's account.³ When such a decree has been entered, the sureties are concluded by it.⁴

XVII. BAIL BONDS.—The liability of sureties on bail bonds, civil and criminal, is fully considered in the article BAIL, vol. 2, p. 1.

XVIII. BONDS OF OFFICERS OF PRIVATE CORPORATIONS.—The liability of sureties on the bonds of the officers of private corporations is fully considered in the article OFFICERS (PRIVATE CORPORATIONS), vol. 17, p. 39.

XIX. BONDS OF PUBLIC OFFICERS—**1. Time Within Which Act or Omission Must Occur to Render Sureties Liable.**—In the absence of a provision to the contrary, the bond of a public officer binds the sureties only as to future transactions. The sureties are not liable for any past defaults or deficiencies which had already occurred, when the bond was executed.⁵ If, however, at the time

The case was tried on that theory. The surety's attempted defense was shut out, and the order treated as conclusive. "We can give it such effect only when the surety has so contracted, expressly and explicitly and in terms which show that such result was fairly understood and contemplated."

1. *Com. v. Gould*, 118 Mass. 300; *Kerr v. Brandon*, 84 N. Car. 128; *Wilde v. Baker*, 14 Allen (Mass.) 349; *Weems v. Lathrop*, 42 Tex. 207. As to the liability of sureties of receivers for interest, the court said, in *Dawson v. Raynes*, 2 Russ. 467: "The question is, whether the sureties of the receiver are to be charged only with the balance of the trust moneys which came into his hands, or whether they are further to be charged with that interest which he would unquestionably be liable to pay, if he were able? The question is one of great importance with reference to all cases in which sureties may be called on to answer for the principal, interest, and money, which the principal debtor would have to pay, if he possessed means of payment. The vice-chancellor was of opinion that the sureties could not be compelled to pay any interest. If the sureties are not liable, within the meaning and intent of the recognizance in its present form, to pay the interest which the receiver himself would be bound to pay, the consequence will be

that the form of the recognizance must be improved, and must be rendered more comprehensive. It seems to me it would be difficult to say, that, where the principal debtor would be obliged to pay interest, there would not be an equity that the surety should pay the interest in default of the principal. The penalty is forfeited by the breach of the condition; the amount of the penalty is the debt due from the sureties at law. How can they have a right to be discharged in this court from their legal liability, till they have paid all that the principal could have been required to pay?"

2. In *Stewart v. Johnston*, 87 Ga. 97, it was held that where the court, at the instance of a party to the case, requires a receiver to execute a new bond, in the same penalty and conditioned as the old bond, the new bond will not operate to discharge the surety on the old bond from liability for future defaults of the receiver, in the absence of circumstances to show that the second bond was intended as a substitute for, rather than as supplement to, the first.

3. *In re Yeager*, 10 Daly (N. Y.) 7; *Van Slyke v. Bush*, 123 N. Y. 47.

4. *Stelle's Case*, 34 N. J. Eq. 199; *Garver v. Tisinger*, 46 Ohio St. 56.

5. In *Bissell v. Saxton*, 66 N. Y. 55, it was held that the official reports of railroad commissioners charging themselves with a certain fund were

not conclusive against their sureties in an action upon their bond; that the commissioners then had the fund on hand; and, it appearing that the fund had in fact been received and converted by one of their number during a prior term, that the sureties were not liable.

In *Farrar v. U. S.*, 5 Pet. (U. S.) 373, it appeared that Rector was commissioned surveyor of the public lands on June 13, 1823, and his bond was executed August 17, 1823. Between March 3, and June 4, of the same year, there had been paid to Rector from the treasury a certain sum of money. The court below refused to permit the sureties on the bond to show that this sum was not in Rector's hands when the bond was executed. On writ of error the judgment was reversed, the court, by Johnson, J., saying: "We feel no difficulty in affirming that for any sums paid to Rector prior to the execution of the bond, there is but one ground on which the sureties could be held answerable to the *United States*, and that is on the assumption that he still held the money in bank or otherwise. If still in his hands, he was, up to that time, bailee to the government; but, upon the contrary hypothesis, he had become a debtor or defaulter to the government and his office was already consummated. If intended to cover past dereliction, the bond should have been made retrospective in its language. The sureties have not undertaken against his past misconduct. They ought, therefore, to have been let into proof of the actual state of facts so vitally important to their defense; and whether paid away in violation or in execution of the trust reposed in him; if paid away, he no longer stood in the relation of bailee."

In *Rochester v. Randall*, 105 Mass. 295; 8 Am. Rep. 519, the same person was chosen treasurer of a town five consecutive years. In the first four he served without a bond; and in the fifth he gave a bond conditioned that whereas he had been chosen to the office for that year, if he should well and faithfully perform all the duties of his said office, the bond should be void. The court held that the sureties were not liable for his appropriation to his own use, during the first year, of money of the town with which he falsely credited himself in his account of that year as having been officially

disbursed by him, and never entered on his subsequent accounts.

In *Thomson v. MacGregor*, 81 N. Y. 592, in an action between copartners, R was, on July 9, 1874, appointed receiver of the partnership assets, and upon that day entered upon the performance of the duties of the trust. On January 30, 1875, he gave a bond with defendant as his surety, conditioned that he would "henceforth faithfully discharge the duties of his trust." R was subsequently removed as receiver, and plaintiff appointed in his place. Upon the accounting of R to which defendant was not a party, R was ordered to pay over to plaintiff a sum which was adjudged to be the balance of the trust funds in his hands. This order R did not obey. In an action upon the bond it did not appear when the deficiency or misappropriation of the funds occurred. Defendant offered to show that no liability accrued after the date of the bond. The evidence was objected to and excluded. The court held that the order was not conclusive upon defendant, and the rejection of the proof offered, was error; that the contract of defendant R should thereafter faithfully discharge his duties did not bind him by the order, and in the absence of express terms in the bond, binding him to submit to the judgment of the court, such a liability could not be imposed upon him.

For other illustrations, see *Myers v. U. S.*, 1 McLean (U. S.) 493; *Vivian v. Otis*, 24 Wis. 518; 1 Am. Rep. 199; *Mahaska Co. v. Ingalls*, 16 Iowa 81; *Bessinger v. Dickerson*, 20 Iowa 261; *Webster Co. v. Hutchinson*, 60 Iowa 721; *Haley v. Petty*, 42 Ark. 392; *State v. Churchill*, 48 Ark. 426; *Parker v. Madsen*, 80 Ind. 155; *Rogers v. State*, 99 Ind. 218; *Green v. People*, 14 Ill. App. 364; *Coons v. People*, 76 Ill. 383; *Stern v. People*, 96 Ill. 475; *McIntyre v. Trustees of Schools*, 3 Ill. App. 77; *Montgomery v. Governor*, 7 How. (Miss.) 68; *Wathen v. Glass*, 54 Miss. 382; *State v. Shackelford*, 56 Miss. 648; *Marney v. State*, 13 Mo. 7; *State v. Alsop*, 91 Mo. 172; *State v. Jones*, 89 Mo. 470; *Pine Co. v. Willard*, 39 Minn. 125; *Detroit v. Weber*, 29 Mich. 24; *Paw Paw v. Eggleston*, 25 Mich. 36; *Missoula Co. v. McCormick*, 4 Mont. 115; *Scarborough v. Parker*, 53 Me. 252; *Van Sickel v. Buffalo Co.*, 13 Neb. 103; 42 Am. Rep. 753; *State v. Galbraith*, 65 N. Car. 409; *Governor v.*

the bond was executed there are funds in the hands of the principal which were received prior to the execution of the bond, any subsequent default in the application of these funds, will render the sureties liable;¹ and where a default has occurred in one term, it cannot be made good by money received during the succeeding term.² Where a default has occurred, but there is no

Lee, 4 Dev. & B. (N. Car.) 457; State v. Orr, 12 Lea (Tenn.) 725; State v. Polk, 14 Lea (Tenn.) 1; Crown v. Com., 84 Va. 282; Barry v. Screwmen's Benev. Assoc., 67 Tex. 250; Pape v. People, 19 Ill. App. 24; Mayor, etc., of Homer v. Merritt, 27 La. Ann. 568; Omro v. Kaime, 39 Wis. 468; U. S. v. Nichol, 12 Wheat. (U. S.) 505; State v. Powell, 40 La. Ann. 234.

1. In Bruce v. U. S., 17 How. (U. S.) 437, Bruce had received money under two successive commissions, and his co-plaintiffs were his sureties in the bond given under the second commission. It was held that if a balance which he had received under his first commission remained in his hands, it was so much money in his hands to be disbursed and applied under his second appointment; and if it was not invested or misapplied during his first official term, but still remained in his hands to be applied according to his official duty, the sureties in his first bond would not be liable for it, because there would have been no default during his first term of office. The sureties in the second bond were held liable, on the ground that the misfeasance happened during the second term, and not during the first.

In Saunders v. Taylor, 9 B. & C. 35; 17 E. C. L. 325, the collector had collected and received rates assessed by the commissioners of sewers and what he had not paid over to the treasurer of the commissioners remained in his hands. The condition of his bond was, that he pay over not only what he should thereafter collect, but all such sums as he had already got in and received; and the case turned upon the construction of this bond. He was in arrears for money collected in 1826, and applied to the payment of those arrears moneys collected by him in subsequent years, leaving a balance due for those subsequent years. His sureties in the bond were held liable for this balance.

In Mutual Loan, etc., Assoc. v. Price, 19 Fla. 127, it was held that where the evidence shows simply that at the date of a bond the difference between the collections and disbursements

amounted to a certain sum, the presumption was that the money was then in the hands of the officer and the surety was responsible, and, to rebut this presumption, must show antecedent misapplication.

In Vivian v. Otis, 24 Wis. 518; 1 Am. Rep. 199, the sureties on the bond of a clerk of a county board of supervisors were held liable for money received by the clerk during his first term, and actually in his hands when his second term commenced, and which he, therefore, received as his own successor, but they were not liable for money received by him during his first term, and misapplied or embezzled by him during his first term.

In Morley v. Metamora, 78 Ill. 394, a supervisor was elected for a second term, and at the end of his first term made a report showing a certain amount in his hands, belonging to the town, which report was approved. The court held the sureties in his second bond were liable, even though the default for which they were sued had actually occurred during his first term. The decision was put upon the grounds that the new sureties must be held to have had notice of what appeared on the public records.

In Board of Education v. Fonda, 77 N. Y. 350, it was held that where an officer elected for a second term has funds in his hands at the beginning of, and after he gives a bond for that term, his failure thereafter to pay and account therefor is a breach of the condition of the bond and the sureties are liable.

In Miller v. Macoupin Co., 7 Ill. 50, successive annual bonds were given by an officer during the same term, and each year the officer debited himself with the balance. It was held, that the sureties for each year were liable for the money in his hands during that year.

2. When the same person is collector of taxes for two successive years, and pays to the town the arrears of taxes collected on the tax list of the first year, with the money collected on the tax list of the second year—the

evidence to determine in which term it occurred, the law will presume that it occurred in the last term.¹

As a general rule, a second bond given in the same term is merely cumulative, and does not release the sureties of the first bond for future defaults during the same term.² The sureties of the second bond given during the same term are in general liable for all defaults of the principal whether they occur before or after the execution of the second bond.³ The sureties on an official bond for a specified term are not in general liable for a default after the term has expired.⁴

town not knowing whence the money came, and fails to perform the condition of his official bond for the second year, his sureties on the bond, when sued for his default, are liable to the extent of the default, and are not entitled to deduct the amount so paid by him for the taxes of the first year. *Colerain v. Bell*, 9 Met. (Mass.) 499.

In *Gwynne v. Burnell*, 7 C. & F. 572, it was held that the breach of the condition of a bond of a tax collector is complete, and the sureties are liable, though all the moneys collected in the year for which they are sureties should be in fact paid in, if any part of them should be appropriated by the collector, and received by the commissioners, in satisfaction of the arrears of a former year. See, to the same effect, *Frownfelter v. State*, 66 Md. 80; *Pine Co. v. Willard*, 39 Minn. 125; *Crown v. Com.*, 84 Va. 282; *Cook v. State*, 13 Ind. 154; *Rogers v. State*, 99 Ind. 218; *State v. Sooy*, 39 N. J. L. 539. See *Patterson v. Freehold*, 38 N. J. L. 255; *Detroit v. Weber*, 29 Mich. 24; *State v. Hemingway*, 10 So. 575.

1. *Kelly v. State*, 25 Ohio St. 567; *Clark v. Wilkinson*, 59 Wis. 543; *Heppe v. Johnson*, 73 Cal. 265; *Kagey v. Trustees*, 68 Ill. 75; *Pape v. People*, 19 Ill. App. 24; *People v. Shannon*, 10 Ill. App. 364; *Pine Co. v. Willard*, 39 Minn. 125; *Haley v. Petty*, 42 Ark. 392; *Bockenstedt v. Perkins*, 73 Iowa 23; *Goodwine v. State*, 81 Ind. 109. But see to the contrary, *Trustees of Schools v. Smith*, 88 Ill. 181; and *Phippsburg v. Dickinson*, 78 Me. 457, where the loss was apportioned on all of the bonds; and see *State v. Churchill*, 48 Ark. 426.

Where the time of the defalcation is unknown, a bill of discovery will be sustained against the principal and the sureties on the different bonds to ascertain in which term the default

occurred. *McDougald v. Maddox*, 32 Ga. 63; *Love v. Keowne*, 58 Tex. 191.

2. *U. S. v. Hoyt*, 1 Blatchf. (U. S.) 326, a bond with sureties, was given by H. to the government, for the faithful performance of his duties as collector of customs, and subsequently an additional bond, with a different surety, but with a like penalty and condition, was given by H., and a judgment was perfected against H. on the latter bond. Held, in a joint action against the obligors in the former bond, that a plea setting up the judgment and averring that in the two actions the plaintiffs sought to recover the same identical sum of money and upon the same identical breaches of each bond, was not a good plea. The second bond did not of itself operate as a merger or extinguishment of the first, being a security of no higher degree.

In *Postmaster-Gen'l v. Munger*, 2 Paine (U. S.) 189, a postmaster gave a bond, and subsequently during the same term gave a second bond with the same condition as the first. The court held that the sureties on the first bond were not released by the giving of the second bond. See also *Finch v. State*, 71 Tex. 52; *New Orleans v. Gauthreaux*, 36 La. Ann. 109; *State v. Crooks*, 7 Ohio, pt. 2, 221; *State v. Sappington*, 67 Mo. 529; *Moore v. Boudinot*, 64 N. Car. 190; *Allen v. State*, 61 Ind. 268; *Harrison v. Lane*, 5 Leigh (Va.) 414; 27 Am. Dec. 607; *Corprew v. Boyle*, 24 Gratt. (Va.) 284; *Glenn v. Wallace*, 4 Strobb. Eq. (S. Car.) 149; 53 Am. Dec. 657; *Longmire v. Fain*, 29 Tenn. 393.

3. *Armstrong v. State*, 7 Blackf. (Ind.) 81; *Steele v. Reese*, 6 Yerg. (Tenn.) 263; *Miller v. Moore*, 3 Humph. (Tenn.) 189; *Cullom v. Dolloff*, 94 Ill. 330; *Treasurers v. Taylor*, 2 Bailey (S. Car.) 524; *State v. Moses*, 18 S. Car. 366; *Jones v. Gallatin Co.*, 78 Ky. 491.

4. In *Steinback v. State*, 38 Ind. 483,

2. Voluntary Bond.—Where an officer, although not required by law, voluntarily gives a bond for the faithful performance of his duties, the sureties on the bond are liable.¹

a township trustee, on the day after his successor was qualified, borrowed money on the credit of a township. The court held that the sureties were not liable.

In *U. S. v. Kirkpatrick*, 9 Wheat. (U. S.) 720, it was held that a bond, given on the 4th of December, 1813, for the faithful discharge of the duties of his office, by a collector of direct taxes and internal duties appointed (under the act of the 22d of July, 1813, ch. 16) by the President, on the 11th of November, 1813, to hold his office until the end of the next session of the Senate, and no longer, and subsequently appointed by the President, with the advice and consent of the Senate, on the 24th of January, 1814, is to be restricted (as to the liability of the sureties) to the duties and obligations created by the collection acts passed antecedent to the date of the bond.

In *Florance v. Richardson*, 2 La. Ann. 663, an auctioneer sold goods the day after his official term had expired. The court held that his sureties were not liable for the proceeds of the sale.

In *Sthresley v. U. S.*, 4 Cranch (U. S.) 169, it was held that a collector of revenue of the *United States*, after removing from office, has no authority to collect the duties outstanding at the time of his removal, and if he does so, his sureties are not liable for their loss.

In *Holloman v. Langdon*, 7 Jones (N. Car.) 49, money was paid to the deputy of a clerk and master after the principal's term had expired, but while he was still holding the office without a new appointment or bond. The court held that the sureties were not liable for the money paid to the deputy. See also, to the same effect, *Governor v. Coble*, 2 Dev. (N. Car.) 489; *Tyler v. Nelson*, 14 Gratt. (Va.) 214; *Mayor v. Horn*, 2 Harr. (Del.) 190; *State v. Dailey*, 4 Mo. App. 172; *Com. v. Hughes*, 10 B. Mon. (Ky.) 160; *Moss v. State*, 10 Mo. 338; 47 Am. Dec. 116; *Dover v. Twombly*, 42 N. H. 59; *Wapello Co. v. Bigham*, 10 Iowa 39; 74 Am. Dec. 370; *Accord v. Governor*, 4 Blackf. (Ind.) 2; *Scott Co. v. Ring*, 29 Minn. 398; *Tuley v. State*, 1 Ind. 500; *Bennett v. State*, 58 Miss. 556.

De Facto Officer.—In some cases where an officer has held over, after his term

has expired, and received moneys, his sureties have been held liable on the ground that he is a *de facto* officer. In *Whitmire v. Langston*, 11 S. Car. 381, a judge of probate held over after his term had expired, and while so holding over he collected a security which he had received during his term of office. The court held that his sureties were liable for the money.

In *Placer Co. v. Dickerson*, 45 Cal. 12, a county treasurer on the day after his term had expired received certain moneys in his official capacity. The court held that the court was liable for the moneys thus received. See, to the same effect, *Wheeling v. Black*, 25 W. Va. 266; *State v. Bird*, 2 Rich. (S. Car.) 99.

Officer Rightfully Holding Over.—Where an officer rightfully holds over in obedience to a statute which provides that he shall hold over until his successor shall be chosen, or chosen and qualified, the sureties on the officer's bond are liable for any default occurring between the expiration of the term and the time when the new officer shall qualify. *Akers v. State*, 8 Ind. 484; *State v. Wells*, 8 Nev. 105; *Thompson v. State*, 37 Miss. 518. But see *Norridgewock v. Hale*, 80 Me. 362; *Mayor v. Horn*, 2 Harr. (Del.) 190.

1. In *U. S. v. Rogers*, 28 Fed. Rep. 607, the court, by Brown, J., said: "It has been repeatedly adjudged by the supreme court that bonds may be required by the government from officers appointed to places of trust, though there is no express statutory authority to take such bonds; and that they will be valid as common-law obligations. *U. S. v. Tingey*, 5 Pet. (U. S.) 115; *U. S. v. Bradley*, 10 Pet. (U. S.) 360. It is sufficient to make the bond a valid obligation that it is voluntarily given, and that the office, and the duties assigned to the officer, and covered by the bond, are duly authorized by law." In *Johnson v. Lazerre*, 2 Ld. Raym. 1459, it was held that a voluntary bond by bail in error is binding, though bail was not necessary. In *Folkes v. Docminique*, 2 Str. 1137, it was held that a voluntary bond given in the spiritual court is good, though the court has no power to take it. In *Washington Co. v. Dunn*, 27 Gratt.

3. General and Special Bonds.—Where a public officer is required to give, in addition to his general bond, a special bond for the faithful performance of certain specified duties, the sureties on the general bond are not liable for a loss incurred in the performance of the duties for which the special bond was required.¹

4. Liabilities of Sureties on Official Bonds—*a*. ACTS OUT OF THE LINE OF THE DUTY OF THE PRINCIPAL.—As a general rule the sureties on the bond of public officers are not liable for any acts or defaults committed by the officer out of the line of his official duties.²

(Va.) 608, it was held that although a statute required a sheriff's bond to be acknowledged in open court, yet it was binding on those who executed it, although it was not acknowledged. See also, on this subject, *U. S. v. Mason*, 2 Bond (U. S.) 183; *State v. Harney*, 57 Miss. 863; *Crawford v. Howard*, 9 Ga. 314; *Potter v. State*, 23 Ind. 550.

1. In *Com. v. Toms*, 45 Pa. St. 408, the court, by Lowrie, C. J., said: "Under the general law of his office, the register of wills gives a bond with sureties for the faithful execution of his duties, and for the payment of all moneys received by him for the use of the commonwealth; and this would seem, at the first glance, to include his duties and receipts, under the Collateral Inheritance Tax Laws, passed since the bond was provided for, especially when, as here, the bond was given since those tax laws were passed. But when we turn to the act of 22d March, 1841, P. L. 99, imposing the collection of the collateral inheritance taxes on the register, we find that the legislature did not rely on the general official bond of the register as a security for the performance of this new duty, but required a special bond for the purpose, and provided a mode to enforce the giving of it. It seems to us very plain, therefore, that the general bond is not intended to secure either payment of these collections or the giving of the special bond to secure them."

In *Britton v. Fort Worth*, 78 Tex. 227, a general fund and a school fund had been mingled by the city treasurer, and there was a default in the aggregate of both funds, the amount of which was known. The court held that the sureties upon the general official bond were not liable for the school fund. See also, on this subject, *Morrow v. Wood*, 56 Ala. 1; *State v. Bateman*, 102 N. Car. 52; *Milwaukee Co. v.*

Ehlers, 45 Wis. 281; *Milwaukee Co. v. Pabst*, 70 Wis. 352; *White v. East Saginaw*, 43 Mich. 567; *Redwood Co. v. Tower*, 28 Minn. 45.

2. In *U. S. v. Morgan*, 28 Fed. Rep. 48, the defendants were sureties on the bond of a disbursing agent, as chief of the bureau of accounts in the Department of State. The principal in the bond also received moneys for the issuing of passports. His acts in the latter capacity were independent of his duties as disbursing agent. The court held that the sureties were not liable for a misappropriation of money received on account of passports. The court, by Brown, J., said: "The evidence shows that there is no deficit and no defalcation as respects the disbursing accounts, for which alone the defendants became liable as sureties. The deficit is solely in the passport funds, for which the defendants never became sureties. The government, having taken no security for Mr. Morgan's acts as respects passport moneys, stands itself as its own surety for his acts in regard to those moneys. The situation is the same as though there were two sets of sureties—the government for the passport funds and the defendants for the disbursing account. Mr. Morgan, by his drafts on the treasurer, undertook to appropriate a part of the disbursing account to the discharge of his independent obligations for passport moneys. The treasurer concurred in the act with full knowledge of the facts. But he parted with no money. He only made the corresponding entries in the books. The act was a fraud on the defendants, as sureties, and illegal as respects all who were concerned in it. Having parted with nothing, the *United States*, in making up its account of the balance due on Mr. Morgan's disbursing account, cannot claim the benefit of

those illegal debits, to the prejudice of the sureties."

In *U. S. v. Adams*, 24 Fed. Rep. 348, the collector of customs at Astoria was directed by the assistant secretary of the treasury to take \$46,500 in gold coin received by him in payment of duties, to San Francisco, and deposit the same with the assistant treasurer. The collector complied with the direction, and on the way to San Francisco a portion of the money was stolen from him. The court held that the sureties on the bond of the collector were not liable, as the carriage of the money to San Francisco was no part of the duties of the collector as prescribed by section 3639 of the U. S. Rev. Statutes.

In *U. S. v. White*, 4 Wash. (U. S.) 414, it was held that the sureties on a bond given by a disbursing agent to the Secretary of the Navy for the faithful execution of his agency in paying invalid pensioners, are not answerable for his defaults in not paying the navy and privateer pensioners; although the principal was duly appointed agent for the two latter duties.

In *State v. Bonner*, 72 Mo. 387, it was held that the sureties on the bond of a county auditor are not liable for school moneys collected by the auditor and not accounted for, it being no part of the official duty of an auditor to collect school moneys.

In *Leigh v. Taylor*, 7 B. & C. 491; 14 E. C. L. 93, it was held that an overseer has not, by virtue of his office, any authority to borrow money; and, in an action against a surety on a bond conditioned for the overseer's faithfully accounting for all sums received by him by virtue of his office, the surety is not liable for a sum lent to the overseer, and applied by him to parochial purposes.

In *People v. Pennock*, 60 N. Y. 421, it was held that the sureties upon the bond of a supervisor, containing the usual condition that he will "account for all moneys belonging to the town coming into his hands as such supervisor," are only liable for the moneys which their principal is authorized and bound by law to receive in his official capacity as disbursing agent for the town; not for that of which he becomes the voluntary custodian, or which is ordered by the bond of supervisors, without authority of law, to be paid to him.

In *Ward v. Stahl*, 81 N. Y. 406, a

person having been appointed collector of a village gave a bond to its treasurer conditioned that he, with defendants as his sureties, "shall well and truly collect the tax which may be delivered to him, and faithfully discharge his duties as such collector . . . and pay over moneys which he shall receive for taxes as such collector." In an action upon the bond, the court held that defendants were not liable for the failure of the collector to pay over state, county, and town taxes levied upon these portions of the town included in the corporate limits and collected by him; that the taxes collected and delivered by the bond were such as the village authorities had a right to impose for village purposes on the whole village; that while under the charter of the village all of the taxes upon property within the corporate limits were to be collected by the village treasurer, those assessed upon the towns were not assessed upon the village, and defendant's obligation did not include them.

In *State v. Rollins*, 29 Mo. 267, it was held that where a county collector advances to the treasury the whole amount of the taxes chargeable against him as collector, and dies before the expiration of his term, leaving part of the taxes uncollected, his successor is not bound to collect such taxes; and if he does so he acts as an agent, and not in his official capacity. His sureties are consequently not liable for his failure to pay them over if he had collected them.

In *San José v. Welch*, 65 Cal. 358, the sureties of a city assessor and clerk were held not liable for taxes collected by him, where there was no statute or ordinance authorizing that officer to collect taxes.

In *People v. Lucas*, 93 N. Y. 585, it was held that the wrongful seizure and sale, by a constable, of the property of A, on an execution against B, does not constitute a breach of the condition of the official bond of the constable, that he will pay to the person entitled thereto "all such sums of money as the said constable may become liable to pay on account of any execution which shall be delivered to him for collection." The seizure is a mere trespass, and although under color of the process, it is in no just sense on account of it, as the liability is solely on account of the trespass.

In *People v. Hilton*, 36 Fed. Rep.

b. SUBSEQUENTLY IMPOSED DUTIES.—The sureties of public officers are not liable for duties subsequently imposed upon the officer, which were not within the scope of the contract as originally contemplated by the parties.¹ They are, however, liable

172, a sheriff received from the plaintiff in replevin a deposit of money in lieu of the bond required by law for the diligent prosecution of the suit. The sheriff subsequently embezzled the money. The court held that the taking of the money instead of a bond, not being authorized by law, was an extra-official act, for which the sheriff's sureties were not liable.

In *Governor v. Perrine*, 23 Ala. 807, a sheriff sold personal property on which he had levied, but the sale was made by agreement of the parties, and not as prescribed by law. The court held that his sureties were not liable for the money.

For other cases illustrating this subject, see *Linch v. Litchfield*, 16 Ill. App. 612; *Saltenberry v. Loucks*, 8 La. Ann. 95; *State v. White*, 10 Rich. (S. Car.) 442; *Nolley v. Callaway Co. Ct.*, 11 Mo. 447; *Smith v. Stapler*, 53 Ga. 300; *Webb v. Anspach*, 3 Ohio St. 522; *Branch v. Com.*, 2 Call (Va.) 510; *Schloss v. White*, 16 Cal. 65; *Hill v. Kemble*, 9 Cal. 71; *Forward v. Marsh*, 18 Ala. 645; *McKee v. Griffin*, 66 Ala. 211; *Thomas v. Browder*, 33 Tex. 783; *State v. Long*, 8 Ired. (N. Car.) 415; *Saint v. Mfg. Co.*, 10 So. 539.

1. In *Lafayette v. James*, 92 Ind. 240; 47 Am. Rep. 140, the sureties of a superintendent of a water works gave a bond for the proper discharge of his duties, which, however, were not defined. Subsequently, an ordinance provided that he should collect the water rates. The court held that the sureties on his bond were not liable for a defalcation on the moneys collected on account of the water rates. In *Pybus v. Gibb*, 6 E. & B. 902, a bond was executed by Gibb and two sureties conditioned for indemnifying the high bailiff of a county court against liabilities from the misconduct in his office of Gibb, who was appointed by the high bailiff one of the bailiffs. At the time the bond was executed, the jurisdiction of the county court was regulated by Stat. 9 & 10 Vict., ch. 95. After the execution of the bond, the jurisdiction of the county court was extended and increased by a subsequent statute. The court held that the subsequent statutes had so materially altered the nature of

the office of bailiff that the sureties were no longer liable to indemnify the high bailiff, even though the misconduct of Gibb was in respect of a matter within the jurisdiction conferred by Stat. 9 & 10 Vict., ch. 95, in respect of which the duty of the bailiff was not altered by the subsequent acts.

In *Malling Union v. Graham*, L. R., 5 C. P. 201, the defendant became surety for A in a bond to the guardians of the Union, which comprised West Malling. The condition being that A should faithfully perform all the duties of his office, and in all matters relating thereto obey the overseers, and pay over moneys to such persons as the overseers should direct. Subsequently the guardians of the Malling Union, on the recommendation of the vestry of West Malling, appointed A collector of poor rates of West Malling. The poor law board duly approved the appointment. The duties under the two appointments were substantially the same. A made default after the last appointment in keeping books and in paying over money, and the defendant was sued under the bond. The court held that the two appointments were inconsistent and incompatible, and that the surety was not liable.

In *Miller v. Stewart*, 9 Wheat. (U. S.) 680, a bond was given for the faithful performance of the duties of the office of deputy collector of direct taxes for eight certain townships, and the instrument of the appointment referred to in the bond, was afterwards altered, so as to extend to another township, without the consent of the sureties. The court held that the surety was discharged from his responsibility for moneys subsequently collected by his principal.

In *U. S. v. Kirkpatrick*, 9 Wheat. (U. S.) 720, it was held that a bond given on the 4th of December, 1813, for the faithful discharge of the duties of his office, by a collector of direct taxes and internal duties appointed (under the act of the 22d of July, 1813, ch. 16) by the President on the 11th of November, 1813, to hold his office until the end of the next session of the Senate, and no longer, and subsequently appointed by the President, with the advice and

for all duties imposed upon the officer, which properly belong to the office.¹

consent of the Senate, on the 24th of January, 1814, is to be restricted (as to the liability of the sureties) to the duties of the obligations created by the collection acts passed antecedent to the date of the bond.

In *White v. East Saginaw*, 43 Mich. 567, after the official bond of a sheriff had been given, an act of the legislature taxing the business of manufacturing and selling intoxicating liquors was passed, and sheriffs were required to collect the tax when warrants therefor were issued by the county treasurers. The court held that the duties of collecting taxes was not germane to the office of sheriff, and that the sureties on his bond would not be liable for his default therein, in the absence of a clear provision of the bond covering such a case.

1. In the various states of the *United States*, the decisions give to the legislatures much latitude as to the imposition of new duties upon public officers without thereby relieving the surety, and a distinction is generally made between the liability of sureties on the bonds of public officers, and that on the bonds of individuals or of officers of private corporations. In the leading case of *People v. Vilas*, 36 N. Y. 459; 93 Am. Dec. 520, the court, by Grover, J., said: "The analogy between this class of cases and the contracts of individuals fails in this respect. In the latter no alteration can be made without the mutual assent of both parties. In the former the legislature have power at any and all times to change the duties of officers, and the continued existence of this power is known to the officer and his sureties, and the officer accepts the office and the sureties execute the bond with this knowledge. It is, I think, the same in effect as though this power was recited in the bond. Had this been done, it would not have been claimed that the sureties were discharged by its exercise. If an individual had given a guaranty of the faithful performance of a contract by one party containing a clause authorizing the other to make alterations in certain of its provisions, it would not be claimed that the surety was discharged by alterations so authorized; and yet this is nothing more than the sureties knew the legislature were competent to do in

the present case. Why has it never been claimed in behalf of officers who had given bonds for the discharge of their official duties, that a contract had been made with them in relation thereto unchangeable by the legislature? Simply because it is understood that all these acts are subordinate to the law-making power, and necessarily subject to such changes as may from time to time be deemed expedient. Every official oath is so interpreted. It is not true that one taking an oath to discharge the duties of an office simply swears to discharge them as then prescribed by law; but that he swears to discharge them as they may from time to time be fixed and regulated by the law-making power. So an official bond conditioned for the discharge of the duties should in like manner be understood, not as restricted to duties as then prescribed by law, but as embracing the duties of the office as from time to time fixed and regulated by the legislature." See also *Board of Education v. Quick*, 99 N. Y. 138; *Com. v. Holmes*, 25 Gratt. (Va.) 771; *Dawson v. State*, 38 Ohio St. 1; *King v. Nichols*, 16 Ohio St. 80; *State v. Swinney*, 60 Miss. 39; *Mayor, etc., of N. Y. v. Kelley*, 98 N. Y. 467; *Territory v. Carson*, 7 Mont. 417; *Prickett v. People*, 88 Ill. 115; *Governor v. Ridgway*, 12 Ill. 14; *People v. McHatton*, 7 Ill. 638; *Compher v. People*, 12 Ill. 290; *People v. Blackford*, 16 Ill. 166; *Morrow v. Wood*, 56 Ala. 1; *Walker v. Chapman*, 22 Ala. 116; *Mayor of N. Y. v. Sibberns*, 3 Abb. App. Dec. (N. Y.) 266; *Kindle v. State*, 7 Blackf. (Ind.) 586; *Colter v. Morgan*, 12 B. Mon. (Ky.) 278; *Graham v. Washington Co. Ct.*, 9 Dana (Ky.) 182; *Marney v. State*, 13 Mo. 7; *Swan v. State*, 48 Tex. 120; *Brown v. Sneed*, 78 Tex. 471; *White v. Fox*, 22 Me. 341; *State v. Carleton*, 1 Gill (Md.) 249.

Examples.—In *Monroe Co. v. Clark*, 92 N. Y. 391, it was held that the imposition by the board of supervisors of a county upon the county treasurer, during his term of office, of the duty of raising, keeping, and disbursing large sums of money, in addition to the usual and ordinary duties of his office—for instance, the raising and disbursing money, during a war, for

c. ACTS OR OMISSIONS OF OTHER OFFICERS.—A surety on the bond of a public officer is not discharged because the loss occurred through the act or omission of another officer. The government is not responsible for the wrongful acts of its officers, and sureties are presumed to enter upon their contract with full knowledge of this principle of law.¹

bounty purposes—does not discharge the sureties upon his bond from all liability.

In *Chadwick v. U. S.*, 3 Fed. Rep. 750, a bond with sureties was given by an internal revenue collector. Subsequent to the date of the bond in suit, Congress passed an act requiring stamps to be prepared for distilled spirits, tobacco, snuff, and cigars, and authorized the commissioner to issue the same to any collector upon his requisition, in such numbers as should be necessary for the district of such a collector. A default was made as to such stamps. The court held that the sureties of the collector were liable.

In *Borden v. Houston*, 2 Tex. 594, it appeared that the mode of payment of the custom's duties in the Republic of Texas, was changed after a collector's bond had been given; it was held that the sureties' liability was not affected by the change, because the collector was bound to receive such payments as the statute directed, and to pay them over in specie.

In *People v. Backus*, 117 N. Y. 196, a warden of a state prison was required to deposit moneys received by him in a bank, the officers and directors thereof guarantying the payments of such moneys. Subsequent to the execution of the guaranty, an act was passed changing the system of contract labor, and thereby greatly increasing the deposits. The court held that the guarantors were not released from their liability.

In *Kruttschmitt v. Hauck*, 6 Nev. 163, a deputy assessor gave a bond to the assessor for faithful performance of "the duties of the said office of deputy assessor," during his continuance therein, and the county was afterwards redistricted; it was held that his sureties were liable for a subsequent default.

In *Sacramento Co. v. Bird*, 31 Cal. 66, it was held that a statute increasing or diminishing the fees of a public officer during his term, does not release the sureties on his official bond.

For other examples, see *Postmaster*

Gen'l v. Munger, 2 Paine (U. S.) 189; *Denio v. State*, 60 Miss. 949; *Cambridge v. Fifield*, 126 Mass. 428; *Lane v. Howell*, 1 Lea (Tenn.) 275; *Gausen v. U. S.*, 97 U. S. 584; *White Sewing Mach. Co. v. Mullins*, 41 Mich. 339; *Marquette v. Ward*, 50 Mich. 174; *Mahaska Co. v. Ingalls*, 14 Iowa 170; *State v. Bradshaw*, 10 Ired. (N. Car.) 229; *People v. Leet*, 13 Ill. 261; *Com. v. Gabbert*, 5 Bush (Ky.) 438; *King v. Nichols*, 16 Ohio St. 80; *Scott Co. v. Ring*, 29 Minn. 398; *Dawson v. State*, 38 Ohio St. 1; *State v. Smith*, 16 Fla. 175; *Mayor, etc., of Berwick v. Oswald*, 1 E. & B. 295; 72 E. C. L. 295; 3 E. & B. 653; 77 E. C. L. 653; *Schuster v. Weissman*, 63 Mo. 552; *State v. Bradshaw*, 10 Ired. (N. Car.) 229.

1. *Boardman Tp. v. Flagg*, 70 Mich. 372; *Manley v. Atchison*, 9 Kan. 358; *Britton v. Fort Worth*, 78 Tex. 227; *Detroit v. Weber*, 26 Mich. 284; *Farmington v. Stanley*, 60 Me. 472; *State v. Bates*, 36 Vt. 387; *Kewaunee v. Knipfer*, 37 Wis. 496; *Mayor v. Blache*, 6 La. 500; *Jefferson Co. v. Jones*, 19 Wis. 51; *U. S. v. Vanzandt*, 11 Wheat. (U. S.) 184; *Mayor, etc., of Durham v. Fowler*, 22 Q. B. Div. 394; *Mayor, etc., of Natchitoches v. Redmond*, 28 La. Ann. 274; *Duncan v. State*, 7 La. Ann. 377; *Boone Co. v. Jones*, 54 Iowa 699; 37 Am. Rep. 229; *Waseca Co. v. Sheehan*, 42 Minn. 57; *Amherst Bank v. Root*, 2 Met. (Mass.) 522; *Bonta v. Mercer Co. Ct.*, 7 Bush (Ky.) 576; *Freanor v. Yingling*, 37 Md. 491; *Charleston v. Paterson*, 2 Bailey (S. Car.) 165; *School Directors v. Brown*, 33 La. Ann. 383; *Stern v. People*, 102 Ill. 540; *Reg. v. Pringle*, 32 U. C. 308; *Dox v. Postmaster-Gen'l*, 1 Pet. (U. S.) 318; *Smith v. Com.*, 25 Gratt. (Va.) 780; *Goodin v. State*, 18 Ohio 6; *Butte Co. v. Morgan*, 76 Cal. 1; *Rochereau v. Jones*, 29 La. Ann. 82; *Frownfelter v. State*, 66 Md. 80.

In *Hart v. U. S.*, 95 U. S. 316, suit was brought on a distiller's bond in which Hosmer was principal. The sureties objected that the taxes charged and sued for were assessed against Hosmer

on spirits he had distilled, and were a first and paramount lien thereon; but that the collector of internal revenue for the district, without the knowledge or consent of the defendants, and without first requiring the payment of the taxes thereon, permitted him to remove from the bonded warehouse a quantity of said spirits more than sufficient to pay any just claim of the plaintiff. The court, however, held that they were liable. The court, by Waite, C. J., said: "The government is not responsible for the laches or the wrongful acts of its officers. *Gibson v. U. S.*, 8 Wall. (U. S.) 269; *U. S. v. Kirkpatrick*, 9 Wheat. (U. S.) 720; *U. S. v. Vanzandt*, 11 Wheat. (U. S.) 184; *U. S. v. Nicholl*, 12 Wheat. (U. S.) 505; *Jones v. U. S.*, 18 Wall. (U. S.) 662. Every surety upon an official bond to the government is presumed to enter into his contract with a full knowledge of this principle of law, and to consent to be dealt with accordingly. The government enters into no contract with him that its officers shall perform its duties. A government may be a loser by the negligence of its officers, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect. Here the surety was aware of the lien which the law gave as security for the payment of the tax. He also knew that, in order to retain this lien, the government must rely upon the diligence and honesty of its agents. If they performed their duties and preserved the security, it inured to his benefit as well as that of the government; but if, by neglect or misconduct, they lost it, the government did not come under obligations to make good the loss to him, or, what is the same thing, release him *pro tanto* from the obligation of his bond. As between himself and the government, he took the risk of the effect of official negligence upon the security which the law provided for his protection against loss by reason of the liability he assumed."

In *U. S. v. Kirkpatrick*, 9 Wheat. (U. S.) 720, it was held that where the laws require quarterly or other periodical accounts and settlements, a mere omission to bring a suit upon the neglect of the officer or agent to account, will not discharge his sureties.

In *Crawn v. Com.*, 84 Va. 282, it was held that a failure to require a county treasurer to make prompt settlement does not discharge his sureties.

In *Chenango Co. v. Birdsall*, 4 Wend. (N. Y.) 453, it was held that the same strictness is not applied to public officers, acting as agents in the settlement of the accounts of a subordinate agent, as is applied to individuals. In this case, action was brought on the bond of a county treasurer, and it appeared that at the audit of a treasurer's accounts a mistake had been made as to his fees, by which he received too much. The court held that this mistake could be rectified. The court, by Marcy, J., saying: "There was an error in the calculation of the commissions, and although the plaintiffs might have discovered it by a careful examination of the accounts, yet it does not appear that it was known to them. I do not believe that because they passed these accounts without debiting the error, having the means to do so, they are precluded from setting the matter right when the mistake is discovered. The plaintiffs, acting as public agents in the settlement of the accounts of the defendant Birdsall, also a public agent, in whom they had full confidence, and who knew, better than they possibly could, the state of the accounts, ought not to be held to the same strictness applied to individuals in the settlements of accounts relating to their private affairs."

In *Minturn v. U. S.*, 106 U. S. 437, an importer of sugars entered them at the customhouse by a warehouse entry, and gave a bond conditional to be void if the principals or either of them should "on or before the expiration of one year from the date of the importation" of said goods, withdraw them "in the mode prescribed by law," and pay to the collector \$23,787.99, "or the true amount, when ascertained, of the duties imposed" by law then existing, or thereafter to be enacted. An act of Congress required the sugars to be kept subject to the order of the importer, "upon payment of the proper duties," to be ascertained on entry, "and to be secured by his bond, with surety." The importer subsequently sold the sugars in bond, and gave to the purchaser, who agreed to pay the duties as part of the purchase-money, a written order, on which the sugars were withdrawn. The full amount of the proper duties which was less than the amount specified in the condition of the bond, was not paid. In a suit on the bond to recover the unpaid duties, the court held that the obligors

d. FOR MONEY STOLEN OR LOST.—Where moneys have been stolen from a public officer or lost without any fault on his part, it has been held in numerous cases that the sureties on the officer's bond are not relieved from liability;¹ but there are other

were liable. The negligence of the officers did not affect the liability of either the principal or the surety in the bond.

In *Wilson v. Glover*, 3 Pa. St. 404, it was held that an agreement by county commissioners without authority of law to discharge a surety of a tax collector, and accept another in his place, does not in fact discharge him until the agreement has been performed, and the substituted surety has given a bond, for the new security must be such a one as would have been a good original security.

In *Com. v. Wolbert*, 6 Binn. (Pa.) 292; 6 Am. Dec. 452, it was held that an omission on the part of the accounting officers of the commonwealth, for a year and upwards, to compel the prothonotary of the common pleas to settle his account of fees, does not discharge the sureties in the official bond of the prothonotary; although the officers are authorized to compel an account at the end of each year, and to enforce payment by execution.

In *People v. Russell*, 4 Wend. (N. Y.) 570, the omission of the comptroller, for eight years, to prosecute the bond of a commissioner of loans, forfeited by the non-payment of interest, constitutes no defense to the surety, although for three years subsequent to the default the principal was solvent and able to pay, and at the time of the commencement of the suit was insolvent and unable to indemnify his surety.

In *Creighton v. Rankin*, 7 C. & F. 325, which was an appeal from Scotland, it appeared that a treasurer appointed by district road trustees had absconded with the trust funds. The House of Lords affirming the judgment of the court below, held that a cautioner for the faithful discharge of his office was liable to the trustees for the balance due from the treasurer, although at several prior audits of his accounts they were guilty of neglect of their duty by allowing him to retain in his hands balances far exceeding the amount allowed by the terms of the bond of caution, without requiring payment and without notice to the cautioner.

In *Looney v. Hughes*, 26 N. Y. 514, it was held that an act requiring a

county treasurer to issue a warrant against a delinquent town collector in twenty days is directory merely; and the issue of such warrant after the expiration of that time is valid as the foundation of an action against the collector's sureties.

In *Bower v. Washington Co.*, 25 Pa. St. 69, the sureties of a tax collector asked to be relieved from their bond, because they were induced to enter into it by seeing a newspaper publication of the accounts of the county, in which it was erroneously stated that the collector had settled up his previous year's duplicate in full. The court held that the sureties were not relieved from their liability.

In *Richmond Co. v. Wandel*, 6 Lans. (N. Y.) 33, a county treasurer was liable for interest on public money, and also for certain money not paid over by him. The board of supervisors allowed him the interest as a perquisite of office, and forgave him the other money on account of his services in averting a draft. The court held that the acts of the board were illegal, and the sureties on the treasurer's official bond were liable for the interest and the other money notwithstanding said acts of the board.

1. In *U. S. v. Prescott*, 3 How. (U. S.) 588, the court, by McLean, J., said: "Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys, which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public? No such principle has been recognized or admitted as legal defense. And it is believed that the instances are few, if indeed any can be found,

where any relief has been given in such cases by the interposition of Congress. As every depository receives the office with a full knowledge of its responsibilities, he cannot, in cases of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs."

In *Com. v. Comly*, 3 Pa. St. 372, it was held that the responsibility of a public receiver depends on his contract, and not on the law of bailment; and where that was to pay over the amount received, it is no defense by his surety that the money was stolen, though the jury find it was kept as a prudent man would keep his own funds.

In *U. S. v. Morgan*, 11 How. (U. S.) 154, it was held that where a collector received treasury notes in payment for duties, which were canceled by him, but afterwards stolen or lost, altered, and then received by him again in payment for other duties, the collector and his sureties are responsible to the government for the amount thereof.

In *U. S. v. Dashiell*, 4 Wall. (U. S.) 182, suit was brought on the official bond of Dashiell, a paymaster in the army of the *United States*, and Paschall, one of his sureties; for breach of the condition in not paying over or accounting for public money that came into his hands. The only defense set up was by way of plea or answer, and in substance was, that Dashiell received of the government \$28,000 in gold, at Charleston, S. C., on June 5, 1857, for the purpose of paying off the troops at Forts Dallas and Capron, in Florida, and, being compelled to stop at Palatka several days, some \$13,000 of the money was stolen from him. The court held that the surety was liable.

In *U. S. v. Keebler*, 9 Wall. (U. S.) 83, it was held that a depository of the money of the *United States*, or a public debtor, cannot defend against a suit on his official bond by proving that he paid the money due the *United States* to one of its creditors, under an order of the Confederate authorities, where he shows no force or physical coercion which compelled obedience to such order.

In *Boyden v. U. S.*, 13 Wall. (U. S.) 17, it was held upon a suit of a bond of a receiver of public moneys of the *United States*, that such a receiver cannot discharge himself by showing

that he was suddenly beset in his office, thrown down, bound, gagged, and that against all the defense he could make, the money was violently and without his fault taken from him.

In *U. S. v. Watts*, 1 N. Mex. 553, the principal in the bond who was a receiver of public moneys, was murdered, and robbed of the moneys in his custody. Even in this extreme case, the court held that the sureties were liable.

In *Hancock v. Hazzard*, 12 Cush. (Mass.) 112, the court said: "A collector of taxes, by accepting the office, takes the risk of the safekeeping of the money he has actually received. His obligation is not regulated by the law of bailments, and the cases cited to that effect are inapplicable. He is a debtor, an accountant, bound to account for and pay over the money he has collected. The loss of his money, therefore, by theft or otherwise, is no excuse for non-performance; this is founded on the nature of his contract and considerations of public policy."

In *U. S. v. Jones*, 36 Fed. Rep. 759, it appeared that a postmaster placed in the mail bag at his office a sum of money belonging to the government to be carried through the mail to the postal depository. While the carrier was on his way to deliver the mail bag to a steamboat, the postmaster intercepted and robbed him of the mail bag. The court held that the sureties on the postmaster's bond were liable for the sum claimed by the government.

In *German American Bank v. Auth*, 87 Pa. St. 419; 30 Am. Rep. 374, the bond of a bank messenger was conditioned that it should be his duty "to account for and pay over all moneys that may come into or pass through his hands as such messenger, and that he shall in all things conduct himself honestly and faithfully as such messenger." The court held that the sureties on this bond were liable for moneys stolen from the bank by the messenger, whether he was acting within the scope of his employment or not, as the robbery was a breach of the condition to "conduct himself honestly and faithfully."

In *Union Tp. v. Smith*, 39 Iowa 9; 18 Am. Rep. 39, the sureties on the bond of a township treasurer were held liable for township money accidentally destroyed by fire.

In *Muzzy v. Shattuck*, 1 Den. (N.

cases which hold that the officer's surety is relieved from liability for such losses.¹

c. FOR MONEY LOST BY FAILURE OF BANK.—It has been held in a number of cases that where public moneys have been deposited in a bank, and the bank has subsequently failed and the moneys have been lost, the sureties on the bond of the officer are liable for the loss.² In *New York* and *South Carolina*, how-

Y.) 233, in an action against a town collector and his sureties, on the official bond executed to the supervisor, brought for the default of the collector in not paying to the county treasurer the money required to be collected by the annual tax list and warrant issued by the board of supervisors, the court held that it was no defense that the collector had collected the money, and that the same had been stolen from his dwelling-house "without any fault, want of care, or omission of duty" on his part.

See also, to the same effect, *Boggs v. State*, 46 Tex. 10; *New Providence v. McEachron*, 33 N. J. L. 339; reversed in 35 N. J. L. 528; *State v. Nevin*, 19 Nev. 162; *State v. Clarke*, 73 N. Car. 255; *State v. Harper*, 6 Ohio St. 607; 67 Am. Dec. 363; *State v. Moore*, 74 Mo. 413; 41 Am. Rep. 322; *Halbert v. State*, 22 Ind. 125; *Morbeck v. State*, 28 Ind. 86; *Rock v. Stinger*, 36 Ind. 346; *Clay Co. v. Simonsen*, 1 Dakota 403; *Taylor Tp. v. Morton*, 37 Iowa 550; *Redwood Co. v. Tower*, 28 Minn. 45; *Board of Education v. Jewell*, 44 Minn. 427; *Monticello v. Lowell*, 70 Me. 437; *State v. Lanier*, 31 La. Ann. 423.

1. In *Cumberland v. Pennell*, 69 Me. 357; 31 Am. Rep. 284, it was held in a suit on the bond of a county treasurer, that if without fault or negligence on his part, he was violently robbed of money belonging to the county, his sureties were not liable.

In *U. S. v. Adams*, 24 Fed. Rep. 348, the collector of customs at Astoria in obedience to an order from the assistant secretary of the treasury took a certain sum of money from Astoria to deposit it with the assistant treasurer at San Francisco, and while *en route*, and without any fault or negligence on his part, the money was stolen from him. The court held that the sureties were not liable for the loss.

In *State v. Houston*, 78 Ala. 576; 56 Am. Rep. 59; 83 Ala. 361, it appeared that a tax collector took public money from the safe wherein it was deposited, put it in envelopes in the pockets of his

coat, and about four hours afterwards started for the county seat, and on the road was robbed by a highwayman, who presented a pistol and compelled him by threats of death, to give up the money. The court held that he was not guilty of negligence, and that his sureties were not liable.

In *Houghton v. Freeland*, 26 Grant's Ch. (Can.) 500, it was held that the sureties on the bond of a treasurer of a municipality were not liable to the corporation for moneys lost through the accidental burning of the house wherein they were kept, when there was no proper place provided by the municipality for the keeping of the same, and the nearest bank was distant some thirty-five miles.

In *Albany Co. v. Dorr*, 25 Wend. (N. Y.) 440, it was held that a public officer intrusted with the receipts and disbursement of public funds, is not responsible for moneys stolen from his office, where there is no imputation of negligence or other default on his part.

2. In *Nason v. Poor Directors*, 126 Pa. St. 445, it was held that a treasurer of the directors of the poor who has given bond for the safekeeping of public moneys, is not relieved from liability on the bond on account of the failure of the bank in which such moneys were deposited by him.

In *Baily v. Com.*, 20 W. N. C. (Pa.) 221, it was held in a suit on the bond of the state treasurer that it was no defense that the treasurer had no vault provided for him by law, and had accordingly deposited the funds in the name of the commonwealth in a reputable bank, taking bond with surety for the amount; that subsequently, through the failure of said bank, the said deposit was lost without fault or negligence on his part, and that he had brought suit on the bond given him by the bank, which suit was still undetermined.

See, to the same effect, *Lowry v. Polk Co.*, 51 Iowa 50; 33 Am. Rep. 114; *State v. Powell*, 67 Mo. 395; 29 Am. Rep. 512; *State v. Moore*, 74 Mo. 413; 41 Am. Rep. 322; *Omro v. Kaime*, 39

ever, a different rule has been established, and in these states, if it appears that the deposit was made in good faith and without negligence, the sureties are relieved.¹

f. FOR INTEREST ON PUBLIC MONEYS.—If a public officer receives interest for the use of public moneys, whether from banks in which such moneys have been deposited, or from individuals to whom they have been loaned, he must account for it, and if he fails to do so, the sureties on his bond are liable.²

g. FOR PENALTIES.—The sureties on the bond of a public officer are not liable for a penalty imposed by statute for official misconduct or neglect.³

5. Liability on Bonds of Particular Officers—*a.* SHERIFFS AND CONSTABLES.—Where a sheriff or constable, having process in his hands, makes an unauthorized levy for sale of property, he is guilty of such a violation of his official duty as will render his sureties liable for the loss.⁴ But in some cases it has been held

Wis. 468; *Ward v. School Dist. No. 15*, 10 Neb. 293; 35 Am. Rep. 477; *Wilson v. Wichita Co.*, 67 Tex. 647; *Perley v. Muskegon Co.*, 32 Mich. 132; 20 Am. Dec. 637; *Havens v. Lathene*, 75 N. Car. 505; *Hart v. Poor Guardians*, 81½ Pa. St. 466.

1. *People v. Faulkner*, 107 N. Y. 477; *York Co. v. Watson*, 15 S. Car. 1; 40 Am. Rep. 675; *Twitty v. Houser*, 17 N. Car. 1.

2. In *Richmond Co. v. Wandel*, 6 Lans. (N. Y.) 33, the court, by Gilbert, J., said: "The notion that a public officer may keep back interest which he has received upon a deposit of public money is an affront to law and morals, for if done with evil intent it is nothing less than embezzlement." See also *Wheeling v. Black*, 25 W. Va. 266; *Hunt v. State*, 124 Ind. 306; *Chicago v. Gage*, 95 Ill. 593; 35 Am. Rep. 182; *U. S. v. Curtis*, 100 U. S. 119; *U. S. v. Poulson*, 30 Fed. Rep. 231; *Cassady v. Trustees*, 105 Ill. 561; *Lewis v. Dwight*, 10 Conn. 95; *Perry v. Horn*, 22 W. Va. 381; but see *Renfroe v. Colquitt*, 74 Ga. 618; *State v. Blake-more*, 7 Heisk. (Tenn.) 638; *U. S. v. Broodhead*, 127 U. S. 212.

3. In *Alabama*, a county clerk is liable for a penalty of five hundred dollars if he issues a marriage license to a minor without the proof required by law. In *Brooks v. Governor*, 17 Ala. 806, a county clerk violated this law, and became liable for the penalty. The court held that the sureties on his official bond could not be compelled to pay it.

The sureties on a bond are not liable

for a penalty which the principal separately has agreed to forfeit in case of his failure to perform. *Dill v. Lawrence*, 109 Ind. 564. See also *Casper v. People*, 6 Ill. App. 28; *Tappan v. People*, 67 Ill. 339; *Treasurers v. Hilliard*, 8 Rich. (S. Car.) 412; *State v. Baker*, 47 Miss. 88; *McDowell v. Burwell*, 4 Rand. (Va.) 317; *State v. Harrison*, *Harper* (S. Car.) 88; *Fletcher v. Chapman*, 2 Leigh (Va.) 565; *Moretz v. Ray*, 75 N. Car. 170. But see *Wilson v. State*, 1 Lea (Tenn.) 316; *Wood v. Farnell*, 50 Ala. 546.

4. In *State v. Jennings*, 4 Ohio St. 423, the court, by Thurman, C. J., said: "The authorities seem to us quite conclusive, that a seizure of the goods of A, under color of process against B, is official misconduct in the officer making the seizure, and is a breach of the condition of his official bond, where that is that he will faithfully perform the duties of his office. The reason for this is, that the trespass is not the act of a mere individual, but is perpetrated *colore officii*. If an officer, under color of a *feri facias*, seizes property of the debtor that is exempt from execution, no one, I imagine, would deny that he had thereby broken the condition of his bond. Why should the law be different if, under color of the same process, he take the goods of a third person? If the exemption of the goods from the execution in the one case makes their seizure official misconduct, why should it not have the like effect in the other? True, it may sometimes be more difficult to ascertain the ownership of the

goods than to know whether a particular piece of property is exempt from execution; but this is not always the case, and if it were, it would not justify us in restricting to litigation the indemnity afforded by the official bond, thus leaving the rest of the community with no other indemnity against official misconduct than the responsibility of the officer might furnish."

In *People v. Schuyler*, 4 N. Y. 173, it was held that where a sheriff, having in his hands a writ of execution against the property of the defendant therein, seizes by virtue thereof the goods of another person, he is guilty of official misconduct, and he and his sureties thereby become liable upon his official bond. The court, by Gardner, J., said: "The bond was in form to the people of the state; it was in effect a security, not only to suitors, who might have a direct interest in the action of the sheriff, but to every citizen who might be injured by his official misconduct. Before, and at the time of the alleged trespass, Schuyler was sheriff of the county of Rensselaer. As a public officer the attachment in question was necessarily and lawfully delivered to and received by him. He assumes to levy and draw up his inventory as sheriff; as sheriff he rightfully summoned a jury, to determine the title to the property seized, and subsequently in his official character received an indemnity and detained the goods, in opposition to the verdict. He received the attachment, therefore, not *colore officii*, but in virtue of his office. His sureties undertook "that he should faithfully execute" the process. If he had "in all things" performed his duty, he would have seized the goods of Fay or returned the writ, instead of which he levied upon the goods of Batchellor, as the property of the defendant in the attachment. Upon principle, and upon grounds of public policy, it seems to me, that the responsibilities of his sureties should be different from those they would incur, if the sheriff had entered upon the premises of the relator, and removed his goods without any process whatever. In the last case supposed, the sheriff would act in his own right, and might be resisted as any other wrongdoer. In the one before us, he was put in motion by legal authority, invoked in behalf of others, and could command the power of the county to aid him in his execution. Respect for the process of our courts, and for the

official character of the sheriff, if it did not forbid forcible opposition (which must have been unavailing), is incompatible with the notion of making resistance indispensable as a means of protection. This must be the alternative, if those who are thus aggrieved are driven to rely exclusively upon the responsibility of the officer who, as in this case, may be wholly insolvent."

In *Lowell v. Parker*, 10 Met. (Mass.) 309, it was held that where a constable attached goods on a writ in which the *ad damnum* exceeded \$70, and which, therefore, he had no authority to serve, the sureties on his bond were liable for the malfeasance, because he took the goods *colore officii*, and such taking was a breach of his official duty.

In *Turner v. Slisson*, 137 Mass. 191, it was held that a seizure, by a constable, of the property of one person upon an execution against another, is a breach of the condition of the constable's bond for the faithful performance of his duties in the service of civil processes, for which he and his sureties are liable; and it is immaterial that the execution is one which he has no authority to serve, if, in making the seizure, he acts *colore officii*.

Marshal.—In *Lammon v. Feusier*, 111 U. S. 17, it was held that the taking, by a marshal of the *United States*, upon a writ of attachment on mesne process against one person, of the goods of another, is a breach of the condition of his official bond, for which his sureties are liable.

False Arrest.—In *Huffman v. Koppelkom*, 8 Neb. 344, it was held that where a sheriff holding process authorizing him to arrest a certain person therein named, carelessly and unlawfully arrests and wounds in so doing, a person other than the one named in the writ, he and his sureties are held liable on his bond. See also *Jefferson v. Hartley*, 81 Ga. 716.

Exempt Property.—In *Hobbs v. Barefoot*, 104 N. Car. 224, it was held that the sureties on the official bond of a sheriff are liable for a sale by their principal of property from execution. See also, as to exempt property, *Casper v. People*, 6 Ill. App. 28; *State v. Farmer*, 21 Mo. 160; *Strunk v. Ocheltree*, 11 Iowa 158.

See also, on the general question, *Carmack v. Com.*, 5 Binn. (Pa.) 184; *Brunott v. McKee*, 6 W. & S. (Pa.) 513; *Archer v. Noble*, 3 Me. 418; *Harris v. Hanson*, 11 Me. 241; *Greenfield v.*

that the wrongful sale of the property of one person, under an execution against another person, is a mere trespass, for which the sureties of the officer are not liable.¹

Where, through negligence or misconduct, a sheriff or constable has failed to recover the amount of an execution, which he could have recovered, or having made the money out of the defendant's property, has failed to pay it over to the persons entitled to it, the sureties on his bond are liable for the loss.²

Wilson, 13 Gray (Mass.) 384; Tracy v. Goodwin, 5 Allen (Mass.) 409; State v. Jennings, 4 Ohio St. 418; Sangster v. Com., 17 Gratt. (Va.) 124; Com. v. Stockton, 5 T. B. Mon. (Ky.) 192; Jewell v. Mills, 3 Bush (Ky.) 62; State v. Fitzpatrick, 64 Mo. 185; Charles v. Haskins, 11 Iowa 329; 77 Am. Dec. 148; Turner v. Killian, 12 Neb. 580; Holliman v. Carroll, 27 Tex. 23; 54 Am. Dec. 606; Van Pelt v. Littler, 14 Cal. 194; U. S. v. Hine, 3 MacArthur (D. C.) 27; Noble v. Himeo, 12 Neb. 193; State v. Mann, 21 Wis. 684; State v. Druly, 3 Ind. 431; Jefferson v. Hartley, 81 Ga. 716; Gerber v. Ackley, 32 Wis. 233; 37 Wis. 43; 19 Am. Rep. 751; Heidenheimer v. Brent, 59 Tex. 533; Walsh v. People, 6 Ill. App. 204; Horan v. People, 10 Ill. App. 21; Jones v. People, 19 Ill. App. 300; Strunk v. Ocheltree, 11 Iowa 158; Forsythe v. Ellis, 4 J. J. Marsh. (Ky.) 298; People v. Mersereau, 74 Mich. 687; Hubbard v. Elden, 43 Ohio St. 380; Rutland v. Paige, 24 Vt. 181; McBroom v. Governor, 6 Port. (Ala.) 32; Stinson v. Hill, 21 La. Ann. 560; Green v. Young, 8 Me. 14; Wyche v. Myrick, 14 Ga. 584.

1. In *People v. Lucas*, 93 N. Y. 585, it was held that the wrongful seizure and sale, by a constable, of the property of A on an execution against B, does not constitute a breach of the condition of the official bond of the constable, that he will pay to the person entitled thereto "all such sums of money as the said constable may become liable to pay on account of an execution which shall be delivered to him for collection." The court, by Andrews, J., said: "The constable to whom an execution is issued may neglect to levy or return it, or having collected it, he may neglect to pay over the money collected thereon, or in other ways may violate the rights of the plaintiff or defendant in the process, and thereby subject himself to liability to the party aggrieved for damages. Such a liability is, within the fair meaning of the bond, a liability

on account of the execution delivered to him for collection. *Sloan v. Case*, 10 Wend. (N. Y.) 371; 25 Am. Dec. 569, where, however, the constable commits a bare trespass upon the property of a third person, not a party to the execution, although under color of the process, the liability he incurs to the person injured is in no just sense on account of the execution. The act done is neither commanded nor justified by the writ. The fact that the constable acted under color of process is wholly irrelevant to the question of his liability. True it may be that, if the execution had not been issued, the trespass might not have been committed, but the liability results from the trespass, and the right of the owner of the property converted to maintain an action, is wholly independent of the particular mode or occasion of the trespass. The owner's action is not through or on account of the execution. The execution is a mere circumstance attending the conversion. The liability of the constable is not founded upon the execution, but upon the trespass of which it was the occasion and incident. It is scarcely necessary to refer to the fact that two of the defendants are sureties, or to the rule that the liability of sureties is not to be extended beyond the fair and reasonable import of their obligation. To hold that the condition of the bond in this case embraces the transaction in question, would, we think, do violence to the fair meaning of language, and impose upon sureties a liability which they could not reasonably have contemplated." See, to the same effect, *State v. Conover*, 28 N. J. L. 224; *State v. Brown*, 54 Md. 318; *State v. Brown*, 11 Ired. (N. Car.) 141; *State v. Mann*, 21 Wis. 684; *State v. McDonough*, 9 Mo. App. 63; *McKee v. Griffin*, 66 Ala. 211; *Carey v. State*, 34 Md. 105.

2. In *State v. Rayburn*, 22 Mo. App. 303, the sureties of a sheriff were held liable to a judgment creditor for a

The sureties of a constable or sheriff are not liable for an act of the officer beyond the scope of his authority or duty,¹ or for his

loss caused by the sheriff releasing a valid levy.

In *Waymire v. State*, 80 Ind. 67, a levy was made upon sufficient personal property to satisfy the judgment, but the officer failed to advertise and sell. The court held that the sureties were liable.

In *Habersham v. Sears*, 11 Oregon 431; 50 Am. Rep. 481, a sheriff's sureties were held liable for a loss occasioned by the sheriff's refusal to make the levy.

In *Witkowski v. Hern*, 82 Cal. 604, the sureties of a constable were held liable where property, seized by virtue of the execution, was damaged in the constable's hands by reason of his negligence.

In *Carter v. Duggan*, 144 Mass. 32, a constable's sureties were held liable where the constable accepted insufficient sureties on a bond taken by him in the service of a replevin writ. The court held that the measure of damages which the plaintiff was entitled to recover was not the value of the property replevied, but the amount which he had lost by reason of the misdoing of the defendant in accepting insufficient sureties.

In *Governor v. Edwards*, 4 Bibb (Ky.) 219, it was held that the sureties of the sheriff were liable for not paying a landlord his rent from the proceeds of the sale of the tenant's goods, liable to distress, after notice that the rent was in arrear.

In *Kane v. Union Pac. R. Co.*, 5 Neb. 105, it was held that a sheriff's exaction of illegal fees is a breach of his official bond.

In *Ex parte Chester*, 5 Hill (N. Y.) 555, application was made in behalf of Chester for leave to prosecute the official bond of the sheriff of Oswego county. An affidavit was read to the court stating that a *fi. fa.* in favor of Chester had been delivered to the sheriff and returned *nulla bona*, notwithstanding the defendant owned a large amount of real and personal property which might have been levied on. The court granted a rule for leave to prosecute.

In *Dennie v. Smith*, 129 Mass. 143, a constable's official bond provided that he should "faithfully perform all the duties of a constable in the service of all civil processes which may be com-

mitted to him." The constable having attached property, refused to restore it after the action had terminated in the owner's favor. Suit was brought against the constable for the conversion of the property, but in the action he was not described in his official capacity. The court held that he had been guilty of a breach of his official bond; that it was immaterial that he was not described as constable, and that his sureties were liable.

In *Lyon v. Horner*, 32 W. Va. 432, a sheriff levied upon property, and the claimant gave a suspending bond, and the sheriff returned the writ and bond and left the property in the possession of the debtor without security, and it was consumed by him. The court held that the sureties of the sheriff were liable for the value of the property to the creditor when it appeared that the property was liable for the debt.

In *Bank of Pennsylvania v. Potius*, 10 Watts (Pa.) 148, it was held that if the sureties on a bond be compelled to pay a debt, by reason of the neglect of the sheriff to collect it from the principal defendant, they will have a right of action against the sheriff and his sureties on his official bond.

For other cases involving liability of the sureties of sheriffs and constables for the neglect or misconduct of their principal, see *Maddox v. Rader*, 9 Mont. 126; *State v. Cayce*, 85 Mo. 456; *Cole v. Crowford*, 69 Tex. 124; *Cash v. People*, 32 Ill. App. 250; *Clark v. Lamb*, 76 Ala. 406; *Shane v. Francis*, 30 Ind. 92; *State v. Vananda*, 7 Blackf. (Ind.) 214; *Fleenor v. Taggart*, 116 Ind. 189; *Ferguson v. Hirsch*, 54 Ind. 337; *State v. Cason*, 11 S. Car. 392; *Habersham v. Sears*, 11 Oregon 431; 50 Am. Rep. 481; *State v. Williams*, 19 S. Car. 62; *Hill v. Sewell*, 27 Ark. 15; *Ex parte Chester*, 5 Hill (N. Y.) 555.

1. In *State v. Davis*, 88 Mo. 585, a deed of trust provided that if the trustee named therein refused to act, the sheriff of the county should execute the trust. The court held that the failure of the sheriff to pay over the fund received by him as trustee, did not make the sureties on his official bond liable for its loss.

In *King v. Baker*, 7 La. Ann. 571, a sheriff seized certain property for which a forthcoming bond with surety was given; the execution on which the

refusal to perform a duty not imposed upon him by law.¹ The sureties of a constable or sheriff must be sued on the bond.²

b. CLERK OF COURT.—Where moneys are paid to a clerk of court in his official capacity, his sureties are liable for their proper appropriation. The sureties of a court clerk are also liable for any omission, neglect or misconduct on the part of the officer in the conduct of his office.³

c. JUSTICES OF THE PEACE.—The sureties of a justice of the peace are not liable for an error of judgment committed by the justice in the exercise of his judicial functions; but they are liable for any neglect or misconduct of their principal acting in his ministerial capacity.⁴

sheriff seized the property was, however, not under seal of the court. It was held that the execution was invalid, and that the surety was not liable. See also *Heidenheimer v. Brent*, 59 Tex. 533; *Greenwell v. Com.*, 78 Ky. 320.

1. In *Com. v. Lentz*, 106 Pa. St. 643, it appeared that the *Pennsylvania* Act of March 20, 1810, § 11, provides that the execution upon a judgment rendered by a justice of the peace "shall be directed to the constable of the ward, district or township where the defendant resides, or the next most convenient to the defendant, commanding him to levy." The court held that while a constable of a ward other than as above specified may, if he chooses, accept and execute such an execution directed to him, he is not obliged to do so, and, in case of his refusal, no action can be maintained upon his official bond for that cause.

2. *Boyd v. Rose*, 4 N. J. L. 230; *Matlock v. Stow*, 3 N. J. L. 533.

3. *Morgan v. Long*, 29 Iowa 434; *Governor v. Dodd*, 81 Ill. 162; *McDonald v. Atkins*, 13 Neb. 568; *In re Finks*, 41 Fed. Rep. 383; *State v. Blair*, 76 N. Car. 78; *State v. Windley*, 99 N. Car. 4; *Wilmington v. Nutt*, 78 N. Car. 177; 80 N. Car. 265; *Gregory v. Morisy*, 79 N. Car. 559; *State v. Watson*, 38 Ark. 96; *Scott v. State*, 46 Ind. 203; *State v. Givan*, 45 Ind. 267; *Sullivan v. State*, 121 Ind. 342; *Henry v. State*, 98 Ind. 381; *Carey v. State*, 34 Ind. 105; *Bowers v. Fleming*, 67 Ind. 541; *State v. Sloan*, 20 Ohio 327; *Waters v. Carroll*, 9 Yerg. (Tenn.) 102; *Rogers v. Odom*, 86 N. Car. 432; *Thomas v. Connelly*, 104 N. Car. 342; *Kerr v. Brandon*, 84 N. Car. 128; *Syme v. Bunting*, 91 N. Car. 48; *Smalling v. King*, 5 Lea (Tenn.) 585.

In *Satterfield v. People*, 104 Ill. 448, the offices of county clerk and clerk of the county court were united in the same person. The court held that the sureties on the bond given by the incumbent as county clerk were liable for probate fees and fees received in suits in the county court.

In *Ottenstein v. Alpaugh*, 9 Neb. 237, the rule rendering sureties on official bonds liable only for acts of their principals done *virtute officii*, was applied to a county clerk's falsely certifying to a claim allowed by the county board and sold to plaintiff.

In *Alcorn v. State*, 57 Miss. 273, the sureties on a chancery clerk's official bond were held not liable for money received by him from the sale of assets of decedent's estate which he made as special commissioner appointed by the court to complete the sale.

In *Cullom v. Dolloff*, 94 Ill. 330, a clerk of the circuit court was not obliged by his bond to account for money received by him until June 1, 1875. On March 16 his sureties succeeded in compelling him to give a new bond. *Held*, that the sureties on the old bond were liable for money received before March 16 and not accounted for. On the liability of sureties on bonds of clerks of courts where there are successive terms, see *Yoakley v. King*, 10 Lea (Tenn.) 67; *State v. Thornton*, 8 Mo. App. 27.

4. In *Com. v. Kendig*, 2 Pa. St. 448, the court, by Rogers, J., said: "The surety in the official bond is liable for the faithful application of all moneys and costs received, which came into the hands of the justice, as a justice, in suits brought on claims before him. But if it should appear (of which the jury must judge) that no suit was brought, and that

d. NOTARY PUBLIC.—The sureties of a notary public are liable for a loss occasioned by a false certificate;¹ or for failure to give notice of non-payment or non-acceptance of a note or bill;² but they are not liable for money deposited with him for the purpose of canceling a mortgage.³

e. PUBLIC TREASURERS.—Public treasurers are as a rule liable for public moneys in their hands, although the moneys were collected and obtained without authority of law.⁴ Such officers are liable for the proper conduct of their office, and if through any neglect, misconduct or default, they lose the funds intrusted to

the claims were put into his hands to collect as agent merely, it is otherwise. But when put into his hands as a justice, the surety is liable, notwithstanding the money is paid without suit. The money being received in his official capacity, the liability is incurred. The object of requiring bond with surety is to protect the rights of suitors, and that should receive a liberal construction."

In *Ditmars v. Com.*, 47 Pa. St. 335, it was held that a surety on the official bond of a justice of the peace, is liable for money collected by him in his official capacity, though without suit; it is not necessary that it should be collected by process.

In *Hale v. Com.*, 8 Pa. St. 415, it was held that where proceedings were commenced before a justice to recover a debt less than \$100, and the defendant confessed judgment for a sum exceeding \$100, which was paid to the justice without execution issued, his sureties are responsible for it to the plaintiff, although the sum for which judgment was confessed was in excess of the jurisdiction of the justice.

See also, as to the liability of the sureties on the bond of a justice of the peace, *Latham v. Brown*, 16 Iowa 118; *Bessinger v. Dickerson*, 20 Iowa 260; *Gowing v. Gowgill*, 12 Iowa 495; *Howe v. Mason*, 12 Iowa 202; *Wright v. Harris*, 31 Iowa 272; *Peabody v. State*, 4 Ohio St. 387; *Place v. Taylor*, 22 Ohio St. 317; *Stevens v. Breatheven*, *Wright (Ohio)* 733; *Widener v. State*, 45 Ind. 244; *Doepfner v. State*, 36 Ind. 111; *Brockett v. Martin*, 11 Kan. 378; *Cressey v. Gierman*, 7 Minn. 398; *Smith v. Lovell*, 2 Mont. 332; *McGrew v. Governor*, 19 Ala. 89; *People v. Herr*, 81 Ill. 125; *Price v. Farrar*, 5 Ill. App. 536; *Green v. People*, 14 Ill. App. 364; *McCormick v. Thompson*, 10 Neb. 484; *Barnes v. Whitaker*, 45 Wis. 204; *Taylor v. Parker*, 43 Wis. 78.

1. *People v. Butler*, 74 Mich. 643.

2. *Lescouzeve v. Ducatel*, 18 La. Ann. 470.

3. *Wheeler v. State*, 9 Heisk. (Tenn.) 393.

4. In *Boehmer v. Schuylkill*, 46 Pa. St. 452, it was held that the sureties on the official bond of a county treasurer are liable for the balance found to be due by him, on settlement of his accounts by the county auditors, whether or not the commissioners had exceeded their legal powers in borrowing money; if raised by them and brought to the county treasurer, the treasurer is bound to keep and disburse it, and for default his sureties are responsible.

In *Rensselaer Co. v. Bates*, 17 N. Y. 242, it was held that moneys borrowed for a public purpose and on the credit of the county by the agent of a board of supervisors, under its resolution passed, without any legal authority but not in violation of public policy or of positive statute, may be recovered by the board of such agent or his sureties.

In *Wylie v. Gallagher*, 46 Pa. St. 205, it was held that the sureties on the official bond of a county treasurer are liable for a balance found by the auditors upon settlement of his account to be due by him to the county, though he was charged therein with scrip issued by the commissioners during his term, in violation of law, but which he received, deposited, and paid out as money.

In *Franklin v. Hammond*, 45 Pa. St. 507, it was held that where the agent of a state treasurer gave bond with sureties to his principal, for faithful performance, and to account for and pay over moneys received, the sureties were held liable for his default in non-payment, though the appointment was only to settle the claims placed in his hands, and there was no direct authority to collect and receive the amounts found to be due.

them, their sureties are liable for the loss.¹ The condition of a treasurer's bond is broken by the failure of the officer to keep his accounts, or make his reports as required by statute.²

In the absence of a statutory provision to the contrary, the sureties of a public treasurer are liable only for a defalcation occurring during the term for which the officer was elected.³

f. TAX COLLECTORS.—If a tax collector has actually collected taxes and appropriated them to his own use, the sureties on his bond are not relieved from liability because the levy was ille-

1. *Comstock v. Gage*, 91 Ill. 329; *Richmond Co. v. Wandel*, 6 Lans. (N. Y.) 33; *Feigert v. State*, 31 Ohio St. 432; *Renfroe v. Colquitt*, 74 Ga. 618; *State v. Kelly*, 32 Ohio St. 421; *Simons v. Jackson Co.*, 63 Tex. 428; *Cassady v. Trustees of Schools*, 105 Ill. 560; *Reed v. Board of Education*, 39 Ohio St. 635; *Barnet v. Abbott*, 53 Vt. 120; *Wilson v. Burfoot*, 2 Gratt. (Va.) 134; *Supervisors v. White*, 30 Barb. (N. Y.) 72; *Frost v. Mexsell*, 38 N. J. Eq. 586.

In an action upon the bond of a county treasurer, where the evidence shows a misappropriation of the funds in his care, and a shortage in his accounts, the burden of proof is upon the defendant to show that the funds have been subsequently replaced. *Milwaukee v. Pabst*, 70 Wis. 352.

The sureties upon the bond of a county treasurer are not liable for his conduct in regard to moneys paid to him on account of sales of state school lands. Such money, having been mingled with the county funds, the sureties are not liable for the whole deficiency upon both funds. *Scott Co. v. Ring*, 29 Minn. 398.

2. In *Tompkins Co. v. Bristol*, 99 N. Y. 316, the court, by Ruger, C. J., said: "The undertaking of sureties in a treasurer's official bond is that he shall faithfully perform his duties; and this involves the obligation of making correct reports, conforming to the requirements of the statute, as well as the payment of funds in his custody. In an action against sureties for an alleged breach of such a bond, the official reports made during the term covered by them are a part of the *res gestæ*, and competent evidence, not only of the facts affirmatively appearing therein, but also of such other facts and circumstances, bearing upon the liability of the sureties as are legitimately inferable therefrom. This arises, not alone from the principle authorizing

the reception of such evidence or declarations of the principal, but as being an official act, performed under the directions of the statute, in pursuance of the stipulations contained in the bond, whereby the sureties have assumed the liability of any neglect in the discharge of the duty."

In *Boone Co. v. Jones*, 54 Iowa 699, it was held in an action on a county treasurer's bond, that the principal's accountings and settlements, made in pursuance of law, are conclusive against him and his sureties, in the absence of mistake.

A treasurer, on surrendering his office during his second term, failed to account for or pay over all the funds then chargeable to him. *Held*, that the sureties for the second term were *prima facie* liable, and that, to exonerate themselves, the burden was on them to show that this deficiency occurred during the former term. *Pine Co. v. Willard*, 39 Minn. 125.

Sureties on the official bond of a county treasurer, who had been released upon their request, held not to be liable for any deficiency in his accounts occurring after his settlement with the county commissioners, whereupon a new bond was accepted in lieu of the first. *Missoula County v. Edwards*, 3 Mont. 60.

Where a county treasurer is his own successor, and reports from time to time during his terms the amount of money he has in his hands, in a suit on the last bond given, his sureties cannot set up that his reports during last term were untrue, and so prove that the deficit occurred in a former term. *Territory v. Cook* (Arizona, 1888), 7 Pac. Rep. 10.

3. *Scott Co. v. Ring*, 29 Minn. 398; *Van Sickel v. Buffalo Co.*, 13 Neb. 103; *Hoboken v. Kamena*, 41 N. J. L. 435; *Fond du Lac v. Moore*, 58 Wis. 170; *State v. Baldwin*, 14 S. Car. 35; *Pine Co. v. Willard*, 39 Minn. 125; *Lauder-*

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gally made.¹ Sureties are liable for the misappropriation of the funds collected.²

SURETY TO KEEP THE PEACE.—See BREACH OF THE PEACE, vol. 2, p. 516; JUSTICE OF THE PEACE, vol. 12, p. 419.

SURFACE.—See note 3.

dale Co. v. Alford, 65 Miss. 63; Crawn v. Com., 84 Va. 282.

1. In Moore v. Allegheny City, 18 Pa. St. 55, it was held that a surety of a collector of city taxes cannot protect himself against liability for taxes collected by the collector and not paid over, by showing that a certain portion of the taxes, stated in the warrant, had been levied on certain persons and property not subject to taxation. See, to the same effect, McLean v. State, 8 Heisk. (Tenn.) 22; Orono v. Wedgewood, 44 Me. 49; 69 Am. Dec. 81; Miller v. Moore, 3 Humph. (Tenn.) 189; State v. Odom, 1 Spears (S. Car.) 245; Chandler v. State, 1 Lea (Tenn.) 296; Vermilion Parish v. Brookshier, 31 La. Ann. 736; Connell v. Crawford Co., 59 Pa. St. 196; Mayor, etc., of Homer v. Merritt, 27 La. Ann. 568.

2. Mansfield v. Wright, 9 Q. B. Div. 683; King v. U. S., 99 U. S. 229; Soule v. U. S., 100 U. S. 8; U. S. v. Stone, 106 U. S. 525.

Under the law of *Pennsylvania*, a county treasurer has no power to release the sureties on the bond of a tax collector; and the fact that such collector, who was indebted to the county for taxes collected but not paid in, has given the treasurer his note for the amount due by him, and that the county has put the note in judgment, and, by execution sale of the collector's effects, has realized part of the debt, will not operate to discharge the sureties, except to the extent of the proceeds of the sale under the judgment. Templeton v. Com. (Pa. 1886), 8 Atl. Rep. 167.

Where sureties upon a tax collector's bond, intrust it to the collector for delivery, and he, or one employed by him, cuts off the signatures and attaches them to a copy of the bond, made because the original is mutilated, they are bound on the new bond. State v. Harney, 57 Miss. 863.

Where a tax collector divided the profits of his office with one of the sureties on his bond, in pursuance of an agreement between them, and the collector afterwards proved a default-

er, and the amount of profits realized by such surety was enough to indemnify all the sureties, the co-sureties may recover from the surety first mentioned the amount they have been obliged to pay by reason of their principal's default. McLewis v. Furgeson, 59 Ga. 644.

Public Officers.—See also *supra*, this title, *Scope of Contract*; also through the article, various cases illustrating the liability of sureties on the official bonds, required of public officers. See also PUBLIC OFFICERS, vol. 19, p. 378.

3. That "surface" may refer to an artificial as well as the original "surface," see LOT, vol. 13, p. 1161.

"**Surfacing**," in a contract for the construction of a railroad, was held not to include filling in between the ties or raising the roadbed. Snell v. Cottingham, 72 Ill. 162. See also Western Union R. Co. v. Smith, 75 Ill. 496. In both these cases it was held that the meaning of the word was to be determined by evidence of witnesses conversant with the subject to which it related. In the former case the court said: "The word 'surfacing' seems to be a technical term among civil engineers, and the definitions given of its meaning are as contradictory as any other part of the evidence. A witness for appellees says, 'surfacing, in railroad parlance, is lifting up the ties and tamping dirt under them, so as to give an evenness to the entire track.' The definition given by a witness for appellants is, 'surfacing a railroad is filling in between the ties, and tamping under.' We do not think the theory of appellants, that 'filling in' is included in 'surfacing,' if that word means what their witnesses say it does, and is to be compensated by the consideration to be paid for laying the track, can be maintained, certainly not in view of the provisions of the contract. The track was to be laid with a 'good even surface.' This is all that is said on that subject. This, we understand from the evidence, can be done without filling in between the ties."

SURFACE WATERS.—(See also DRAINS AND SEWERS, vol. 6, p. 2; FLOODS, vol. 8, p. 67; LAKES AND PONDS, vol. 12, p. 610; NAVIGABLE WATERS, vol. 16, p. 236; NUISANCES, vol. 16, p. 922; UNDERGROUND WATERS; WATERS.)

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I. DEFINITION.—Surface waters are waters of a casual and vagrant character, which ooze through the soil or diffuse or squander themselves over the surface, following no definite course.¹ They are waters which, though customarily and naturally flowing in a known direction and course, have nevertheless no banks or channel in the soil;² and include waters which are diffused over the surface of the ground and are derived from rains and melting snows,³ occasional outbursts of water which in time of freshet or melting of snows descend from the mountains and inundate the country;⁴ and the moisture of wet, spongy, springy, or boggy ground.⁵ But when surface waters reach and become a part of

1. *Schaefer v. Marthaler*, 34 Minn. 489; 57 Am. Rep. 73.

2. *Livingston v. McDonald*, 21 Iowa 166; 89 Am. Dec. 563.

3. *Crawford v. Rambo*, 44 Ohio St. 282; *Schaefer v. Marthaler*, 34 Minn. 489; 57 Am. Rep. 73; *Barkley v. Wilcox*, 87 N. Y. 143; 40 Am. Rep. 519; *Lessard v. Stram*, 62 Wis. 114; 51 Am. Rep. 715; *Broadbent v. Ramsbotham*, 11 Exch. 615; *Flagg v. Worcester*, 13 Gray (Mass.) 603.

4. *Macomber v. Godfrey*, 108 Mass. 221; 11 Am. Rep. 349; *Shields v. Arndt*, 4 N. J. Eq. 247; *Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 174.

5. *Barkley v. Wilcox*, 86 N. Y. 147; 40 Am. Rep. 519; *Rawstron v. Taylor*, 11 Exch. 382.

Surface water is water which is merely spread over the surface and flows without any regular course or channel, or circulates under the surface through the pores of the earth. *Swett v. Cutts*, 50 N. H. 446; 9 Am. Rep. 276.

It is water which, whether it has fallen as rain or has come from the overflow of a pond or swamp, sinks into the top soil and struggles through it. *Buffum v. Harris*, 5 R. I. 253.

Rain water which lodges in a basin formed in the land, though by percolation it forms one of the sources of supply of a brook, is surface water. *Broadbent v. Ramsbotham*, 11 Exch. 615.

Surface water has been characterized as water which comes no one knows exactly whence, and flows no one knows

a natural water-course, they lose their character as surface waters and come under the rules governing water-courses.¹

II. SURFACE WATERS AND WATER-COURSES DISTINGUISHED.—The distinguishing features of surface waters are purely negative and consist in the absence of the distinguishing features which are common to all water-courses. Hence it is that the courts have not attempted to give any complete and full definition of surface waters. The question that has arisen has usually been whether the water in question was surface water or was a stream or water-course. If it has the characteristics of a water-course, it is treated as such and is governed by the rules of law applicable to water-courses. If the characteristics of a water-course are absent, it is usually treated as surface water and is governed by the rules of law applicable to surface waters.

To constitute a water-course, there must be a stream, usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides, or bank, and it usually discharges itself into some other stream or body of water. It must be something more than mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes.²

exactly how, either under ground or on the surface, unconfined in any channel, either as rainfall or from springs of the earth, which may vary from day to day, or spring up from beneath the surface in a direction which no one knows. *Grand Junction Canal Co. v. Shugar, L. R., 6 Ch. 486.*

It has been declared to be "the lost water that percolates the soil below the surface of the earth, in hidden recesses, without a known channel or course, and the wild water that lies upon the surface of the earth or temporarily flows over it as the natural or artificial elevations may guide or invite it, but without a channel, and which may be caused by the falling of rain or the melting of snow and ice, or the rising of contiguous streams or rivers." *Taylor v. Fickas, 64 Ind. 172; 37 Am. Rep. 114.*

1. *Palmer v. Waddell, 22 Kan. 352; Gibbs v. Williams, 25 Kan. 214; 37 Am. Rep. 241; Schaefer v. Marthaler, 34 Minn. 487; 57 Am. Rep. 73; Alcorn v. Sadler, 66 Miss. 221; Jones v. Han-novan, 55 Mo. 462.*

2. *Hoyt v. Hudson, 27 Wis. 660; 9 Am. Rep. 473; Fryer v. Warne, 29 Wis. 515; Lessard v. Stram, 62 Wis. 112; 51 Am. Rep. 715; Palmer v. Waddell, 22 Kan. 352; Gibbs v. Williams, 25 Kan. 220; 37 Am. Rep. 241; Schlichter v. Philippy, 67 Ind. 204; Weis v.*

Madison, 75 Ind. 253; 39 Am. Rep. 135; Robinson v. Shanks, 118 Ind. 133; Luther v. Winnisimmet Co., 9 Cush. (Mass.) 174; Ashley v. Wolcott, 11 Cush. (Mass.) 195; Barnes v. Sabron, 10 Nev. 236; Jones v. Wabash, etc., R. Co., 18 Mo. App. 257; Benson v. Chicago, etc., R. Co., 78 Mo. 514; 20 Am. & Eng. R. Cas. 96; Barkley v. Wilcox, 86 N. Y. 143; 40 Am. Rep. 519; aff'g 19 Hun (N. Y.) 320; Jeffers v. Jeffers, 107 N. Y. 650; Wagner v. Long Island R. Co., 2 Hun (N. Y.) 636; Venum v. Wheeler, 35 Hun (N. Y.) 55; Shields v. Arndt, 4 N. J. Eq. 246; Eulrich v. Richter, 37 Wis. 228; O'Connor v. Fond du Lac, etc., R. Co., 52 Wis. 531; 38 Am. Rep. 754.

"A natural water-course is a natural stream, flowing in a defined bed or channel with banks and sides, having permanent sources of supply. It is not essential to constitute a water-course that the flow should be uniform or uninterrupted. The other elements existing, a stream does not lose the character of a natural water-course because in times of drought, the flow may be diminished, or temporarily suspended. It is sufficient if it is usually a stream of running water." *Barkley v. Wilcox, 86 N. Y. 143; 40 Am. Rep. 519; aff'g 19 Hun (N. Y.) 320.*

"For a water-course there must be a channel, a bed to the stream, and not

And, to constitute a water-course, the size of the stream is immaterial. It is only necessary that it be a stream in fact as distinguished from mere surface drainage, occasioned by freshets or other extraordinary causes; and the flow of water need not be constant.¹ Other elements existing, a stream does not lose the character of a natural water-course because in times of drought the flow may be diminished or temporarily suspended. It is sufficient if it is usually a stream of running water.²

It is essential to the existence of a water-course that there should be a well-defined bed or channel with banks. If these characteristics are absent, there is no water-course within the legal meaning of the term; hence natural depressions in the land through which surface water from adjoining lands naturally flows, are not water-courses.³ And if the water of a stream, instead of

merely low land or a depression in the prairie over which water flows. It matters not what the width or depth may be, a water-course implies a distinct channel, a way cut and kept open by running water, a passage whose appearance, different from that of the adjacent land, discloses to every eye, on a mere casual glance, a bed of a constant or frequent stream." Brewer, J., in *Gibb v. Williams*, 25 Kan. 220; 37 Am. Rep. 241.

A water-course means a living stream with defined banks and channel, not necessarily running all the time, but fed from other and more permanent sources than mere surface water. *Jeffers v. Jeffers*, 107 N. Y. 651.

When water has a definite source, as a spring, and takes a definite channel, it is a water-course, and no person through whose land it flows has a right to divert it from its natural channel. *Pyle v. Richards*, 17 Neb. 182.

For a water-course there must be a channel and bed to the stream, and not merely low land or slough through which water flows. *Chicago, etc., R. Co. v. Morrow*, 42 Kan. 339.

1. *Pyle v. Richards*, 17 Neb. 182; *Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 171.

2. *Barkley v. Wilcox*, 86 N. Y. 143; 40 Am. Rep. 519, *aff'g* 19 Hun (N. Y.) 320.

In *Ferris v. Wellborn*, 64 Miss. 29, it appeared that a creek had a channel half a mile long, with a definite bed and banks of varying width and depth. Water was conveyed and discharged by the creek through the adjacent low lands to a running stream, although the creek was dry most of the time. There was always a stream, however,

when there was water to be carried out. It was held that the creek was a water-course with all the incidents thereof.

Surface Water in Channel of Stream.—Although surface water may accumulate in the channel of a stream which is dry a part of each year and greatly increase the flow of water at times, yet neither the accumulation of surface water, nor the fact that the stream is dry at times, will defeat a recovery for injuries arising from the diversion of the stream. *Pyle v. Richards*, 17 Neb. 180.

Irregular Flow of Stream.—In *Barnes v. Sabron*, 10 Nev. 236, it appeared that Currant Creek was partly supplied at certain seasons of the year from springs having their rise and flow along its banks and bed, but mostly from the melting snow on the mountains. There was no regularity as to the quantity of water, for, to quote the language of the witnesses, "no two seasons were alike," the amount of water flowing being dependent upon the character of the weather during the preceding winter. After a cold season, when deep snow had fallen, the water flowed in greater quantity and for a longer time than after an open winter with but little snow; hence the amount of water varied in the summer season, according to statements made by different witnesses, from nothing to five thousand inches. It was held on these facts that Currant Creek was a water-course and not mere surface drainage.

3. *Jeffers v. Jeffers*, 107 N. Y. 650; *Barkley v. Wilcox*, 86 N. Y. 144; 40 Am. Rep. 519, *aff'g* 19 Hun (N. Y.) 320.

Natural Depression.—In *Bloodgood*

furnishing the current along the surface, sinks into the soil, and no water remains to pass along, except under the surface, it ceases to be a water-course.¹ If, however, a stream flowing between well-defined banks reaches level ground and spreads itself out over a wide space without cutting for itself a channel, and then narrows and flows again in a defined channel which

v. Ayers, 108 N. Y. 403; 2 Am. St. Rep. 443, *aff'g* 37 Hun (N. Y.) 356, a spring, or at least a reservoir of water, existed on plaintiff's land. The water followed depressions in the land across plaintiff's meadow to a road. It ran in no defined channel having natural banks, but flowed over the sod almost wholly without breaking it, following the lowest levels and sometimes spreading out over an acre or more. Its route could be traced by the deeper green of the grass which it watered, but it proved no obstruction when that came to be cut, for the evidence was that plaintiff mowed across it habitually as if it were not there. It was held that the water so flowing was surface water.

Slough or Bayou.—The Whitewater river, *Missouri*, is a stream of perpetual flow, draining a large area of country, and is about two hundred feet wide. At a certain point in its course a slough or bayou runs out of it eastwardly at nearly right angles. The slough, at its junction with the Whitewater, has a width of about one hundred and fifty feet, and a well-defined channel and banks for a distance of from four hundred to six hundred feet and no more. This slough or bayou is known as the Thumb. It is not shown to be fed by any living springs, but in high water the waters of the Whitewater find a partial outlet through it, running through its defined channel for the distance above stated, and then spreading out through the timber and over the surrounding country without any defined channel. It was held that the bayou or slough was not a natural water-course, and that the construction of a solid embankment across it at its junction with the Whitewater should not be enjoined. *St. Louis, etc., R. Co. v. Schneider*, 30 Mo. App. 620.

Overflow of Pond.—After heavy rains, a pond of surface water on the plaintiff's land discharged a part of its waters along a certain line over the defendant's lands. Plaintiff, by defendant's permission, dug a ditch along the line of the flow, but it did not appear that the line of discharge, before the digging

of the ditch, had any fixed bed or banks, and the water did not usually flow therein. It was held that neither the original line of flow nor the artificial channel was a water-course. *Fryer v. Warne*, 29 Wis 511.

Water-Course Under Drainage Act.—It has been held that it is not essential for all purposes that there should be a well-defined bed or channel, with banks, in order to bring the flow of surface water within the meaning of a water-course. In *Lambert v. Alcorn* (Ill. 1893), 33 N. E. Rep. 53, the question arose whether the natural course along which surface water flowed was a water-course within the meaning of the *Illinois* statute, authorizing the owners of land to drain the same into any natural water-course, and it was held that if the formation of the land is such as to give to the surface water flowing from one tract to the other a fixed and determinate course, so as to uniformly discharge it upon the lower tract at a fixed and definite point, the course thus uniformly followed by the water in its flow, is a water-course within the meaning of the statute and within the principles applicable to the drainage of surface waters. It was also declared that it is not important that the force of water is not sufficient to wear out a channel or canal having definite and well-marked banks.

Evidences of Water-Course.—In *Howard v. Ingersoll*, 13 How. (U. S.) 427, it was declared that the bed of a river is a natural object, not to be sought for merely by the application of abstract rules, but as other natural objects are sought for and found, by examining the banks and ascertaining whether the presence and the action of the water are so common and usual and so long continued as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the soil itself. This principle is plainly applicable in determining the question whether the channel in which water flows is a water-course within the legal meaning of the term.

1. *Buffum v. Harris*, 5 R. I. 243;

conveys the water into a river, it does not cease at any point of its course to be a water-course.¹

III. RAVINES AND GORGES.—It has been declared that water flowing in the hollows or ravines of land, which is mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water, does not come within the legal definition of a water-course.² But this rule has not received universal and unqualified application. Thus, it has been held that if the face of the country is such as necessarily collects in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet to some common reservoir, and if

Broadbent v. Ramsbotham, 11 Exch. 602; *Macomber v. Godfrey*, 108 Mass. 219; 11 Am. Rep. 349.

1. *Macomber v. Godfrey*, 108 Mass. 219; 11 Am. Rep. 349.

A spring on the defendant's land, sixteen rods from the land of the plaintiff, supplied a small stream of water that ran to the plaintiff's land, the water as it came from the spring being sufficient to fill a half-inch pipe and the flow being constant and nearly uniform, except in very dry times when it failed to run. For seven rods the stream descended rapidly in a well-defined course to a piece of marshy ground, where it spread so that its flow was slight and not sufficient to break the turf, but was generally sufficient to form a continuous sluggish current along the surface in a natural depression, to a watering place within the plaintiff's line. *Held* to be a water-course within the meaning attached in law to that term. *Gillet v. Johnson*, 30 Conn. 180.

Lake Having Apparent Current.—A lake fed by several streams, whose waters in times of flood find an outlet by percolation through a bed of gravel, so rapidly that there is an apparent current towards the gravel bed, is a water-course, and not merely surface water. *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192; 46 Am. Rep. 199.

Abandoned Creek.—If the bed of a creek has long been abandoned by the water, and streets, roads, railroad tracks and buildings have been constructed across it in places, it is no longer to be regarded as a water-course, and water gathered in a reservoir formed by the construction of the streets, etc., across it, is to be regarded as surface water. *Kansas City v. Swope*, 79 Mo. 446.

2. *Jones v. Wabash, etc., R. Co.*, 18 Mo. App. 257; *Benson v. Chicago, etc., R. Co.*, 78 Mo. 514; 20 Am. & Eng. R.

Cas. 96; *Hoyt v. Hudson*, 27 Wis. 661; 9 Am. Rep. 473; *Johnson v. Chicago, etc., R. Co.*, 80 Wis. 644; *Robinson v. Shanks*, 118 Ind. 134; *Lessard v. Stram*, 62 Wis. 112; 51 Am. Rep. 715; *Eulrich v. Richter*, 37 Wis. 226; *Wagner v. Long Island R. Co.*, 2 Hun (N. Y.) 636; *Gregory v. Bush*, 64 Mich. 37.

Ravines.—*Lhemerie Coulie* was a hollow or ravine worn down through the hills or bluffs on the east side of the Mississippi river. The evidence showed that there was no living stream of water flowing down the coulie or out of the mouth thereof; but that during, and for a short time after, any considerable rainfall, water flowed down the coulie upon the lowlands below the bluffs. There had, however, never been any definite channel through the lowlands in which the water was accustomed to flow, and it spread out over the lowlands. In an action against a landowner for damming back and turning away the water from his lands, it was held that the coulie was not a water-course. *Lessard v. Stram*, 62 Wis. 112; 51 Am. Rep. 715.

In *Weis v. Madison*, 75 Ind. 257; 39 Am. Rep. 135, a case which seemed to have involved the flow of surface water through a ravine, though the nature of the ravine and the extent of country drained through it, did not appear from the report, *Elliott, J.*, said: "Ravines, through which surface water runs in times when there are heavy rainfalls, are not natural water-courses. To constitute a natural water-course, there must be a bed and banks and evidences of a permanent stream of running water."

This doctrine is cited with approval in *Rice v. Evansville*, 108 Ind. 13; 58 Am. Rep. 22; and in *Carroll County v. Bailey*, 122 Ind. 46, it was followed and applied under the following circumstan-

such water be regularly discharged through a well-defined channel which the force of the water has made for itself, and which is the accustomed channel through which it flows and has flowed from time immemorial, such channel is an ancient water-course.¹

ces: A public highway leading into a village passed over a ravine or depression, some ten feet or more in depth and about 75 feet in width, the sides of which inclined gradually. Years before, this ravine or depression was filled with earth and gravel, so as to make the surface of the highway level, and in the center a stone archway was constructed under the highway. The archway was formed by building two parallel walls five feet apart, twenty feet long and eight feet high, arched over the top with stone, and covered with earth. No water flowed through the ravine or archway except immediately after hard rains, when surface water, conducted through a sewer pipe, terminating in an adjacent field five or six rods from the highway, flowed through the archway. The action was brought against the county commissioners for damages sustained by the plaintiff by falling from the bridge. The court held that as the county commissioners were charged with the duty of maintaining "bridges" only, and as the term "bridge," as used in the *Indiana* statutes, implied a water-course which required to be bridged, and as the ravine or depression was not a water-course, the action could not be maintained.

1. *Earl v. De Hart*, 12 N. J. Eq. 283; 72 Am. Dec. 395. This decision was cited with approval in *McKinley v. Union County*, 29 N. J. Eq. 171; *Kelly v. Dunning*, 39 N. J. Eq. 484; *Schnitzius v. Bailey*, 48 N. J. Eq. 409; *Taylor v. Fickas*, 64 Ind. 167; 31 Am. Rep. 114; *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 194; 46 Am. Rep. 199; *Simmons v. Winters*, 21 Oregon 35.

The case of *Earl v. De Hart*, 12 N. J. Eq. 280; 72 Am. Dec. 395, was followed and applied by the supreme court of *Kansas* in *Palmer v. Waddell*, 22 Kan. 355, a case in which the evidence showed that in time of heavy rains and in the spring season every year as far back as the memory of man ran, the surface of the ground back for a mile and over from the Mississippi river, was such as to collect water falling on a large section of country, to such an extent as required an outlet to the river through the bottom or low lands at the foot of the bluffs, and that the flow of

the water had produced a definite or natural channel through the land of the defendant and of other persons, where such accumulated surface water had always been accustomed to run. It was held that there was a natural water-course which could not be obstructed. The court said: "The rule that the owner of a tract of land may obstruct the flow of surface water across his land appears to and does have an exception, which is where surface water, having no definite source, is supplied from the falling rain and melting snow from a hilly region or high bluffs, and, owing to the natural formation of the surface of the ground, is forced to seek an outlet through a gorge or ravine, and by its flow assumes a definite or natural channel, and escapes through such channel regularly during the spring months of every year, and in seasons of heavy rains; and such has always been the case so far as the memory of man runs."

In a later case of *Gibbs v. Williams*, 25 Kan. 214; 37 Am. Rep. 241, the same court held that to bring such water within the rules relating to water-courses, it is not sufficient that the conformation of the surface be such that the water falling on a large tract of land naturally flows upon and over a depression at one end of that tract; there must be a necessity for the outflow over this depression in order to prevent the flooding of a considerable portion of land, and there must be a distinct channel, with well-defined banks, cut through the turf and into the soil by the action of the water—the bed of a stream, or something which will present on casual glance to everyone, the unmistakable evidences of the frequent action of running water. In this case, *Brewer, J.*, remarked: "It sometimes happens that in a hilly country the melting snows and falling rains on a large tract form an accumulation of surface water, which must flow through some defile or gorge between the hills; or, if that be closed, must remain on the tract, stagnant water, rendering valuable lands useless. In such cases, there appears to be a public necessity to forbid the obstruction of such channel. And if the defile may not be closed, then the torrent which of right comes through

it has acquired so much of the characteristics of a natural stream as to be entitled to flow undisturbed through any distinct and well-defined channel which it may have cut through level lands to the river or lake. Now, that which sustains this lower channel is not the fact that much water flows in it, but because of the impossibility of obstruction or dispersion before the stream reaches it. Suppose, for instance, a tract of a thousand acres, nearly level, but with a slight incline toward one corner. Undisturbed, quite a volume of water in a heavy rain might accumulate and flow towards this corner,—a much larger volume, in fact, than any that would accumulate in a hilly tract of only five hundred acres; yet in the one case it would not be just to call the passage-way across the corner a water-course, for dispersion of the water is easy and without danger of destruction of any considerable amount of land; while in the other, as dispersion would be impossible and the accumulation must form a stream, it might be just to hold it possessed of all the essential attributes of a water-course. In short, the only exception to the rule concerning surface water is where necessity compels it."

In *Union Pac. R. Co. v. Dyche*, 31 Kan. 120; 14 Am. & Eng. R. Cas. 272, plaintiff was the owner of a farm through which defendant's railway had been constructed. On the south side of the railroad track and adjoining the reserve, the plaintiff had a field of rye of about thirty-seven acres. That field was flooded, and in consequence most of the crop was destroyed. North of the railroad track about 120 rods the ground rose in bluffs of considerable height. Between the railroad track and the bluffs ran a wagon road. In the bluffs, just west of the plaintiff's farm, were three ravines, through which the water from the hills and country back of the bluffs flowed down to the Kansas river, which ran along the plaintiff's land to the south. An area of country of several hundred acres—from one to two sections—was drained through the ravines. From these ravines the water flowed in well-defined ditches, uniting just above the north side of the wagon road, and then flowed over the wagon road through a slough or depression to the railroad track; thence through a culvert built in the railroad track to the west of the plaintiff's land, and from there onward through a slough, or

drain, or ditch, to the Kansas river. It was held that the flow of the water through these ravines, ditches, sloughs, etc., was the flow of a natural water-course, the court remarking: "The configuration of the country is such that they deserve protection as natural water-courses."

In *McClure v. Red Wing*, 28 Minn. 186, the municipal authorities had graded a street across a ravine which was about three rods wide, and on either side of which was a hill fifteen or twenty feet high. There was a well-defined channel or water-course from six to eight feet wide, and from four to five feet deep in the bottom of the ravine. This channel was the only and usual means of drainage of a considerable tract of country, but it was usually dry except during heavy rains and the melting of snow. The city constructed a road or street across the ravine and placed therein a sewer to permit the water to flow beneath it. The sewer proved insufficient, and the result was that adjoining lands were flooded. The court held that the rules applicable to surface waters could not be applied without considerable modification, and that the ravine must be regarded as a water-course. It said: "We do not deem it necessary to determine whether this was a natural 'water-course' or mere 'surface water' within the legal definition of these terms. If it be surface water, the general common-law doctrine that neither the retention nor repulsion of surface waters is an actionable injury must necessarily be modified in such cases. In a broken and bluffy region of country, like that part of southeastern *Minnesota* adjacent to the Mississippi river and its tributaries, intersected by long, deep coulies, or ravines, surrounded by high, steep hills or bluffs, down which large quantities of water from rain or melting snow rush with the rapidity of a torrent, after attaining the volume of a small river, and usually following a well-defined channel, it would be manifestly inappropriate and unjust to apply the rules of the common law applicable to surface water. In many respects such streams partake more of the nature of natural streams than of surface water, and must, at least to a certain extent, be governed by the same rules."

The decisions of other courts seem to recognize that the exception may exist, although the question has not

The question whether a ravine, down which large quantities of water flow after heavy rains and the melting of snow, is a water-course, is one to be determined by a jury.¹

IV. OVERFLOW OF WATER-COURSES.—It has been held that waters which have overflowed the banks of a stream or river in times of freshet, in consequence of the insufficiency of the natural channel to hold them and carry them off, are surface waters within the meaning of rules of law relative to such waters.² If, however,

formally come before them for decision. Thus, in *Barkley v. Wilcox*, 86 N. Y. 144; 40 Am. Rep. 519, Andrews, J., said: "In an undulating country, there must always be valleys and depressions, to which water, from rains or snow, will find its way from the hill-sides, and be finally discharged into some natural outlet. But this does not constitute such valleys or depressions water-courses." But he further added with reference to the rule of law adopted in *New York* (p. 148): "We do not intend to say, that there may not be cases which, owing to special conditions and circumstances, should be exceptions to the general rule declared."

In *Hoyt v. Hudson*, 27 Wis. 656; 9 Am. Rep. 473, Dixon, C. J., in commenting on the exception in respect to hilly regions, said: "This exception, or suggested exception, seems sound and just. The rule itself is established in favor of agriculture, and of the right of every owner to make the most profitable use of his own land. But where, in such exceptional cases, it appears that considerable tracts of land are drained through ravines or narrow valleys, and would otherwise be submerged or greatly injured by the accumulation and presence of surface water, so that the rule would operate adversely to the interests of agriculture and be productive of more harm than good, it would seem that it ought to give way, or its application be suspended. At all events, the suggestion presents a contingency or possible class of cases, with respect to which this court should not be regarded as having expressed any opinion. Nor should the court be understood as deciding that the right of the owner to obstruct or divert the natural flow of surface water is without limit or qualification by what may be necessary in the reasonable use and improvement of his land." See also *Morrison v. Buckport*, etc., R. Co., 67 Me. 353.

1. Province of Jury.—An action was

brought for the alleged erection of a dam across a brook or water-course. The testimony tended to show that the alleged brook was a ravine through which surface water, which had gathered on the higher lands, ran during the melting of snows and after heavy rains, but in no regular or defined channel, nor generally so as to hinder the growing of crops in the ravine on the plaintiff's land. The trial court instructed the jury in substance that there being no substantial conflict in the testimony as to the character of the stream as a proposition of law, the *locus in quo* was a water-course. On appeal, the supreme court held the instruction to be erroneous, and that the question whether the ravine was a water-course should have been submitted to the jury. *Eulrich v. Richter*, 37 Wis. 230.

2. *Taylor v. Fickas*, 64 Ind. 167; 31 Am. Rep. 114; *Morris v. Council Bluffs*, 67 Iowa 346; 56 Am. Rep. 343; *McCormick v. Kansas City*, etc., R. Co., 57 Mo. 438; *Shane v. Kansas City*, etc., R. Co., 71 Mo. 237; 5 Am. & Eng. R. Cas. 64; 36 Am. Rep. 480; *Abbott v. Kansas City*, etc., R. Co., 83 Mo. 271; 20 Am. & Eng. R. Cas. 103; 53 Am. Rep. 581; *Jones v. St. Louis*, etc., R. Co., 84 Mo. 151; *Jones v. Wabash*, etc., R. Co., 18 Mo. App. 256; *Schneider v. Missouri Pac. R. Co.*, 29 Mo. App. 70; *St. Louis*, etc., R. Co. v. *Schneider*, 39 Mo. App. 624.

But in *Crawford v. Rambo*, 44 Ohio St. 282, a contrary view was adopted, the court saying: "It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any one time constitutes the water of the river at such time; and the land over which its current flows must be regarded as its channel, so that when swollen by rains and melting snows it extends and flows over the bottoms

the overflow returns to the channel, it is no longer to be deemed surface water.¹ Water which seeps through an embankment or levee of a river is to be deemed surface water, and is governed by the rules applicable to the flowage, diversion, and repulsion of surface water.²

V. PONDS, STAGNANT BODIES, ETC.—When surface waters reach and become a part of a permanent body of water contained in a natural basin forming a lake or pond, but having no outlet, and situated on the lands of two or more persons, they lose their character as surface waters and are governed by the same rules as are water-courses.³ The owners of the land upon which a

along its course, that is its flood channel, as when by drought it is reduced to its minimum, it is then in its low-water channel."

Embankment to Prevent Overflow.—In *McDaniel v. Cummings*, 83 Cal. 515, *rev'd* on re-hearing, 22 Pac. Rep. 216, it was held that a riparian owner may by a barrier or embankment keep the overflow of a river off his land, although the embankment may set it back upon other lands, if the owner of the latter will not co-operate with his neighbors in erecting a levee on the bank to protect all the lands from overflow. See also *Lamb v. Reclamation Dist.*, 73 Cal. 125; 2 Am. St. Rep. 775; *Gray v. McWilliams* (Cal. 1893), 32 Pac. Rep. 976.

A contrary rule, however, has been adopted in *England* in *Rex v. Trafford*, 1 B. & Ad. 874; 20 E. C. L. 498. In that case riparian owners had, for the purpose of protecting their lands, placed fenders upon the banks of a stream with the result that the waters were prevented from escaping across the country as they had been accustomed to do and were thrown back upon the embankment of a canal which suffered injury. It was held that the fenders were an unlawful obstruction or diversion of the stream, and that the proprietors might be indicted in maintaining a public nuisance, the court being of the opinion that no distinction could be made between water flowing in the ordinary channel in usual seasons and the extraordinary course which the overflow had been accustomed to take in seasons of freshet and flood. The view adopted by the English courts, has also been adopted in *Ohio*. See *Crawford v. Rambo*, 44 Ohio St. 297; *Columbus, etc., Iron Co. v. Tucker*, 48 Ohio St. 63.

1. *Sullens v. Chicago, etc., R. Co.*, 74 Iowa 665; 7 Am. St. Rep. 501.

It appeared that in times of high

water, surface waters of a creek left its bank at a point above a culvert and flowed for a short distance over the adjoining land. They were forced back by the embankment of a railroad into the creek again above the culvert. It was held that such waters were not surface waters, but must, in determining the sufficiency of a culvert, be regarded in the same light as if they had continuously flowed in the creek. *Moore v. Chicago, etc., R. Co.*, 75 Iowa 263.

2. *Gray v. McWilliams* (Cal. 1893), 32 Pac. Rep. 976.

3. *Schaefer v. Marthaler*, 34 Minn. 487; 57 Am. Rep. 73; *Alcorn v. Sadler*, 66 Miss. 221.

In *Schaefer v. Marthaler*, 34 Minn. 487; 57 Am. Rep. 73, there was a natural depression forming a basin in which a body of water four and one-quarter acres in extent collected. The pond was fed solely by surface waters produced by rains and melting snows, which naturally drained into the basin. At an ordinary stage, the greatest depth of water in the basin was five feet. The bed of the basin was owned partly by the plaintiff and partly by the defendant; and, at an ordinary stage, the greatest depth of the water on the line between the lands of the parties was two and nine-tenths feet. The soil under the basin was such that it retained the water, and the only waste was from evaporation, except during a short period in each year when it overflowed through a natural channel on the land of one of the parties. There was another natural channel through which, during heavy rains, and when there was an accumulation of water on the high lands from melting snow, the water flowed into the basin. The basin had, so far as was known, never been dry except in one year during a time of extreme drought. In winter the water froze to the bottom, but water for stock could be obtained

pond of surface water is situated cannot drain it upon the lands of an adjoining proprietor where the water would not otherwise go.¹ But, on the other hand, it has been held in the case of natural ponds which are merely the collection of surface waters from rain or melting snow, and where there is such a descending grade that by filling up the ponds with dirt there would be a flow of water towards and on to the lower lands, such ponds may, for the purposes of good husbandry, be drained, either by tile or other drains, into any natural water-course existing upon the superior estate, and caused to flow over the lower estate, though the flow of water be increased thereby. In so holding, however, the courts seem to concede that the owner of the superior estate would not have

by cutting through the ice and digging into the mud at the bottom. The court held that, although this body of water was only supplied from surface waters coming into the basin from adjoining lands, yet it must be governed by the same rules as water-courses, and that one of the owners on whose land it was situated could not drain it off without the other landowner's consent. Gilfillan, C. J., said: "It is somewhat strange that, so far as we are able to ascertain, there is no case reported which decides the rights, with respect to such a body of water, of the different owners of the land upon which it lies. The cases most nearly analogous are those relating to water-courses. . . . When surface waters reach and become part of a natural water-course, they lose their character as surface waters and come under the rules governing water-courses. . . . When they have ceased to spread and diffuse over the surface or percolate through the soil; when they have lost their casual and vagrant character and have reached and come to rest in a permanent mass or body in a natural receptacle or reservoir, not spreading over or soaking into the soil, forming mere bog or marsh, they cannot be regarded as surface waters any more than they can be after having entered into a stream. The mass or body of water constituting a lake or pond is an advantage or element of value to the lands upon which nature has placed it of the same kind as is the water-course to the lands through which nature has caused it to flow. There is no reason that can be suggested why the stream should be the property of each on his own land, of all the lands through which it flows, and why one owner should not prevent its flow as nature caused it to flow upon the land of another, that is not equally

applicable to a body of water like this, and none can be suggested why the rights of the owners of the lands upon which nature has placed it should not be equal to the rights in respect to a stream."

In *Alcorn v. Sadler*, 66 Miss. 221, the facts were very similar, and the court followed the decision of the *Minnesota* court in *Schaefer v. Marthaler*, 34 Minn. 487, remarking: "In the absence of such precedent we would not hesitate to announce a rule so obviously just and harmonious with the rules of law applicable to water."

In *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192; 46 Am. Rep. 199, it was held that if the outlet of a lake be by percolation through a bed of gravel, and the percolation is so rapid that there is a sensible current in the lake towards the gravel bed, the lake is to be regarded as a running stream and not merely as surface water, and it is unlawful to obstruct the flow of the stream to the place of discharge.

1. *Anderson v. Henderson*, 124 Ill. 164. See also *Pettigrew v. Evansville*, 25 Wis. 223; 3 Am. Rep. 50; *Ludeling v. Stubbs*, 34 La. Ann. 935.

Drainage of Pond.—There was a natural pond covering about five acres of defendant's land, which was the reservoir for the surface waters of about one hundred acres of lowland surrounding. Before the defendant cut a ditch to drain the pond, there was no outlet to it, and the water accumulating therein was carried away by evaporation and percolation. It was held that the defendant could not drain the pond upon plaintiff's land through the ditch which he had cut. *Davis v. Londgreen*, 8 Neb. 43.

Defendant was the owner of a farm north of and higher than the plaintiff's

the right to drain a large body of water, practically forming a lake, upon the lower land of his neighbor, to its consequent destruction or serious injury.¹

A landowner may drain surface water directly into an adjoining pond, if it formerly flowed there naturally over the surface of the ground.² But the owner of land upon which there is a marsh having a natural outlet to a lake, cannot drain his marsh by means of a ditch which is cut in such a manner as to drain off the waters already forming a portion of the lake.³

VI. PROPERTY IN SURFACE WATERS.—The property in the lost water that percolates the soil beneath the surface in hidden recesses, without a known channel or course, and the property in the wild water that lies upon the surface of the earth, or temporarily flows over it, as the natural or artificial elevations or depressions may guide or invite it, but without a channel, and which may be caused by the falling of rain or the melting of snow and ice, or the rising of contiguous streams or rivers, fall within the maxim that a man's land extends to the center of the earth below the surface and to the skies above, and are absolute in the owner of the land as being part of the land itself. Such water is not in a water-course or in an infinitesimal number of minute water-courses, in the sense of being obedient to the law regulating the use of water flowing in natural channels, but is, in the eye of the law, the moisture, and a part of the soil with which it intermingles, and the person who owns the soil may apply all that is found therein to his own

farm. There was a low and swampy part of the defendant's land, which was sometimes a pond into which two streams ran, and where surface water also collected. This swamp naturally discharged its surface water to the west and not upon plaintiff's land. It was separated from plaintiff's land by high ground, which was impenetrable to water. Through this high ground defendant dug a wide and deep ditch to a point upon his own land. Through this ditch defendant discharged the whole of the waters of the pond and marsh upon his own land, where the same was so gravelly as immediately to take up such water and transmit it underground upon the plaintiff's land, where it again came to the surface and caused the plaintiff damage. It was held that, even if the pond and marsh consisted wholly of surface water, the defendant had no right to discharge it through a ditch as he did at such a place and in such a manner, that it would naturally and necessarily, although underground, flow upon plaintiff's land. *Vernum v. Wheeler*, 35 Hun (N. Y.) 53.

On defendant's lands there was a marshy basin from which in times of high water a portion of the water contained therein overflowed its rim and naturally found its way through a swale to and upon the plaintiff's land, while the remaining portion of the water in the basin had no outlet and was dissipated by evaporation. It was held that the defendant could not by an artificial drain conduct the water that had no natural outlet through the basin and along the swale, so as to cause it to flow upon the plaintiff's land to his damage. *Butler v. Peck*, 16 Ohio St. 334; 88 Am. Dec. 452.

1. *Peck v. Herrington*, 109 Ill. 611; 50 Am. Rep. 627; *rev'd* 11 Ill. App. 62; *Com'rs of Highways v. Whitsitt*, 15 Ill. App. 318.

2. *Hoester v. Hemsath*, 16 Mo. App. 485.

3. *Bennett v. Murtaugh*, 20 Minn. 151. In this case plaintiff owned a mill upon a stream which was supplied by a lake. The defendant owned marsh or swampy lands bounding on the lake and with a natural outlet to it. It was held that the defendant must

purposes at his own free will.¹ The fact that water has flowed for years over the surface of the upper lands on to the lower lands, does not give the owner of the lower land a right to its continued flow or prevent the upper proprietor from converting it to his own purposes.²

VII. OBSTRUCTION AND REPULSION OF SURFACE WATERS.—A great divergence has arisen in the rules adopted in the various states as to the right of the lower proprietor to obstruct the flow of surface water and to repel it from his premises by means of an embankment or other obstruction. Some states have adopted what is known as the civil-law rule, which subjects the lower estate to the easement or servitude of receiving the flow of surface water from the upper estate. Other states again have adopted what is known as the common-law rule, by virtue of which the lower proprietor may do as he pleases with his land and may receive or repel or divert surface water flowing thereon at his pleasure. In one or two states again, a modified rule has been adopted under which each case is to be governed by its circumstances, and the right to obstruct or repel the flow of surface water, is to be determined by the reasonableness of the use of the lower estate.

1. Civil-Law Rule.—Under the rule of the civil law, where two estates adjoin and one is lower than the other, the lower must necessarily be subject to the natural flow of water from the upper one. This inconvenience is deemed to arise from its position and is considered usually to be more than compensated by other circumstances. Hence, the owner of the lower ground has no right to erect embankments whereby the natural flow of the water from the upper ground is stopped, nor has the owner of the upper ground a right to make excavations or drains by which the flow of water is diverted from its natural channel and a new channel made on the lower ground; nor can he collect into one channel, waters usually flowing off into his neighbor's land by several channels, and thus increase the wash upon the lower estate; but he may, and good husbandry sometimes requires that he should, cover up and conceal the drains through his own land, keeping the place of discharge unchanged. And, as he may use running streams to irrigate his lands, even though he does thereby not unreasonably diminish the supply of his neighbor, so also he may use the proper means of draining his ground where it is too moist, and may dis-

be enjoined from constructing a ditch from his marshy lands to another stream not supplied by the lake, the necessary effect of the ditch being to drain away and lower the waters of the lake.

1. *Taylor v. Fickas*, 64 Ind. 167; 31 Am. Rep. 114; *New Albany, etc., R. Co. v. Peterson*, 14 Ind. 112; 77 Am. Dec. 60; *Greencastle v. Hazelett*, 23 Ind. 186; *Buffum v. Harris*, 5 R. I. 253;

Green v. Carotta, 72 Cal. 267; *Curtiss v. Ayrault*, 47 N. Y. 73; *Hougan v. Milwaukee, etc., R. Co.*, 35 Iowa 558; 14 Am. Rep. 502; *Grand Junction Canal Co. v. Shugar, L. R.*, 6 Ch. 483; *Emporia v. Soden*, 25 Kan. 608; 37 Am. Rep. 265. See also *infra*, this title, *Percolating Waters*.

2. *Parks v. Newburyport*, 10 Gray (Mass.) 28; *Swett v. Cutts* 50 N. H. 439; 9 Am. Rep. 276.

charge the water according to the natural channel, even though the flow of water upon his neighbor be thereby somewhat increased.¹

The rule of the civil law creating an easement or servitude of drainage over the lower lands has its foundation in the natural

1. This rule of the civil law was laid down in the terms stated in the text by Lowrie, J., in *Martin v. Riddle*, 26 Pa. St. 415, the earliest case in which the civil-law rule was adopted in the *United States*.

Louisiana Statute.—In *Louisiana*, where the civil-law rule is in force, it has been embodied in a provision of the Code (art. 666) in the following terms: "It is a servitude due by the estate situated below to receive the waters which run naturally from the estate situated above, provided the industry of man has not been used to create that servitude. The proprietor below is not at liberty to raise any dam, or to make any other work to prevent this running of the water. The proprietor above can do nothing whereby the natural servitude due by the lower estate may be rendered more burdensome." It will be observed that this provision, literally construed, prohibits the upper proprietor from taking any steps for the drainage of his land, although in the ordinary course of agriculture, if the result thereof be to render the servitude more burdensome to the lower estate. But the court has declared that a strict and literal application of the provision of the Code would be destructive to agriculture; and has sought, whenever a legitimate case presented itself, to make such an application of the law as would, by imposing mutual obligations on the owners of both properties, render effective the servitude of the upper estate without subjecting the lower estate to unnecessary and injurious charges. See *Minor v. Wright*, 16 La. Ann. 151; *Martin v. Jett*, 12 La. 502; 32 Am. Dec. 120; *Sowers v. Shiff*, 15 La. Ann. 300. The provision of the Code is consequently to be construed liberally in favor of the upper or dominant tenement. *Guesnard v. Bird*, 33 La. Ann. 796.

And the owner of the upper or dominant estate may therefore drain his lands in the ordinary course of agriculture. Thus, in *Martin v. Jett*, 12 La. 501; 32 Am. Dec. 120, Bullard, J., said: "That every man has a right to clear and cultivate his land, cannot be doubted. The clearing of land and fitting it for agricultural purposes is not

calculated to render this kind of servitude more onerous. On the contrary, lands, it is well known, become more dry by being cleared, because evaporation goes on more rapidly. But it is one thing to clear and cultivate arable lands, and another thing to reclaim lands naturally covered with stagnant waters, in such a way as to throw the mass of water which would naturally remain in pools or ponds upon the lands of one's neighbor situated below. The Roman law, which, perhaps, forms the best anticipated commentary upon this part of our code, permitted ditches to be cut by the superior owner, not for the purpose of making the waters flow upon the adjacent land, but for the purpose of improving, by cultivation, his land, and making it more healthy, and laid down the equitable rule that he ought not to ameliorate his own land to the injury of his neighbor. '*Sic debere quem meliorem agrum facere ne vicini deteriore faciat.*' Digest, law 1, section 4."

In *Anderson v. Henderson*, 124 Ill. 170, the rule of the civil law is also defined. Scott, J., said: "The owner of a higher tract of land has the right to have the surface water falling or coming naturally upon his premises by rains or melting snow, pass off the same through the natural drains upon or over the lower or servient lands next adjoining, and the owner of the dominant heritage has, and ought to have, the right, by ditches and drains, to drain his own land into the natural and usual channels which nature has provided, even if the quantity of water in that way thrown upon the next adjoining lower lands be thereby increased. The rule in this respect is a just one, and is indispensable to secure proper drainage—in many instances necessary to render land tillable. While the owner of lower lands shall receive all water that naturally flows from the next higher lands, the owner of the higher lands may not open or remove natural barriers, and let on to such lower lands water that would not otherwise naturally flow in that direction. That would be to subject the servient heritage to an unreasonable burden, which the law will not permit, and against which the

situation of the land and the necessity of affording an escape for the flow of surface waters. It is also to some extent founded upon the application of the maxim *sic utere tuo ut alienum non lædas*.¹ But the rule that the lower estate must receive the surface drainage of the upper, does not apply to the overflow of water from large rivers, and the owners of land along such streams have a right to construct levees or embankments for protection of their lands from the ravages of flood waters, although the effect thereof may be to prevent the free passage of such flood waters in as large and ample a manner as they would otherwise pass, or may

owner ought reasonably to have protection. The principles of law that govern in such cases are in harmony with good neighborship, and ought to be readily acquiesced in."

1. That this is the foundation of the rule is apparent from the language employed in the various cases.

In *Martin v. Riddle*, 26 Pa. St. 415, it is said: "The general principles of law in the matter of rain water and drainage, and of the respective rights and duties of adjoining proprietors in relation thereto . . . are in general the same as in the case of running water—they follow nature."

In *Kauffman v. Griesemer*, 26 Pa. St. 407; 67 Am. Dec. 437, the court said: "Almost the whole law of water-courses is founded on the maxim of the civil law, '*aqua currit et debet currere*.' Because water is descendible by nature, the owner of a dominant or superior heritage has an easement in the servient or inferior tenement, for the discharge of all waters which by nature rise in or fall upon the superior."

In *Gillham v. Madison Co. R. Co.*, 49 Ill. 484; 95 Am. Dec. 627, Breese, C. J., said, in reference to the common rule as to surface waters, that it "wholly ignores the most favored and valuable maxim of the law, *sic utere tuo, alienum non lædas*, a maxim lying at the very foundation of good morals, and so preservative of the peace of society"; and in accordance with the view thus expressed decided that the owner of a servient heritage has no right, by embankments or other artificial means, to stop the natural flow of the surface water from the dominant heritage and thus throw it back upon the latter. And in *Gormley v. Sanford*, 52 Ill. 158, Lawrence, J., in reference to the doctrine laid down in that case, said: "This rule was thought by this court, in that cause, to rest upon a sound basis of reason and authority,

and was adopted. We find nothing in the argument, or authorities presented in the present case, to shake our confidence in the conclusion at which we then arrived. In our judgment, the reasoning which leads to the rule forbidding an owner of a field to overflow an adjoining field by obstructing a natural water-course fed by remote springs, applies with equal force to the obstruction of a natural channel through which the surface waters, derived from the rain or snow falling on such field, are wont to flow. What difference does it make, in principle, whether the water comes directly upon the field from the clouds above, or has fallen upon remote hills, and comes thence in a running stream upon the surface, or rises in a spring upon the upper field and flows upon the lower? The cases asserting a different rule for surface waters and running streams, furnish no satisfactory reason for the distinction. It was suggested in argument, if the owner of the superior heritage has a right to have his surface waters drain upon the inferior, it would follow that he must allow them so to drain, and would have no right to use and exhaust them for his own benefit, or to drain them in a different direction. We do not perceive why this result should follow. The right of the owner of the superior heritage to drainage is based simply on the principle that nature has ordained such drainage, and it is but plain and natural justice that the individual ownership arising from social laws should be held in accordance with pre-existing laws and arrangements of nature. As water must flow, and some rule in regard to it must be established where land is held under artificial titles created by human law, there can clearly be no other rule at once so equitable and so easy of application as that which enforces natural laws. There is no surprise or hardship in this, for each successive owner takes

with him whatever advantages or inconveniences nature has stamped upon his land."

In *Hughes v. Anderson*, 68 Ala. 280; 44 Am. Rep. 147, Stone, J., said: "The surface of the earth is everywhere uneven, producing inequality of elevation. Water seeks its level, and flows naturally from a higher to a lower plane. These differences of elevation are sometimes characterized as superior and inferior heritages. The inferior heritages, or lower surface, is doomed by nature to bear a servitude to the superior in this, that it must receive the water that falls on and flows from the latter. The inferior cannot complain of this, for *aqua currit et debet currere, ut solebat*. The proprietor of the superior heritage cannot, by artificial means, cause water to flow on the inferior, which had theretofore flowed in a different direction; neither can the owner of the inferior heritage, by dam or levee, obstruct the natural flow of the water, and cause it to flow back, or stand on the lands of the superior. *Sic utere tuo, ut alienum non laedas* is the maxim, the rule in such case. *Stein v. Burden*, 29 Ala. 127; 65 Am. Dec. 394. So, as a rule, everyone must so enjoy his own property as not to offend his neighbor's equal right to enjoy his own unmolested. But this rule cannot be enforced in its strict letter without impeding rightful progress, and without hindering industrial enterprise. Hence minor individual interest is sometimes made to yield to a larger and paramount good. To deny this principle would be to withhold from the world the inestimable benefits of discovery and progress in all the great enterprises of life. The rough outline of natural right, or natural liberty, must submit to the chisel of the mason, that it may enter symmetrically into the social structure."

Similarly, in *Nininger v. Norwood*, 72 Ala. 284; 47 Am. Rep. 412, it is said: "These parties, complainant and defendants, acquired the lands with full knowledge of their natural relations, and that from one parcel because of its altitude, and because water is in its nature descendible, the bursts of water from the creek in freshets, and the accumulations of rain water, had and found a natural outlet over the immediately adjacent lower lands. Whatever of advantage to the one, or of inconvenience to the other, resulted from the natural formation of the lands, entered into the consideration of the ac-

quisition; and there can be no justice in suffering one party to increase his advantages, or to lessen his inconveniences at the expense and to the injury of the other."

In Addison on Torts (6th ed.), p. 95, it is said: "Land cannot be cultivated or enjoyed unless the springs which rise on the surface and the rains that fall thereon be allowed to make their escape through the adjoining and neighboring lands. All lands therefore are, of necessity, burdened with the servitude of receiving and discharging all waters which flow down to them from lands on higher level, and if the owner or occupier of the lower lands interposes artificial impediments in the way of the natural flow of the water through or across his lands, and by so doing causes the higher lands to be flooded, he is responsible in damages for infringing the natural rights of the possessor of such higher land to the natural outfall and drainage of the soil, unless he has gained a right to pen back the water by contract, grant, or prescription. So, if the proprietor of the higher lands alters the natural condition of his property and collects the surface and rain water together at the bottom of his estate and pours it in a concentrated form and in unnatural quantities upon the land below, he will be responsible for all damages thereby caused to the possessor of the lower lands."

In *Boynton v. Langley*, 19 Nev. 72; 3 Am. St. Rep. 781, Hawley, J., said: "As to the flow of water caused by the fall of rain, the melting of snow, or natural drainage of the ground, the prevailing doctrine is, that when two tracts of land are adjacent, and one is lower than the other, the owner of the upper tract has an easement in the lower land to the extent of the water naturally flowing from the upper land to and upon the lower tract, and that any damage that may be occasioned to the lower land thereby is *damnum absque injuria*. Water seeks its level, and naturally flows from a higher to a lower plane; hence the lower surface or inferior heritage is doomed by nature to bear a servitude to the higher surface, or superior heritage, in this, that it must receive the water that naturally falls on and flows from the latter. The proprietors of the lower land cannot complain of this, for *aqua currit et debet currere, ut solebat*. But this rule—this expression of the law—only applies to waters which flow naturally from springs, from storms

tend to increase the flow of flood water upon lands not similarly protected.¹ If the owner of higher land upon a river which is subject to overflow, fails to erect levees or embankments to protect his land from the effect of the floods, his neighbor owning lower land in his rear may protect himself from such floods by erecting a levee on his own land, although the effect thereof may be to increase the flood waters on the higher land bounding upon the river, the owner of which has not resorted to like means of protection.² But the "seepage" through a levee or embankment in time of flood is surface water, and the lower proprietor is bound to permit it to flow over his lands in the manner in which surface water usually flows over them.³

The rule of the civil law has been adopted in the states of *Alabama*,⁴ *California*,⁵ *Georgia*,⁶ and *Illinois*.⁷ In *Iowa*⁸ the question

of rain or snow, or the natural moisture of the land. Wherever courts have had occasion to discuss this question, they have generally declared that the servitude of the lower land cannot be augmented or made more burdensome by the acts or industry of man."

1. *Lamb v. Reclamation Dist.*, 73 Cal. 125; 2 Am. St. Rep. 775.

2. *McDaniel v. Cummings*, 83 Cal. 515.

3. *Gray v. McWilliams* (Cal. 1893), 32 Pac. Rep. 976.

4. *Alabama*.—*Hughes v. Anderson*, 68 Ala. 280; 44 Am. Rep. 147; *Nininger v. Norwood*, 72 Ala. 277; 47 Am. Rep. 412; *Crabtree v. Baker*, 75 Ala. 91; 51 Am. Rep. 424; *Farris v. Dudley*, 78 Ala. 124; 56 Am. Rep. 24.

5. *California*.—*Ogburn v. Connor*, 46 Cal. 346; 13 Am. Rep. 213; *McDaniel v. Cummings*, 83 Cal. 515; *Gray v. McWilliams* (Cal. 1893), 32 Pac. Rep. 976.

By *California* Statutes, 1850, p. 219, which is embodied in the *California* Political Code, section 4468, it was enacted that: "The common law of *England*, so far as it is not repugnant to or inconsistent with the constitution of the *United States*, or the constitution or laws of the State of *California*, shall be the rule of decision in all the courts of this state."

In *Ogburn v. Connor*, 46 Cal. 346; 13 Am. Rep. 213, the court adopted the rule of the civil law, following the earlier and unreported case of *Castro v. Bailey*, No. 2023 (1869). In *McDaniel v. Cummings*, 83 Cal. 515, it was urged that the rule adopted in the earlier cases was erroneous and contrary to the provisions of the statute,

but the court held that the law of the earlier decisions had become a rule of property in the state, and that it was bound thereby on the principle of *stare decisis*, Beatty, C. J., observing: "Necessarily it has become a rule of property and of right respecting interests which have vested during that interval, and it cannot now be disturbed without manifest injustice to all who have acted upon the faith of it. If it be erroneous, it must nevertheless be upheld upon the principle of *stare decisis*, and so far as our action is concerned, the rule must continue to obtain as it is laid down."

6. *Georgia*.—*Goldsmith v. Elsas*, 53 Ga. 186.

7. *Illinois*.—*Gillham v. Madison Co. R. Co.*, 49 Ill. 484; 95 Am. Dec. 627; *Gormley v. Sanford*, 52 Ill. 158; *Toledo, etc., R. Co. v. Morrison*, 71 Ill. 616; *Peck v. Herrington*, 109 Ill. 611; 50 Am. Rep. 627, reversing 11 Ill. App. 62; *Totel v. Bonnefoy*, 123 Ill. 653; *Groff v. Ankenbrandt*, 124 Ill. 51; 7 Am. St. Rep. 342; *Anderson v. Henderson*, 124 Ill. 164; *Dayton v. Drainage Com'rs*, 128 Ill. 271; *Young v. Com'rs of Highway*, 134 Ill. 569; *Ware v. Pilgrim*, 3 Ill. App. 474; *Mellor v. Pilgrim*, 7 Ill. App. 309; *Com'rs of Highway v. Whitsitt*, 15 Ill. App. 318; *Wagner v. Chaney*, 19 Ill. App. 546; *Stoddard v. Filgur*, 21 Ill. App. 560; *Patneaud v. Claire*, 32 Ill. App. 554; *Graham v. Keene*, 34 Ill. App. 87; *Crohen v. Ewers*, 39 Ill. App. 34.

8. *Iowa*.—In *Iowa*, the decisions can scarcely be considered uniform or positively deciding the question. *Livingston v. McDonald*, 21 Iowa 160, was an action for collecting surface water and

discharging it on the lower lands. Dillon, J., who delivered the opinion of the court, expressed a preference for the rule of the civil law, but as the question of the right to obstruct and repel surface water did not arise in the case, the language which he employs is only *dictum*.

Drake v. Chicago, etc., R. Co., 63 Iowa 302; 17 Am. & Eng. R. Cas. 45; 50 Am. Rep. 746, was an action against a railroad company for obstructing surface water by embankment. The company had only acquired an easement or right of way for the railroad under the statute, and not a fee, and it was held that it had no right by virtue of such easement to cast back the surface water on the higher lands. The court did not determine what its right would be if it had acquired a fee, but conceded that it might be different. Adams, J., said: "In *Livingston v. McDonald*, 21 Iowa 160; 89 Am. Dec. 563, the court held that the owner of the higher land could not be allowed to collect water and precipitate it in increased quantities upon the land below to the injury of such land. The question as to whether a landowner can be allowed, by changing the surface of his land or erecting improvements thereon, to prevent the escape of surface water from adjoining land, where the same did not flow through any natural channel, has never been determined by this court; and we have to say that it appears to us that the question does not necessarily arise in the case at bar."

In a second appeal in the same case, *Drake v. Chicago, etc., R. Co.*, 70 Iowa 59; 29 Am. & Eng. R. Cas. 514, the court held its first decision to be the law of the case whether right or wrong; but Seever, J., expressing his own opinion, declared that the court had adopted an erroneous view on the first appeal. He said: "The writer desires to say that he is now satisfied that the opinion on the former appeal is wrong. My reasons, briefly, are that the common law, as between individuals who respectively own the upper and lower estate, is that either may, for the purpose of improving his land, divert or dam up surface water, and if in so doing the other suffers damage, there can be no recovery. The only exception to this rule is that the improvement, whatever it may be, must not have the effect to increase the quantity of water which is precipitated on the land of another. . . . The rule of the civil law is different, and it

has been adopted in *Illinois* and *California*, and possibly in other states. The same common-law rule has been held applicable to railroads. . . . In at least one or more cases the fact that the company only owned an easement was considered, and it was held that such fact made no difference, and I am at a loss to know why it should. The same rule, under the same circumstances, should prevail as to both individuals and corporations. Conceding the easement in this case, the defendant has the same absolute right to construct its road therein and make embankments at its pleasure; and, in this respect, it has the same rights in my judgment as any other landed proprietor."

In *Sullens v. Chicago, etc., R. Co.*, 74 Iowa 662; 7 Am. St. Rep. 501, the railroad company had constructed an embankment across a valley through which a creek flowed, in such a manner as to turn all the water which flowed from above into the main stream. The culvert in its roadbed across the stream proved to be insufficient, and it was held that it was liable for the obstruction of the waters and the flooding of the plaintiff's lands. The court seems to have expressed a preference for the modified doctrine which will be hereafter referred to, and which is founded partly on the common-law rule, and partly on the civil-law rule. Robinson, J., said: "The case of *Abbott v. Kansas City R. Co.*, 83 Mo. 271; 2 Am. & Eng. R. Cas. 103; 53 Am. Rep. 581, is in many respects similar to this case, and is relied upon by the appellant. That case adheres to the common-law rule, and seems to depend in part upon the fact that by the statutes of *Missouri*, the common law is made the rule of action and decision in that state. In this state there is no requirement of that kind, and we are free to determine the questions involved according to such rules of law as shall seem to us to be applicable. The difficulty which must sometimes arise from attempts to apply the strict rule of the common law to all cases, is illustrated by the fact that the supreme court of *Missouri* was constrained to abandon it in two cases, which were overruled in the one above cited. Each case must of necessity depend largely upon its own facts. Even in those states where the common law prevails, the courts hold that the landowner must improve his property in a reasonable manner. *Mosher v. Kansas City, etc., R. Co.*, 60 Mo. 329; *Abbott*

can hardly be said to be settled. In *Kentucky*,¹ too, the decisions

v. Kansas City, etc., R. Co., 83 Mo. 271; 20 Am. & Eng. R. Cas. 103; 53 Am. Rep. 581; *Pettigrew v. Evansville*, 25 Wis. 223; 3 Am. Rep. 50. 'But persons exercising this right to improve and ameliorate the condition of their own land, must exercise it in a careful and prudent way. . . . Each proprietor, in such case, is left to protect his own lands against the common enemy of all . . . so as to occasion no unnecessary inconvenience or damage to plaintiff.' *McCormick v. Kansas City, etc., R. Co.*, 57 Mo. 433. See also *Benson v. Chicago, etc., R. Co.*, 78 Mo. 504; 20 Am. & Eng. R. Cas. 96. This court said in *Livingston v. McDonald*, 21 Iowa 172, that 'the rules of the civil law, . . . so far as they deny to the upper owner the right to collect the water in a body, or precipitate in greatly increased or unnatural quantities upon his neighbor, to the substantial injury of the latter, we deem to be just and equitable; . . . and to this extent it is supported by the weight of authority in the common-law courts.' It is also said: 'We recognize the general rule that each may do with his own as he pleases, but we also recognize the qualification that each should so use his own as not to injure his neighbor.' The same principle as applied to the obstructing of the flow of surface water was recognized in *Drake v. Chicago, etc., R. Co.*, 63 Iowa 302; 17 Am. & Eng. R. Cas. 45; 50 Am. Rep. 746. The rule thus far adhered to by this court seems to be just, and we do not think there is sufficient cause to abandon it. The reasons for requiring that improvements on land be so made as to do no unnecessary injury to other lands, apply with especial force to the construction of railways. . . . In such cases, if injury result from an improper construction of the railway, or from wrong in its operation, we see no reason why the railway corporation may not be made to respond in damages. In this case, defendant raised its embankment across the valley of Rock Creek in such a manner as to turn all the water which flowed from above into the main stream. It was not practicable for plaintiff to counteract the effect of this by means of banks or ditches. Whatever its primary object may have been, the fact is that the defendant assumed control of the surface waters of the valley, changed their

course, and compelled them to flow through an outlet of its own construction. Under these circumstances, we think it was the duty of defendant to construct and maintain its culvert so that its capacity should be sufficient to properly pass the waters of such floods as might reasonably be expected to occur. It would be most unreasonable to limit this obligation of defendant to the providing of such a culvert as would carry off the water which could be contained within the banks of the stream." This decision was followed in *Moore v. Chicago, etc., R. Co.*, 75 Iowa 263; and *Noe v. Chicago, etc., R. Co.*, 76 Iowa 360.

In the recent case of *Wharton v. Stevens*, 84 Iowa 107, the court held that the lower proprietor through whose lands a swale runs through which the surface water drains, cannot dam back the waters to the injury of the higher estate. In so deciding, the court uses language which seems to adopt the rule of the civil law, saying: "It would be a bold counsel who would advocate, and a bold court which would decide, that water from rains and melting snows, which is called by counsel 'surface water,' when it finds the swales provided by nature to bear it away, may be arrested in its natural course and made to flow back upon the land which these swales are intended to drain. The effect of such a decision would be stupendous. It would subject millions of acres of the best agricultural land to destruction. It would bring strife, with loss and poverty, to a vast number of farmers of the state." But at the same time it must be noticed that the court appears to limit its decision to swales which naturally form the drainage course of a large tract of country.

1. *Kentucky*.—In *Kentucky*, the courts have not definitely declared either in favor of the civil law or the common-law rule, but the decisions of the supreme court seem to be consistent only with the rule of the civil law. Thus, in *Kemper v. Louisville*, 14 Bush (Ky.) 87, the plaintiffs were owners of a lot of ground in the city of Louisville bordering on an improvement made after their purchase and known as Grayson street. The lot was situated in a portion of the city where the water after heavy rains accumulated in such quantities as to form small ponds that flowed from one

lean towards the civil-law rule. So also in *Louisiana*,¹ *Maryland*,² *Michigan*,³ *Nevada*,⁴ *North Carolina*,⁵ and *Ohio*.⁶ In

to another, and in a short time were drained by a depression in the ground. Plaintiffs avoided the temporary inconvenience caused by the collection of water by raising their lot above the natural surface. In laying out Grayson street, the city filled up the natural depression through which the waters drained without sewer or culvert, and obstructed the passage of the water, with the result that the plaintiffs' lot was permanently covered with water and their dwelling rendered almost uninhabitable. It appears from the report that no part of the plaintiffs' lot was actually taken by the improvement, yet the court held that the turning back of the water upon the plaintiffs' lot was an interference with their private rights and that the city must respond in damages. In determining the effect of this decision, it must be noted that the *Kentucky* Constitution, art. 13, § 14, only provides that no person's property shall "be taken or applied to public use . . . without just compensation being previously made to him," and does not provide for compensation for injury to property when no part is taken. In *Kentucky*, too, the courts have recognized the principle that a municipal corporation having power to grade and re-grade its streets will not be liable to owners of property for damages on account of the raising or lowering the streets above or below the adjacent lots. *Keasy v. Louisville*, 4 Dana (Ky.) 154; 29 Am. Dec. 395; *Wolf v. Covington, etc., R. Co.*, 15 B. Mon. (Ky.) 408; *Louisville, etc., R. Co. v. Brown*, 17 B. Mon. (Ky.) 777. Consequently the only ground upon which the decision in *Kemper v. Louisville*, 14 Bush (Ky.) 87, can proceed, would seem to be that the owner of the higher or dominant estate has an easement over the lower for the natural drainage of his lands.

In *Hahn v. Thornberry*, 7 Bush (Ky.) 403, the defendants owned lands lying to the north and east of the plaintiffs' land. A pond extended from northeast to southeast through the lands of the parties. The plaintiffs' lands at one time were imperfectly drained by the flow of water in an easterly direction into Beargrass Creek, but about twenty years before the suit was begun, a ditch was dug from the western end of the

pond into Mill Creek, and since that time the usual flow of the water, during the dry season, had been through the ditch and into Mill Creek. In wet seasons, however, there was still a flow from the eastern end into Beargrass Creek. Defendants erected dams across the eastern end of the pond and raised the water to the plaintiffs' injury, and it was held that the defendants' acts were wrongful and that plaintiffs were entitled to an injunction. There was apparently no evidence that there was any water-course at the eastern end of the pond within the legal meaning of the term, and it is to be noticed that the defendants cited in their brief cases supporting the common-law rule. It is thus to be supposed that in this case also the court in effect adopted the rule of the civil law, though no mention is made thereof, or any notice taken of it.

1. *Louisiana*.—*Martin v. Jett*, 12 La. 502; 32 Am. Dec. 120; *Lattimore v. Davis*, 14 La. 161; 33 Am. Dec. 581; *Hays v. Hays*, 19 La. 351; *Adams v. Harrison*, 4 La. Ann. 168; *Delahoussaye v. Judice*, 13 La. Ann. 587; 71 Am. Dec. 521; *Hooper v. Wilkinson*, 15 La. Ann. 497; 77 Am. Dec. 194; *Barrow v. Landry*, 15 La. Ann. 681; 77 Am. Dec. 199; *Minor v. Wright*, 16 La. Ann. 151; *Bowman v. New Orleans*, 27 La. Ann. 501; *Guesnard v. Bird*, 33 La. Ann. 796; *Ludeling v. Stubbs*, 34 La. Ann. 935; *Schaffer v. State Nat. Bank*, 37 La. Ann. 242, 248; *Louisiana* Code, art. 666.

2. *Maryland*.—*Philadelphia, etc., R. Co. v. Davis*, 68 Md. 281; 34 Am. & Eng. R. Cas. 143.

3. *Michigan*.—*Boyd v. Conklin*, 54 Mich. 583; 52 Am. Rep. 831. See also *Rice v. Flint*, 67 Mich. 401; *Osten v. Jerome*, 93 Mich. 196; *Leidlein v. Meyer* (Mich. 1893), 55 N. W. Rep. 367.

4. *Nevada*.—It would seem that the easement does not include the right to discharge upon the lower tenement, waters used for the irrigation of the upper or dominant tenement. *Boynton v. Longley*, 19 Nev. 69; 3 Am. St. Rep. 781.

5. *North Carolina*.—*Porter v. Dunham*, 74 N. Car. 767; *Overton v. Sawyer*, 1 Jones (N. Car.) 308.

6. *Ohio*.—*Butler v. Peck*, 16 Ohio St. 334; 88 Am. Rep. 452; *Tootle v. Clifton*, 22 Ohio St. 247; 10 Am. Rep. 732; *Crawford v. Rambo*, 44 Ohio St. 284.

*Pennsylvania*¹ and *Tennessee*² the civil-law rule prevails, and in *West Virginia*³ also, it would seem from the *dictum* of the court.

In some states a distinction has been made between urban and rural property, and it has been held, or at all events, an opinion has been expressed, that the rule of the civil law that the lower proprietor holds his land subject to the burden of receiving the surface water which naturally drains from the higher land, does not apply to city and village lots.⁴

1. *Pennsylvania*.—*Martin v. Riddle*, 26 Pa. St. 415; *Kauffman v. Griesemer*, 26 Pa. St. 497; 67 Am. Dec. 437; *Hays v. Hinkleman*, 68 Pa. St. 324; *Davidheiser v. Rhoads*, 25 W. N. C. (Pa.) 513; *Glass v. Fritz*, 148 Pa. St. 324; *Meixell v. Morgan*, 149 Pa. St. 415.

2. *Tennessee*.—*Carriger v. East Tennessee, etc., R. Co.*, 7 Lea (Tenn.) 388; *Louisville, etc., R. Co. v. Hays*, 11 Lea (Tenn.) 382; 14 Am. & Eng. R. Cas. 264; 47 Am. Rep. 291.

3. *West Virginia*.—There is no decision necessarily involving the point in *West Virginia*, but in *Gillison v. Charleston*, 16 W. Va. 282; 37 Am. Rep. 763, there is a *dictum* which manifests a decided preference for the rule of the civil law. Johnson, J., said: "A number of the authorities we have cited, recognize the principle that individuals and municipal corporations have the right to dispose of surface water in any manner they please, to prevent its flow from adjoining lands upon their premises, although the result may be to flood the adjoining land, or to expel it, throw it upon the lands of their neighbors, and in either case are not liable to an action. These cases seem to lose sight entirely of the wholesome principle of ethics as well as law, that a man may use his property as he pleases provided he does not thereby injure the rights of his neighbor."

In *North* and *South Dakota*, the courts do not appear to have decided the question whether the civil law or the rule of the common law will obtain in these states; but it was held in *Hannaher v. St. Paul, etc., R. Co.*, 5 Dakota 1, that an action to recover damages for negligently constructing a railroad so as to unnecessarily dam back the surface water, will not lie when the railroad is constructed in the usual manner.

In *Oregon*, also, the question has not been decided. In *West v. Taylor*, 16 Oregon 165, Strahan, J., expressly avoided expressing an opinion as to

either rule, since the facts of the case did not make it necessary. In *Whitney v. Willamette Bridge R. Co.* (Oregon, 1892), 31 Pac. Rep. 472, the court held that neither by the common law nor by the civil law had the lower proprietor a cause of action against the upper for discharging on the lower lands the surface water that would naturally drain there; but expressed no opinion as to the right of the lower proprietor to repel the waters by embankment.

4. *Farris v. Dudley*, 78 Ala. 126; 56 Am. Rep. 24; *Crabtree v. Baker*, 75 Ala. 94; 51 Am. Rep. 424; *Nininger v. Norwood*, 72 Ala. 283; 47 Am. Rep. 412; *Boyd v. Conklin*, 54 Mich. 583; 52 Am. Rep. 831; *Livingston v. McDonald*, 21 Iowa 160; 89 Am. Dec. 563; *Phillips v. Waterhouse*, 69 Iowa 199; 58 Am. Rep. 220; *Bentz v. Armstrong*, 8 W. & S. (Pa.) 40; *Young v. Leedom*, 67 Pa. St. 351. See also *Kauffman v. Griesemer*, 26 Pa. St. 407; 67 Am. Dec. 437.

In *Bentz v. Armstrong*, 8 W. & S. (Pa.) 40, it was held that if several persons unite in the purchase of a piece of ground, and divide the same into smaller lots, upon each of which a house is built, and then partition is made between them, each must so regulate his own lot as that the water which falls or accumulates upon it shall not run on the lot of his neighbor, and that the erection by the owner of the lower lots of an obstruction which turns back the water on the upper lands, does not give a cause of action. Kennedy, J., said: "In the purchase of lots of ground laid out and sold for the purpose of building up towns or cities thereon, it has ever been understood, and such has been the practice and usage too, that the natural formation of the surface will, and indeed must, necessarily undergo a change in the construction of the buildings and other improvements that are designed and intended to be made. In doing this, it would seem to be right that the com-

mon benefit and convenience of the respective owners of adjoining lots should be consulted and attended to; but certainly no one ought to be restrained from improving his lot in such a manner as to make it answer the purpose for which it was laid out, sold and purchased, if practicable without overreaching upon his neighbor's lot. He ought to be permitted to form and regulate the surface of it as he pleases, either by excavation or filling up as may be requisite to the convenient enjoyment of it, taking care, however, not to produce any detriment or injury to his neighbor in the occupation or enjoyment of his adjoining lot. It is of great importance that the water upon each lot, arising from rain or other cause, should be conducted by the owner or occupier thereof, if he wishes to have it removed, directly from it to a sewer or other place appropriated for the receipt and discharge of the same, and not be turned or led on to an adjoining lot without the consent of the owner, and it appears to me to be the duty of the owner of each lot, if he improves it, to do it in such a way, if practicable, as to lead and conduct the water that happens to fall or be on it, off in the way just mentioned, without regard to the original formation of the surface of his lot. If the rear of his lot should be elevated so much above the front that he cannot conduct the water to the rear so as to discharge it into a sewer or other appropriate place, then he ought to bring it to the front of his lot, where he must of necessity have some place to discharge it, without throwing it upon his neighbor's ground. This he ought to do, even if he should be compelled to carry it under or through his house or buildings."

In *Sentner v. Tees*, 132 Pa. St. 216, the court held that where two adjacent properties, one improved and the other unimproved, lie below the grade of the street, the owner of the unimproved lot is not liable in damages for the natural flow of surface water from his lot into the cellars of houses on the adjoining lot, although the water might be drained away by connections with a city sewer.

In *New York*, as will afterwards appear, the common-law rule has been adopted; and it has been held that the owner of a city lot may improve it and fill it up, or may, if he desires to build, construct walls so as to protect his lot against the surface water from an adjoining lot; but the owner of the latter

cannot be compelled to improve or drain his lot for the benefit of the former. So long as he leaves his lot in its natural condition, his neighbors cannot complain of the surface water. *Vanderwiele v. Taylor*, 65 N. Y. 341. Earl, Com'r, said: "It is undoubtedly true that the rule which would be applicable to surface water in agricultural districts must be somewhat modified in its application to city lots. Such lots are useful only for building, and the owners must be permitted to improve them for building purposes. The owner of a lower lot, who desires to build, must be permitted to fill it up, to ditch it, to construct walls, or to build his house so as to protect his lot against the surface water of the adjoining lot. If he thus prevents the flow of surface water upon his lot, the owner of the higher lot has no cause of action against him. But even in a city there is no principle of the common law which requires one lot owner to improve or drain his lot for the benefit of another. So long as he leaves it in its natural condition his neighbors cannot complain of the flow of the surface water. While this rule recognizes and upholds proprietary rights, it cannot work injustice. If the surface water on any lot is a real nuisance, there is ample power in the city authorities for the purposes of health or public convenience, to abate it. They may require that the lot owner shall drain his lot or connect it with a public sewer. This may be done as a governmental regulation. But the owner of the lower lot has no right which has been invaded, and he has no standing, as the owner of the lower lot merely, which enables him to sue the owner of the higher lot." This *dictum* was delivered previous to the adoption by the court of the common-law rule, and at a time when the court seemed to be inclined to follow the rule of the civil law. The common-law rule was adopted in *Barclay v. Wilcox*, 86 N. Y. 140.

Rural Property Within City Limits.—But if the lots lie in a thinly populated part of the city, and are used for their natural purposes and not for building purposes, it would seem that the lower proprietor is bound to receive the discharge of surface waters, though it might be otherwise where the city has established an artificial grade and provided an artificial sewerage of which the property owners may avail themselves. Thus, in *Gormley v. Sanford*, 52 Ill. 157, the court said: "Where a city has established an artificial grade and

2. Common-Law Rule.—In opposition to the rule of the civil law, what has been known as the common-law doctrine, has been adopted in many of the states.¹ Under this rule, it is held that the right of the owner of land to occupy and improve it in such a manner and for such purposes as he may see fit, either by changing the surface, or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing on it from the surface of adjoining lots, either to stand in unusual quantities on the adjacent lands, or to pass on to and over it in greater quantities and in other directions than they were accustomed to flow. *Cujus est solum, ejus est usque ad cælum* is regarded as a general rule applicable to the use and enjoyment of real property, and the right of a party to the free and unfettered control of his own land above, upon, and beneath the surface, cannot be interfered with or restrained by any consideration of injury to other land, which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. Nor is it at all material in the application of this principle of law whether a party obstructs or changes the direction and flow of surface water by preventing it from coming within the limits of his land, or by erecting barriers or changing the level of the soil so as to turn it off in a new course after it has come within his boundaries. The obstruction of surface water or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil.²

provided an artificial sewerage of which property owners can reasonably avail themselves, we should probably hold it their duty to do so, and so the court substantially instructed in the present case, but this was not the state of facts in reference to this property so far as was disclosed by this record. The lots lie in a very thinly populated addition to the city of Morris, and those belonging to plaintiff were used for the purpose of fruit growing, while defendant mined coal upon his."

But in opposition to the decisions cited, it was held in *Goldsmith v. Elsas*, 53 Ga. 186, that where two city lots adjoin, the lower owes a servitude to the higher so far as to receive the water which naturally runs from it, provided the owner of the latter has done no act to increase such flow by artificial means.

1. It is of interest to note that what

is known as the common-law doctrine, seems to have originated in the *Massachusetts* courts in the cases of *Parks v. Newburyport*, 10 Gray (Mass.) 28, and *Gannon v. Hargadon*, 10 Allen (Mass.) 106; 87 Am. Dec. 625. The English courts do not appear to have had the question before them for consideration, and in *England*, the question seems to be unsettled. See article *Surface Waters*, 23 Am. Law Rev. 388.

2. The rule is stated in the terms laid down in the text in *Gannon v. Hargadon*, 10 Allen (Mass.) 106; 87 Am. Dec. 625. But, although it is thus stated, it will be seen from the next subdivision of this article that, even where the common-law doctrine has been adopted, the owner of the higher lands cannot collect surface waters into a body and discharge them upon the lower lands. With this limitation, which is not

clearly expressed in the text, the rule as stated has been generally recognized by the courts.

In *Grant v. Allen*, 41 Conn. 156, it was held that a person has no right, without permission, to go upon his neighbor's land, from which surface water flows upon his own, and put earth upon it, or dig the soil, for the purpose of turning the flow of water from his own land. And it is no justification of the act that the flow of water is endangering the wall of his house, and that he has given notice to the owner of the adjoining lot, and the latter has neglected to take any action. Pardee, J., observed: "The right of the owner of land to determine the manner in which he will use it, or the mode in which he will enjoy it, the same being lawful, is too high in character to be affected by considerations growing out of the retention, diversion, or repulsion of mere surface water, the result of falling rain or melting snow. There being in the case before us no grant, express or implied, and no stipulation between the parties concerning the mode in which their respective parcels of land shall be occupied and improved, the defendants could not enter upon the plaintiff's land without his consent, place additional earth upon it, change the grade and burden it with a barrier for the diversion of such water from their own land. He could not compel them to receive it, they could not compel him to withhold it."

In *Cairo, etc., R. Co. v. Stevens*, 73 Ind. 278; 5 Am. & Eng. R. Cas. 58; 38 Am. Rep. 139, Woods, J., said: "*Taylor v. Fickas*, 64 Ind. 167; 31 Am. Rep. 114, is the leading case in this state, and adopts the common-law rule as to surface water. The facts, in brief, were, that the owner of the lower land had planted, near the upper line of his land, a row of trees for the purpose of keeping back the driftwood, which was accustomed to be carried over his land by the overflow of the Ohio river. The result, which must have been anticipated, and was, therefore, presumably intended, was, that the driftwood, lodging against this row of trees, accumulated water on the adjacent land above, and either destroyed or greatly depreciated the value thereof. It was held, however, that no action lay for the obstruction, and citing many of the American and some of the English cases on the subject, it was declared that waters percolating through the soil, or contained

in hidden recesses, without a known channel or course, surface waters, and waters overflowing from contiguous streams or rivers 'fall within the maxim that a man's land extends to the centre of the earth below the surface, and to the skies above?'" The learned judge then made the following statement of the law. "The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either in changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities in other directions than they were accustomed to flow. . . . The obstruction of the surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil. . . . It is difficult to invent a formula for the statement of a rule of law which will accurately express the rule in its application to varying circumstances; and it may be that there is some verbal inconsistency in the formula quoted from these opinions of this court; but when applied to the subject-matter of each there is no inconsistency of principle involved or expressed. The one has to do with the landowner's conduct in guarding his possession against encroachment of surface and flood waters from without, and the other with the discharge of such waters from his own land on to that of another. With reasonably near approximation to accuracy, it may be laid down as a general rule, that upon the boundaries of his own land, not interfering with any natural or prescriptive water-course, the owner may erect such barriers as he may deem necessary to keep off surface water or overflowing floods from or across adjacent lands; and for any consequent repulsion, turning aside or heaping up of these waters to the injury of other lands, he will not be responsible; but such waters as fall in rain and snow

on his land, or come thereon by surface drainage from or over contiguous lands, he must keep within his boundaries, or permit them to flow off without artificial interference, unless within the limits of his land he can turn them into a natural water-course. This is in accordance with the general principle, that such waters are a common enemy which each proprietor may fight off as he will; but, once on his land, they become his property (in a qualified sense of course), and the maxim applies, '*Sic utere tuo, ut alienum non laedeas.*'"

In *Gibbs v. Williams*, 25 Kan. 214; 37 Am. Rep. 241, Brewer, J., said: "The ordinary rule concerning surface water is settled and familiar; the lower estate owes no duty to the higher, and the owner of each may use or abandon surface water as he pleases. It is not one of the legal rights appertaining to land, that the water falling upon it from the clouds shall be discharged over land contiguous to it, and this is the law no matter what the conformation of the face of the country may be, and altogether without reference to the fact that in the natural condition of things the surface water would escape in any given direction; and the consequence is, therefore, that there is no such thing known to the law as any particular flow of the surface water *jure naturæ*. The owner of the land may at his pleasure withhold the water falling on his property from passing on to that of his neighbors, and in the same manner may prevent the water falling on the land of the latter from coming upon his own. In a word, neither the right to discharge nor to receive surface water can have any legal existence except from a grant express or implied. The wisdom of this doctrine will be apparent to all minds on a little reflection. If the right to run in its natural channel was annexed to surface water as a legal incident, the difficulties would be infinite indeed. Unless the land should be left idle, it would be impossible to enforce the right in its rigor; for it is obvious every house that is built, every furrow that is made in a field, is a disturbance of such right. If such a doctrine prevailed, every acclivity would be and remain a water-shed, and most low ground would become reservoirs. It is certain that any other doctrine but that which the law has adopted would be altogether impracticable. . . . This rule is both just and wise. It gives to

each owner the fullest dominion over his own land, the largest liberty of improvement of that land according to the necessities of his business and the dictates of his judgment. It enables each to use and accumulate all the water falling upon his own land—a right of no small value in a state like ours; for it is a frequent thing for farmers on the upland prairies, away from streams, to throw up a little wall of earth at the lower side of their farms, and thus obtain a pool of stock water supplied from the fall of rain. But, wise or unwise, it has become a settled rule, and may not be disturbed save by legislative action."

In *Morrison v. Buckport, etc., R. Co.*, 67 Me. 355, Peters, J., said: "It is a fundamental maxim of the law that a man may use his own land, for lawful purposes, as he pleases. He may make erections or excavations thereon to any extent whatsoever. Within his own limits, he can control not only the face of the earth, but everything under and above it. Thereby the estate of another man may be, in various ways, injuriously affected. Much loss and hardship even might grow out of it. But it is not a legal injury and there is no legal remedy for it. Such results are necessarily incident to the ownership of land. . . . Among other results from the application of this principle it is well established that any proprietor of land may control the flow of mere surface water over his own premises, according to his own wants and interests, without obligation to any proprietor, either above or below. There may not be an entire coincidence of view in the cases in this country as to the extent of the right of the upper proprietor in this respect, but in all cases the principle is admitted. He may prevent the surface water from coming upon his land according to its accustomed flow, whether flowing thereon from a highway or any adjoining land. *Bangor v. Lansil*, 51 Me. 521. He may prevent it from passing from his land in its natural flow. *Gannon v. Hargadon*, 10 Allen (Mass.) 106; 87 Am. Dec. 625. It was said in *Rawstron v. Taylor*, 11 Exch. 369, that 'one party cannot insist upon another maintaining his field as a mere water table for the other's benefit.' He may erect structures upon his own land as high as he pleases without regard to its effect upon surface water, no matter how much others are disturbed by it. *Flagg v. Worcester*, 13

What is known as the common-law doctrine, is recognized and followed in the following states, viz.: the States of *Connecticut*,¹ *Indiana*,² *Kansas*,³ *Maine*,⁴ *Massachusetts*,⁵ *Minnesota*,⁶

Gray (Mass.) 601; *Bates v. Smith*, 100 Mass. 181. And he may dig ever so deep upon his own land for proper purposes, although he thereby deprives his neighbor of the sources of water. *Chase v. Silverstone*, 62 Me. 175; 16 Am. Rep. 419. If all this were not so, men could not reconstruct and utilize their landed estates without infinite trouble and suits."

The cases in other states recognize the rule in substantially similar terms. See *Bowlsby v. Speer*, 31 N. J. L. 351; 86 Am. Dec. 215; *Rathke v. Gardner*, 134 Mass. 14; 14 Am. & Eng. R. Cas. 281; *Kansas City, etc., R. Co. v. Riley*, 33 Kan. 374; 20 Am. & Eng. R. Cas. 116.

With reference to the maxim *sic utere tuo ut alienum non laedas*, Biddle, J., said, in *Taylor v. Fickas*, 64 Ind. 167; 31 Am. Rep. 114: "The maxim that everyone must so enjoy his property as not to injure the property of another, means no more than everyone must so enjoy his property according to his legal right as not to injure the legal right in the property of another. It is sometimes impossible for the owner to use his property within his legal right without, in some slight degree at least, injuring the property of another. Such a case is not within the maxim, provided it does not injure a legal right in the property of another."

1. *Connecticut*.—*Chadeayne v. Robinson*, 55 Conn. 345; 3 Am. St. Rep. 55; *Grant v. Allen*, 41 Conn. 156. But compare *Adams v. Walker*, 44 Conn. 466; 91 Am. Dec. 742.

2. *Indiana*.—*Taylor v. Fickas*, 64 Ind. 167; 31 Am. Rep. 114; *Cairo, etc., R. Co. v. Houry*, 77 Ind. 364; 5 Am. & Eng. R. Cas. 62; *Cairo, etc., R. Co. v. Stevens*, 73 Ind. 278; 5 Am. & Eng. R. Cas. 58; 38 Am. Rep. 139; *Benthall v. Seifert*, 77 Ind. 302; *Shelbyville, etc., Turnpike Co. v. Green*, 99 Ind. 205; *Hill v. Cincinnati, etc., R. Co.*, 109 Ind. 511; 29 Am. & Eng. R. Cas. 502.

3. *Kansas*.—*Atchison, etc., R. Co. v. Hammer*, 22 Kan. 763; 31 Am. Rep. 216; *Gibbs v. Williams*, 25 Kan. 214; 37 Am. Rep. 241; *Kansas City, etc., R. Co. v. Riley*, 33 Kan. 374; 20 Am. & Eng. R. Cas. 116.

4. *Maine*.—*Bangor v. Linsil*, 51 Me. 521; *Greeley v. Maine Cent. R. Co.*, 53 Me. 200; *Morrison v. Bucksport, etc.,*

R. Co., 67 Me. 353; *Murphy v. Kelley*, 68 Me. 521.

5. *Massachusetts*.—*Parks v. Newburyport*, 10 Gray (Mass.) 28; *Gannon v. Hargadon*, 10 Allen (Mass.) 106; 87 Am. Dec. 625; *Franklin v. Fisk*, 13 Allen (Mass.) 211; 90 Am. Dec. 194; *Bates v. Smith*, 100 Mass. 181; *Macomber v. Godfrey*, 108 Mass. 221; 11 Am. Rep. 349; *Rathke v. Gardner*, 134 Mass. 14; 14 Am. & Eng. R. Cas. 281; *Keith v. Brockton*, 136 Mass. 119; 6 Am. & Eng. Corp. Cas. 133; *Cassidy v. Old Colony R. Co.*, 141 Mass. 178; 23 Am. & Eng. R. Cas. 85.

If land adjoins a highway, the owner may lawfully prevent surface water from coming thereon from the highway, although it is necessary to stop up the mouth of a culvert built by the selectmen across the highway; but the act must be done within the limits of the land belonging to the person doing it. *Franklin v. Fish*, 13 Allen (Mass.) 211; 90 Am. Dec. 194.

A proprietor of land may erect structures upon it as solid and as high as he pleases without regard to their effect upon surface water, which would otherwise come from the adjoining lands upon his soil. And the fact that the adjoining land is a burial ground, does not abridge his rights in this respect. The erection of a structure for the purpose of preventing the surface water from flowing from the burial ground over his land, is not a violation of the *Massachusetts* statute with reference to the drainage of burial grounds; for the proprietors of the burial grounds have no easement which he violates or obstructs. *Bates v. Smith*, 100 Mass. 181.

The owner of land is not liable for not preventing surface water from accumulating thereon and flowing thence to the adjoining land of another, to his injury. *Morrill v. Hurley*, 120 Mass. 99. See also *Collins v. Waltham*, 151 Mass. 197.

6. *Minnesota*.—*O'Brien v. St. Paul*, 25 Minn. 336; 33 Am. Rep. 470; *Hogenson v. St. Paul, etc., R. Co.*, 31 Minn. 226; 14 Am. & Eng. R. Cas. 291; *Rowe v. St. Paul, etc., R. Co.*, 41 Minn. 384; 16 Am. St. Rep. 706; *Jordan v. St. Paul, etc., R. Co.*, 42 Minn. 172; 41 Am. & Eng. R. Cas. 1. See

Missouri,¹ *New Hampshire*,² *New Jersey*,³ and *New York*.⁴ So the

also *Follmann v. Mankato*, 45 Minn. 457.

In *Rowe v. St. Paul, etc., R. Co.*, 41 Minn. 384; 16 Am. St. Rep. 706, the defendant's railroad traversed in a northerly and southerly direction an unusually flat and level prairie, having a gradual and uniform slope of two to four feet to the mile westerly to the Red river. Plaintiff's farm was situated about one mile to the east of defendant's railway, which was consequently from two to four feet lower than defendant's land. The action was brought for damages suffered by the plaintiff by reason of the obstruction interposed by the road-bed to the free passage of surface waters from the adjacent lands, so as to prevent the drainage thereof through and over defendant's right of way to the river. There was no water-course. It was held that the plaintiff could not recover.

In *Jordan v. St. Paul, etc., R. Co.*, 42 Minn. 172, it appeared that in order to secure a proper elevation of the road-bed above the general surface, the company had dug two large ditches, about six miles in length, one on each side of its road-bed, parallel with and about ten feet from it, and connected them by means of five large culverts. The ditches ran through vast stretches of low, wet land, and accumulated large quantities of water, and at certain seasons of the year this overflowed in destructive currents the lands of the plaintiff, thereby damaging his crops. The complaint did not allege the unskillful or improper construction of the ditches or culverts, as to number or capacity, but simply questioned the right of the defendant to have the ditches and culverts there, even though necessary to its railroad, if their effect would be to accumulate surface water and cause it to flow on plaintiff's land, where it would not otherwise flow. It was held that the plaintiff could not recover.

1. In *Missouri*, the decisions are not uniform. In the earlier cases the court followed the common-law rule. See *Hosher v. Kansas City, etc., R. Co.*, 60 Mo. 229; *McCormick v. Kansas City, etc., R. Co.*, 57 Mo. 437; *Clark v. Hannibal, etc., R. Co.*, 36 Mo. 224. In two cases it thereafter followed the civil-law rule. *McCormick v. Kansas City, etc., R. Co.*, 70 Mo. 359; 35 Am. Rep.

435; *Shane v. Kansas City, etc., R. Co.*, 71 Mo. 237; 5 Am. & Eng. R. Cas. 64; 36 Am. Rep. 480. But in a long series of subsequent decisions, it has reverted to and invariably followed the common-law rule. *Munkres v. Kansas City, etc., R. Co.*, 72 Mo. 514; 5 Am. & Eng. R. Cas. 79; *Benson v. Chicago, etc., R. Co.*, 78 Mo. 504; 20 Am. & Eng. R. Cas. 96; *Stewart v. Clinton*, 79 Mo. 603; 7 Am. & Eng. Corp. Cas. 511; *Abbott v. Kansas City, etc., R. Co.*, 83 Mo. 271; 20 Am. & Eng. R. Cas. 103; 53 Am. Rep. 581; *Jones v. St. Louis, etc., R. Co.*, 84 Mo. 151; 29 Am. & Eng. R. Cas. 523; *Hoester v. Hemsath*, 16 Mo. App. 486; *Jones v. Wabash, etc., R. Co.*, 18 Mo. App. 251; *Martin v. Benoist*, 20 Mo. App. 262; *Field v. Chicago, etc., R. Co.*, 21 Mo. App. 600; *Schneider v. Missouri Pac. R. Co.*, 29 Mo. App. 68; *Bird v. Hannibal, etc., R. Co.*, 30 Mo. App. 365; *St. Louis, etc., R. Co. v. Schneider*, 30 Mo. App. 620; *Burke v. Missouri Pac. R. Co.*, 29 Mo. App. 370; *Collier v. Chicago, etc., R. Co.*, 48 Mo. App. 398.

2. *New Hampshire*.—*Swett v. Cutts*, 50 N. H. 439; 9 Am. Rep. 276. See also *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 573; 82 Am. Dec. 179.

But in *New Hampshire*, while it is settled in respect to water not gathered into a stream, but circulating through the pores of the earth beneath its surface, that a landowner who, in the reasonable use of his own land, obstructs or diverts the flow of such water, although it be to the injury of his neighbor's land, is not liable in damages, yet his right to so obstruct or divert such water is limited to a reasonable use for domestic, agricultural, and manufacturing purposes, not trenching, however, upon the civil rights of others. *Swett v. Cutts*, 50 N. H. 439; 9 Am. Rep. 276.

3. *New Jersey*.—*Bowlsby v. Speer*, 31 N. J. L. 351; 86 Am. Dec. 215. See also *Union v. Durkes*, 38 N. J. L. 21; *Kelly v. Dunning*, 39 N. J. Eq. 483.

But in the case of *Lord v. Carbon Iron Mfg. Co.*, 42 N. J. Eq. 174, the vice-chancellor further declared that land on a lower level is under a natural servitude to that located above it to receive the water naturally flowing down to it.

4. *New York*.—*Barkley v. Wilcox*, 86 N. Y. 140; 40 Am. Rep. 519; *Wag-*

common-law rule may be said to prevail in the States of *Texas*,¹

ner *v. Long Island R. Co.*, 2 Hun (N. Y.) 633. See also *Goodale v. Tuttle*, 29 N. Y. 459; *Gould v. Booth*, 66 N. Y. 64.

In *Vanderwiele v. Taylor*, 65 N. Y. 341, 345, the court held that an action to recover damages alleged to have been caused by the act of the defendant in permitting water to accumulate on his premises, a city lot, and from thence to flow into the plaintiff's cellar causing injury, would not lie, and in deciding that case, Earl, Com'r, used language which seems to approve of the civil-law rule. It is to be noted too that, in deciding the case of *Barkley v. Wilcox*, 86 N. Y. 148; 40 Am. Rep. 519, in which the rule of the common law was adopted, the court was careful to declare that the rule was not absolute, Andrews, J., remarking: "We do not intend to say that there may not be cases which, owing to special conditions and circumstances, should be exceptions to the general rule declared."

1. *Texas*.—In *Gross v. Lampasas*, 74 Tex. 195, it appeared that a natural drain or depression of the ground ran through the city of Lampasas for a distance of about one mile southwest from the plaintiff's property and passing through the plaintiff's lots. The waters drained along the depression from the southwest to the northeast. The drain or depression had no perceptible banks until within about 150 yards of plaintiff's boundary line. For the distance of 150 yards, however, there was a drain with perceptible banks, in many places from one to three feet high and from ten to twelve feet wide. During heavy rainfalls, the water had a depth of from three to five feet in the drain in the immediate vicinity of plaintiff's land, but only flowed for a few hours. Only surface water flowed in the depression which was the natural drainage outlet of over one thousand acres to the southwest and south of plaintiff's property. Plaintiff erected a wall across the southern boundary of his lot, the wall being about six feet high and about eighteen inches thick, and the rock being laid in mortar. The wall caught the water flowing along the depression and during heavy rains set the water back over the adjoining streets. The city constructed a ditch in front of plaintiff's premises for the purpose of carrying off the ponded surface water, and plain-

tiff thereupon began an action for damages for unlawfully interfering with the access to his lots. The trial court held that the construction of the ditch was rendered necessary by the erection of plaintiff's wall; that the wall was illegally erected by the plaintiff and that he could not recover. On appeal, however, the supreme court held that the plaintiff had the right to prevent the surface water from flowing over his property and reversed the judgment of the trial court.

This case is based upon the common-law rule, which must thus be regarded as the rule in *Texas*, except in the case of railways. By statute (Rev. Stat., art. 4171) it is enacted: "In no case shall any railroad construct a road-bed without first constructing the necessary culverts or sluices, as the natural lay of the land requires for the necessary drainage thereof." It has been held that this provision applies to surface waters as well as to water-courses, and that under it railways are bound to provide for the drainage of surface waters. See *Gulf, etc., R. Co. v. Helsley*, 62 Tex. 593; 20 Am. & Eng. R. Cas. 89; *Austin, etc., R. Co. v. Anderson*, 79 Tex. 427. And the obstruction of the flow of the water by the construction of a railway in a street, is contrary to the statute, and an action lies for damages caused by it. *Rosenthal v. Taylor, etc., R. Co.*, 79 Tex. 325.

A railroad company built an embankment and culvert, which diverted the waters from ordinary rains and caused them to overflow and injure plaintiff's lands. It was held that a defense showing that plaintiff had warning of the danger and could have prevented the overflow at slight expense by cutting a ditch on the line of his land, was not sufficient if it was not further shown that by cutting the ditch the plaintiff would not have injured contiguous land. *Austin, etc., R. Co. v. Anderson* (Tex. 1892), 19 S. W. Rep. 1025.

In an action under the statute for damages caused by an overflow, evidence that the railway embankment prevented the water from passing off, as it formerly did, thus causing the overflow, notwithstanding the existence of considerable openings for the purpose of permitting the water to pass through the embankment, is sufficient

*Vermont*¹ and *Wisconsin*.²

3. Modified Doctrine.—In *Arkansas* and *South Carolina*, a modified doctrine seems to have been adopted, under which the right to obstruct surface water depends, not upon the existence or non-existence of an easement, or upon absolute right of property in the soil, but upon the question whether the obstruction is a necessary result of a reasonable use of the land. If a reasonable necessity exists for obstructing or diverting the natural flow of surface water, the right may be exercised, provided it be done with a prudent regard to the welfare and rights of the adjacent owner.³

VIII. DRAINAGE OF SURFACE WATERS.—It is a general rule, which apparently has no exception, that the natural flow of surface wa-

to sustain a judgment for the plaintiff. *Texas, etc., R. Co. v. Snyder* (Tex. 1891), 18 S. W. Rep. 559.

1. *Vermont*.—*Harwood v. Benton*, 32 Vt. 724. See also *Beard v. Murphy*, 37 Vt. 99; 86 Am. Dec. 693.

In *Beard v. Murphy*, 37 Vt. 99; 86 Am. Dec. 693, the surface water flowed naturally from the plaintiff's land to the land of the defendant. The plaintiff was in the habit of pouring filthy water from his kitchen on to the defendant's premises, which ran into and injured the defendant's well. It was held that, after giving notice, the defendant might erect an obstruction so as to prevent this injury, even if it resulted in turning back the surface water on the plaintiff's land to his injury.

2. *Wisconsin*.—*Hoyt v. Hudson*, 27 Wis. 656; 9 Am. Rep. 473; *Eulrich v. Richter*, 37 Wis. 226; *Ramsdale v. Foote*, 55 Wis. 560; *Hanlin v. Chicago, etc., R. Co.*, 61 Wis. 515; 20 Am. & Eng. R. Cas. 78; *Waters v. Bay View*, 61 Wis. 642; 7 Am. & Eng. Corp. Cas. 486; *O'Connor v. Fond du Lac, etc., R. Co.*, 52 Wis. 526; 38 Am. Rep. 754; *Lessard v. Stram*, 62 Wis. 112; 51 Am. Rep. 715; *Johnson v. Chicago, etc., R. Co.*, 80 Wis. 641. See also *Pettigrew v. Evansville*, 25 Wis. 228; 3 Am. Rep. 50.

3. *Arkansas*.—In *Little Rock, etc., R. Co. v. Chapman*, 39 Ark. 473; 17 Am. & Eng. R. Cas. 51; 43 Am. Rep. 280, the plaintiffs were the owners of six lots in the town of Argenta, situated in a low flat of ground, running with the course of the Arkansas river, between a higher bank along the river margin and a higher table-land behind. Defendant laid its track along this low land upon a slightly elevated embankment, leaving a connection between the two sides of its railroad for the

passage of water of only two tile drains about twelve or fourteen inches in diameter. The embankment passed near by and below the plaintiffs' lots. It was held that it was the duty of the railroad company to provide adequate means of drainage, and that the plaintiffs were entitled to damages. *Eakin, J.*, said: "The question is whether a railway company, in the use of its conceded right of way, has the right to injure the lands of higher proprietors by flooding them with surface water which had been used to pass over the right of way, where, by reasonable care and at a reasonable expense, it might consistently with the enjoyment of the right of way, leave free passage for the water. I think it may be assumed in the outset that no man with just and kindly sentiments, would be apt to treat a neighboring proprietor in that fashion, and there may be much doubt moreover whether it accords with the golden rule; but we must waive these considerations and decide it as a matter of law and as settled by the weight of authority and the better reasoning."

. . . With regard to surface water, the common-law courts generally agree that each proprietor has the right to fend off the surface water flowing naturally or falling upon his own soil, so as to divert its course, and may even throw it back upon his neighbor from whose land it came. The point, however, upon which there is among them a great conflict and no little obscurity, is as to whether this right is absolute at the will of the lower proprietor, or whether its exercise must be reasonable for proper objects and with due care to inflict no injury beyond what may be fairly necessary. The question rather concerns the good

ter from higher on to lower ground does not give a cause of action.¹ The owner of land bounded upon a stream or water-course has the right to all the advantages of drainage which the stream reasonably used may give him, and, consequently, he may drain his land into the stream.²

The right of the plaintiff to drain waters from his land into a stream or natural water-course is not limited to the drainage and discharge of the surface waters in the same manner as when the

faith of the act, and the manner of doing it, rather than the right itself. If necessary, the right is generally unquestioned, and if done with due care of the property of another, although the latter may be injured, he has by the common law no remedy."

South Carolina.—In *Waldrop v. Greenwood, etc., R. Co.*, 28 S. Car. 163; 34 Am. & Eng. R. Cas. 204, the question did not necessarily arise, but Simpson, C. J., who delivered the opinion of the court, expressed a very strong opinion as to the rule which ought to be adopted, saying: "In some of the states a medium principle has been adopted which makes the right to disturb the natural flow of surface water by the owners of land situated as above suggested, depend somewhat upon the facts and circumstances of each case; the right, as a general rule, existing when there is a necessity for its exercise to the proper enjoyment of the ownership of the property for the protection of which it is exercised, and there is no reasonable way of preventing the injury; and not existing where no such reasonable necessity is present, or where the injury inflicted could have been inexpensively and easily prevented. Without going into the argument now as to which of these principles should be adopted in our state, and without announcing any final adjudication thereon in this case (the non-suit herein having been sustained upon another ground, rendering such adjudication unnecessary, even if the question here was distinctly raised in the pleadings and rules below, which is at least doubtful), it is sufficient for us to say, as at present advised and as applicable to respondent's position in support of the non-suit, that we think the medium line referred to above has the strongest foundation, being based upon that great underlying principle, which is the basis of all just laws in reference to the exercise of ownership of prop-

erty, and which alone harmonizes such exercise on the part of each with similar rights in others with whom they may come in contact, to wit, *sic utere tuo, ut alienum non lædas*, unless there be some overruling necessity otherwise."

1. See *Rathke v. Gardner*, 134 Mass. 14; *Peck v. Goodberlett*, 109 N. Y. 180; *Sowers v. Lowe* (Pa. 1887), 9 Atl. Rep. 44; 14 Am. & Eng. R. Cas. 281; *Pettigrew v. Evansville*, 25 Wis. 223; 3 Am. Rep. 50; *McCormick v. Horan*, 81 N. Y. 86; 37 Am. Rep. 479.

Improvement of City Lot.—The fact that a city lot has been so improved by its owner as to cause the rain waters falling upon it to flow upon the adjacent street or alley at the established grade, whence it flows upon a neighboring lot which is below grade, does not give a cause of action to the owner of the latter lot. *Phillips v. Waterhouse*, 69 Iowa 199; 58 Am. Rep. 220.

Drainage of Garden.—The defendant owned land upon the slope of a hill running down to a mill pond belonging to the plaintiff. He cultivated and fertilized his land in the ordinary way for garden purposes, and the flow of the surface water carried a large amount of solid matter into the plaintiff's mill pond. It was held that the defendant's acts gave the plaintiff no cause of action for an unlawful encroachment upon its mill pond. *Middlesex Co. v. McCue*, 149 Mass. 103; 14 Am. St. Rep. 402.

Catch-Basins in Highway.—A town collected surface water in catch-basins or gutters constructed beneath the surface of a highway. The water percolated thence through the soil into the cellar of the plaintiff upon a lot adjoining the highway. It was held that the plaintiff had no cause of action against the town. *Kennison v. Beverly*, 146 Mass. 467.

2. *Treat v. Bates*, 27 Mich. 390; *Jenkins v. Wilmington, etc., R. Co.*, 110 N. Car. 438; *Miller v. Laubach*, 47 Pa.

land was in a state of nature and unchanged by cultivation or improvement. The owner of lands drained by a water-course may change and control the natural flow of the surface water therein, and, by ditches and otherwise, accelerate the flow or increase the volume of water which reaches the stream, and if he does this in the reasonable use of his own premises, he exercises only a legal right and incurs no liability to a lower proprietor.¹ But a land owner cannot concentrate and discharge into the stream the surface water of his lands in quantities beyond the

St. 154; 86 Am. Dec. 521; *Jackman v. Arlington Mills*, 137 Mass. 277.

In *Miller v. Laubach*, 47 Pa. St. 154; 86 Am. Dec. 521, Thompson, J., said: "No doubt the owner of land through which a stream flows, may increase the volume of water by draining into it, without any liability to damages by a lower owner. He must abide the contingency of increase or diminution of the flow in the channel of the stream, because the upper owner has the right to all the advantages of drainage or irrigation reasonably used as the stream may give him. But that is an entirely different thing from draining the water standing on the lands of one, through artificial channels, on to that of another. That cannot be done without his consent, and this was the substance of the charge below."

In *Waffle v. New York Cent. R. Co.*, 58 Barb. (N. Y.) 413, *aff'd* 53 N. Y. 11; 13 Am. Rep. 467, Johnson, J., said: "Every person has the unquestionable right to drain the surface water from his own land to render it more wholesome, useful or productive, or even to gratify his taste or will; and if another is inconvenienced or incidentally injured thereby, he cannot complain. No one can divert a natural water-course and stream, through his land, to the injury of another with impunity; nor can he by means of drains and ditches, throw the surface water from his own land upon the land of another, to the injury of such other. But where a person can drain his own land without turning the water upon the land of another, or where it can be done by drains entering into a natural stream or water-course, there can be no doubt of his right thus to drain, even though the effect may be to increase the volume of water unusually at one season of the year, or to diminish the supply at another."

Waters Accumulating in Quarry.—The plaintiffs opened a quarry on their

premises. The excavation made, formed a natural reservoir in which the surface water from the contiguous land collected, and in the spring when the plaintiffs commenced their operations they pumped this water, together with that arising from the melting snows and what came from small natural water-courses cut off by the excavation, into the water-course, which lower down crossed the defendant's farm. This water, if the excavation had not been made, would have naturally descended and flowed into the stream, and although the flow of water, when the pumping was going on, was greater than it would otherwise have been, the natural capacity of the water-course was sufficient to carry off the water pumped into it, together with the other water running into the stream. There was no evidence that the defendants sustained damage from the acts of the plaintiffs in pumping the water into the stream. It was held that the defendant was not entitled to obstruct the stream, thus casting back upon the plaintiffs' land the water which they pumped into it, and that the plaintiffs were entitled to an injunction restraining the defendant from so obstructing the water-course. *McCor-mick v. Horan*, 81 N. Y. 86; 37 Am. Rep. 479.

1. *Waffle v. New York Cent. R. Co.*, 53 N. Y. 11; 13 Am. Rep. 467, *aff'g* 58 Barb. (N. Y.) 413; *McCor-mick v. Horan*, 81 N. Y. 86; 37 Am. Rep. 479.

Pumping Water from Mine.—The owner of land in which there is a mine may pump into a stream which forms the natural drainage of his land, water from the mine, although the quantity of water in the stream is thereby increased and its quality so affected as to render it totally unfit for use for domestic purposes by the lower riparian owners. *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126; 57 Am.

natural capacity of the water-course, to the damage of the lower riparian owners.¹

In the clearing, improvement, and preparation of land for cultivation, the owner thereof may, in the exercise of good husbandry, drain his soil, although the consequence is that the surface water flows from his land with greater rapidity, and the quantity of water flowing upon the lower land is considerably increased.²

Rep. 445, *overruling* 86 Pa. St. 401; 27 Am. Rep. 711.

1. Noonan *v.* Albany, 79 N. Y. 470; 35 Am. Rep. 540; McCormick *v.* Horan, 81 N. Y. 86; 37 Am. Rep. 479.

Subjacent Support.—The act of a land owner in draining the water in a lawful manner does not give his neighbor a cause of action, although he withdraws from the adjoining land the support of the water beneath such land and thereby causes the surface to subside. The owner of land has no right at common law to the support of subterranean waters. *Popplewell v. Hodgkinson*, L. R., 4 Exch. 248.

2. Hughes *v.* Anderson, 68 Ala. 280; 44 Am. Rep. 147; Hicks *v.* Silliman, 93 Ill. 255; Peck *v.* Herrington, 109 Ill. 611; 50 Am. Rep. 627, *reversing* 11 Ill. App. 62; Com'rs of Highways *v.* Whitsitt, 15 Ill. App. 318; Chicago, etc., R. Co. *v.* Glenney, 28 Ill. App. 364; Grahame *v.* Keene, 34 Ill. App. 87; Templeton *v.* Voshloe, 72 Ind. 134; 34 Am. Rep. 150; Vannest *v.* Fleming, 79 Iowa 638; 18 Am. St. Rep. 387; Martin *v.* Jett, 12 La. 501; 32 Am. Dec. 120; Lattimore *v.* Davis, 14 La. 161; 33 Am. Dec. 581; Sowers *v.* Shiff, 15 La. Ann. 300; Barrow *v.* Landry, 15 La. Ann. 681; 77 Am. Dec. 199; Guesnard *v.* Bird, 33 La. Ann. 796; Ludeling *v.* Stubbs, 34 La. Ann. 935; Middlesex Co. *v.* McCue, 149 Mass. 103; 14 Am. St. Rep. 102; Gregory *v.* Bush, 64 Mich. 37; Yerex *v.* Eineder, 86 Mich. 24; 24 Am. St. Rep. 113; Osten *v.* Jerome, 93 Mich. 196; Peck *v.* Goodberlett, 109 N. Y. 180; Kaufman *v.* Griesemer, 26 Pa. St. 411; 67 Am. Dec. 437; Martin *v.* Riddle, 26 Pa. St. 415; Rhoads *v.* Davidheiser, 133 Pa. St. 226; 19 Am. St. Rep. 630; Meixell *v.* Morgan, 149 Pa. St. 415; Pettigrew *v.* Evansville, 25 Wis. 223; 3 Am. Rep. 50.

In *Pettigrew v. Evansville*, 25 Wis. 223; 3 Am. Rep. 50, Dixon, C. J., said: "It is the duty of every owner of land, if he wishes to carry off the surface water from his own land, to do so without material injury or detriment to the

lands of his neighbors, and if he cannot, he must suffer the inconvenience arising from its presence, and cannot complain that others refuse to allow it passage over their lands. Such is the sound and wholesome doctrine of the law upon this subject, and, although it does not go so far as to require the owner to resort to any artificial means to prevent the surface water from his land flowing on to the land of another, when such flowing is produced by natural causes, yet it will prevent him from using such means for the purpose of making it flow there, whenever the same would be materially injurious to the interests of the proprietor thereof. And it is also true, as stated in the books, that considerable latitude is left to the owners of estates as to the manner in which they will cultivate and improve them, and in so doing they may undoubtedly somewhat change the course and flow of the surface water, so as in a measure to increase the quantity which would otherwise pass upon the lands of others. They may also fill up low wet places so as to render them arable, or fit for crops, thus causing the water which previously settled in them to spread and pass on to the lands of others, doing no perceptible injury thereto. But the extent to which any proprietor may go, in these and other ways in turning the surface water of his own land off on to the lands of others, must, in each case, we think, be determined by the degree of injury which it will produce. Very slight damage will not, perhaps, be regarded; but if the injury be immediate, and such as to perceptibly and materially impair the value or destroy the usefulness of the adjoining estate, we apprehend that the law will not permit it to be done, and certainly we know of no adjudged case where it has been held that the waters of a natural pond or reservoir upon the land of one person may be drained by him directly upon the land of another directly to his injury; nor where one owner has been allowed, by means of a ditch,

In the interest of good husbandry and tillage and improvement of his farm in good faith, the landowner may fill up sag holes, pools, and basins in his land, so that water will not accumulate or stay in them, although the flow of the water upon the adjacent lands is thereby incidentally increased.¹ But the owner of higher lands cannot drain the waters in a direction other than that

trench, sewer, or the like, to gather the surface water from his own land and throw it upon the land of another, so as materially to lessen its value and produce injury to the owner. Such a proceeding would be contrary to natural right and justice, and the law does not sanction it."

In *Peck v. Goodberlett*, 109 N. Y. 108, the plaintiff sued to recover damages for an alleged diversion by defendant of water from its natural channels into and upon the plaintiff's land. The lands of the parties were naturally so situated that plaintiff's land received the surface water which flowed from defendant's land. Defendant prepared his land for cultivation in the natural and customary manner, having a due regard to the ordinary flow of surface water in the existing and natural depressions in the land. He erected a stone wall which divided his land from the plaintiff's, leaving therein openings opposite dead furrows made by him on his own land, through which the water flowing in its natural direction passed upon the plaintiff's land. The defendant did not divert or interfere with any natural water-course, nor did he turn the flow of surface water in a direction other than that in which it naturally would have flowed, and he acted in entire good faith with a view to the cultivation and improvement of his own premises. The referee, before whom the case was tried, found that no actual damage to the plaintiff's land or crops could be attributed to the defendant's acts, and that while at times the water passed on to plaintiff's land with slightly increased velocity, the quantity of water had not been increased by the acts of the defendant. It was held that the defendant's acts were justifiable, and that the plaintiff had no cause of action.

The owner of the upper land collected the surface water by means of underground drains and discharged it on the lower estate at one point. It was held that the owner of the lower land had no cause of action if the point of discharge was the natural water-shed of both tracts, although the flow of water

was rendered greater by the use of the drains than it would have been if surface drains only had been used. *Meixell v. Morgan*, 149 Pa. St. 415.

In *Templeton v. Voshloe*, 72 Ind. 134; 34 Am. Rep. 150, the court declared that the owner of the upper field may make such drains as are required by good husbandry and the proper improvement of the surface ground, and as may be discharged into natural channels without inflicting palpable and unnecessary injury to the lower field; but in *Cairo, etc., R. Co. v. Stevens*, 73 Ind. 278; 5 Am. & Eng. R. Cas. 58; 38 Am. Rep. 139, it was said that the owner of the upper land must either keep the surface water within his own boundaries or permit it to flow off without artificial interference; unless within the boundaries of his own land, he can turn it into a natural stream.

The question whether an owner of lands merely increases the flow of water in the course of the natural and ordinary improvement of his estate, or causes water to flow on the adjacent lands, which in the absence of his drains would have flowed in a different direction, must be given to the jury and decided by it under proper instructions. *Hughes v. Anderson*, 68 Ala. 280; 44 Am. Rep. 147.

The fact that the ditches on the defendant's lands which drained the water from a swamp on to the land of the plaintiff, rendering the latter land unproductive, were made in the exercise of good husbandry and improved the plaintiff's land, is no defense to an action for unlawfully collecting the surface water into a body and discharging it on to the lower lands. *Yerex v. Einder*, 86 Mich. 24; 24 Am. St. Rep. 113.

1. *Gregory v. Bush*, 64 Mich. 37. When there are natural ponds on the upper lands which are merely the collection of surface water from rain and melting snow which fall upon the land, and there is such a descending grade that by filling up the ponds there would be a flow of water towards and on to the lower estate, such ponds may, for the purpose of husbandry, be drained either

in which they would naturally flow.¹ Nor can the owner of the upper land collect the waters of his estate into a ditch, or drain and discharge it in a volume on the lower land to its injury.²

It is no defense to an action for wrongfully discharging surface

by tile or other drains into any natural drainage course existing on the upper lands and caused to flow over the lower estate, although the flow of water may thereby be increased. But it would appear that the owner of the upper estate would not have the right to drain a large body of water or a lake upon the land of the adjoining owner and destroy it. *Peck v. Herrington*, 109 Ill. 611; 50 Am. Rep. 627, *rev'g* 11 Ill. App. 62; *Com'rs of Highways v. Whitsett*, 15 Ill. App. 319.

1. *Hughes v. Anderson*, 68 Ala. 280; 44 Am. Rep. 147; *Adams v. Walker*, 34 Conn. 466; 91 Am. Dec. 742; *Anderson v. Henderson*, 124 Ill. 164; *Dayton v. Drainage Com'rs*, 128 Ill. 271; *Davis v. Com'rs of Highways* (Ill. 1892), 33 N. E. Rep. 58; *Barrow v. Landry*, 15 La. Ann. 681; 77 Am. Dec. 199; *Hooper v. Wilkinson*, 15 La. Ann. 497; 77 Am. Dec. 194; *Ludeling v. Stubbs*, 34 La. Ann. 935; *Hogenson v. St. Paul, etc., R. Co.*, 31 Minn. 224; 14 Am. & Eng. R. Cas. 291; *Butler v. Peck*, 16 Ohio St. 335; 88 Am. Rep. 452; *Rhoads v. Davidheiser*, 133 Pa. St. 226; 19 Am. St. Rep. 630; *Torrey v. Scranton*, 133 Pa. St. 173.

The owner of the upper lands cannot divert the flow of water on his plantation front to the rear so as to effect his drainage in an opposite direction to the detriment of other adjoining proprietors. *Hooper v. Wilkinson*, 15 La. Ann. 497; 77 Am. Dec. 194.

The easement which exists in states which have adopted the civil-law rule in favor of the upper proprietor, does not authorize him to divert the flow of water from its natural course and discharge it upon the lower estate at a place where it would not naturally flow on the ground that it is more beneficial to the lower estate. The question whether the discharge of the water at a place other than that where it would naturally flow, is more beneficial to the lower estate, is a matter which concerns only the proprietor of the lower lands. *Barrow v. Landry*, 15 La. Ann. 681; 77 Am. Dec. 199.

2. *Hughes v. Anderson*, 68 Ala. 280; 44 Am. Rep. 147; *Crabtree v. Baker*, 75 Ala. 91; 51 Am. Rep. 424; *Springfield, etc., R. Co. v. Henry*, 44 Ark. 360;

Newgass v. St. Louis, etc., R. Co., 54 Ark. 140; *Durgin v. Neal*, 82 Cal. 595; *Adams v. Walker*, 34 Conn. 466; 91 Am. Dec. 742; *Goldsmith v. Elsas*, 53 Ga. 186; *Nevins v. Peoria*, 41 Ill. 502; 89 Am. Dec. 392; *Aurora v. Reed*, 57 Ill. 29; 11 Am. Rep. 1; *Toledo, etc., R. Co. v. Morrison*, 71 Ill. 616; *St. Louis, etc., R. Co. v. Gapps*, 72 Ill. 188; *Hicks v. Silliman*, 93 Ill. 255; *Peck v. Herrington*, 109 Ill. 611; 50 Am. Rep. 627, *rev'g* 11 Ill. App. 62; *East St. Louis, etc., R. Co. v. Eisentraut*, 134 Ill. 96; *Young v. Com'rs of Highways*, 134 Ill. 569, *rev'g* 34 Ill. App. 178; *Stoddard v. Filgur*, 21 Ill. App. 560; *Kankakee, etc., R. Co. v. Horan*, 23 Ill. App. 259; *Brown Tp. v. Barrett*, 38 Ill. App. 248; *Templeton v. Voshloe*, 72 Ind. 134; 34 Am. Rep. 150; *Weis v. Madison*, 75 Ind. 241; 39 Am. Rep. 135; *Evansville v. Decker*, 84 Ind. 325; 42 Am. Rep. 86; *Crawfordsville v. Bond*, 96 Ind. 236; *Rice v. Evansville*, 108 Ind. 7; 58 Am. Rep. 22; *Reed v. Cheney*, 111 Ind. 387; *Davis v. Crawfordsville*, 119 Ind. 1; 12 Am. St. Rep. 361; *Weddell v. Hapner*, 124 Ind. 315; *De Haven v. Helvie*, 126 Ind. 82; *Patoka Tp. v. Hopkins*, 131 Ind. 142; *Young v. Gentis* (Ind. 1892), 32 N. E. Rep. 796; *Livingston v. McDonald*, 21 Iowa 160; 89 Am. Dec. 563; *Martin v. Jett*, 12 La. 503; 32 Am. Dec. 120; *Lattimore v. Davis*, 14 La. 161; 33 Am. Dec. 581; *Sowers v. Shiff*, 15 La. Ann. 300; *Guesnare v. Bird*, 33 La. Ann. 796; *Ludeling v. Stubbs*, 34 La. Ann. 935; *White v. Chapin*, 12 Allen (Mass.) 516; *Curtis v. Eastern R. Co.*, 14 Allen (Mass.) 55; 98 Mass. 428; *Rathke v. Gardner*, 134 Mass. 14; 14 Am. & Eng. R. Cas. 281; *Stanchfield v. Newton*, 142 Mass. 110; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552; *Cubit v. O'Dett*, 51 Mich. 347; *Gregory v. Bush*, 64 Mich. 37; *Chapel v. Smith*, 80 Mich. 100; *Yerex v. Eineder*, 86 Mich. 24; 24 Am. St. Rep. 113; *O'Brien v. St. Paul*, 25 Minn. 331; 33 Am. Rep. 470; *Hogenson v. St. Paul, etc., R. Co.*, 31 Minn. 224; 14 Am. & Eng. R. Cas. 291; *Blakely Tp. v. Devine*, 36 Minn. 53; *Pye v. Mankato*, 36 Minn. 373; 1 Am. St. Rep. 671; *Olson v. St. Paul, etc., R. Co.*, 38 Minn. 419; 34 Am. & Eng. R. Cas. 152; *Beach v. Gaylord*, 43 Minn. 476; *Follmann v. Mankato*,

45 Minn. 457; Illinois Cent. R. Co. v. Miller, 68 Miss. 760; McCormick v. Kansas City, etc., R. Co., 70 Mo. 359; 35 Am. Rep. 431; Benson v. Chicago, etc., R. Co., 78 Mo. 504; 20 Am. & Eng. R. Cas. 96; Rychlicki v. St. Louis, 98 Mo. 497; 25 Am. & Eng. Corp. Cas. 160; 14 Am. St. Rep. 651; Paddock v. Somes, 102 Mo. 226; Martin v. Benoist, 20 Mo. App. 262; Davis v. Londgreen, 8 Neb. 43; Fremont, etc., R. Co. v. Marley, 25 Neb. 138; 13 Am. St. Rep. 482; Field v. West Orange, 36 N. J. Eq. 118; 37 N. J. Eq. 600; Kelly v. Dunning, 39 N. J. Eq. 482; Soule v. Passaic, 47 N. J. Eq. 28; Miller v. Morristown, 47 N. J. Eq. 62; Perkins v. Moorestown, etc., Turnpike Co., 48 N. J. Eq. 499; Slack v. Lawrence Tp. (N. J. 1890), 19 Atl. Rep. 663; Byrnes v. Cohoes, 67 N. Y. 204; Jutte v. Hughes, 67 N. Y. 267; Noonan v. Albany, 79 N. Y. 470; 35 Am. Rep. 540; Barkley v. Wilcox, 86 N. Y. 148; 40 Am. Rep. 519; Mairs v. Manhattan Real Estate Assoc., 89 N. Y. 498; Vogel v. New York, 92 N. Y. 10; 2 Am. & Eng. Corp. Cas. 537; 44 Am. Rep. 349; Seifert v. Brooklyn, 101 N. Y. 143; 54 Am. Rep. 664; Bellows v. Sackett, 15 Barb. (N. Y.) 96; Foot v. Bronson, 4 Lans. (N. Y.) 47; Mitchell v. New York, etc., R. Co., 36 Hun (N. Y.) 177; Saal v. Abeles, 20 N. Y. Wkly. Dig. 528; Porter v. Dunham, 74 N. Car. 780; Station v. Norfolk, etc., R. Co., 109 N. Car. 337; Jenkins v. Wilmington, etc., R. Co., 110 N. Car. 446; Butler v. Peck, 16 Ohio St. 334; 88 Am. Rep. 452; Miller v. Laubach, 47 Pa. St. 154; 86 Am. Dec. 521; Hays v. Hinkleman, 68 Pa. St. 324; Rhoads v. Davidheiser, 133 Pa. St. 226; 19 Am. St. Rep. 630; Inman v. Tripp, 11 R. I. 520; 23 Am. Rep. 520; Wakefield v. Newell, 12 R. I. 75; 34 Am. Rep. 598; Whipple v. Fairhaven, 63 Vt. 221; Gillison v. Charleston, 16 W. Va. 282; 37 Am. Rep. 763; Knight v. Brown, 25 W. Va. 808; Hargreaves v. Kimberly, 26 W. Va. 787; 57 Am. Rep. 121; Pettigrew v. Evansville, 25 Wis. 223; 3 Am. Rep. 50.

In *Hogenson v. St. Paul, etc., R. Co.*, 31 Minn. 224; 14 Am. & Eng. R. Cas. 291, Gilfillan, C. J., said: "The acts of the defendant amount to this: That, being incommoded by the presence of surface waters on its lands, it, by means of ditches, accumulates them and transfers them to the lands of others, where they would not otherwise go, to the damage of the latter lands. Without a grant of the right it cannot do this. The right of an owner to improve this

land for the purpose for which such land is ordinarily used, and to do it in the ordinary manner, as by building on it, or raising the surface where necessary to its improvement, even though as an incident to it the rain and snow waters falling on it may be diffused over adjoining land, was conceded *arguendo* in *O'Brien v. St. Paul*, 25 Minn. 331; 33 Am. Rep. 470. Without determining whether that right may not be qualified by the circumstances of particular cases, we are prepared to say that that is as far as it is safe to go, and that it does not include the right to gather the surface waters on one's land and turn them upon the land of another, to its damage, even though the former land may as a consequence thereof be improved. In other words, he may not in this way improve his own land, by merely transferring to the land of another a burden which nature has imposed on his own land. The defendant is liable for the damage caused to the lands of others by the waters which it caused to flow through its ditch upon them."

Liability Does Not Depend on Negligence.—The liability of the upper proprietor for damage caused by collecting surface water into a stream and casting it upon the lower land to its damage, does not depend upon any question of care or negligence. The act itself gives rise to the cause of action. *Jutte v. Hughes*, 67 N. Y. 267; *Mairs v. Manhattan Real Estate Assoc.*, 89 N. Y. 498.

In *Yerex v. Eineder*, 86 Mich. 24; 24 Am. St. Rep. 113, a part of the defendant's land was swamp. The defendant dug a ditch which drained the water from the swamp to the land of the plaintiff, rendering it unproductive. It was held in an action for damages that the fact that the digging of the ditch was good husbandry on the part of the defendant, and improved his land, was no defense.

Accumulated Water in Cellar.—The owner of land cannot dig a cellar, and, after the surface water has partially filled it, discharge the water which has collected upon adjoining land of another by means of an open tunnel dug from the cellar to the adjoining land and house. *Martin v. Benoist*, 20 Mo. App. 362.

The plaintiff brought an action to recover damages for injuries to merchandise, which was caused by the flooding of a basement in which the

merchandise was stored. The complaint contained an allegation that the defendants made an excavation in the street and sidewalk in front of and adjoining the plaintiff's premises; that rain water was allowed to accumulate therein, and flowed upon plaintiff's premises and into and upon his stock of goods. It was held that this statement was a sufficient allegation of negligence on the part of the defendants as against a general demurrer; and that the gist of the action was not the making of the excavation, but negligently allowing the rain water to accumulate therein and flow into plaintiff's cellar. *Durgin v. Neal*, 32 Cal. 595.

The plaintiffs occupied a store in a city, which had a cellar and a sub-cellar, and also a vault under the sidewalk in front. The defendant erected a building on an adjoining lot and constructed a vault under the sidewalk in front thereof. In so doing it took up the sidewalk and the curb and gutter and excavated a space in the street extending about two feet outside the line of the curb. The excavation in front of the vault wall was not filled in and there was thus left an open space in the street of eighteen inches, or two feet, in width, along and in front of the front wall of the defendant's vault. There was also a space of some inches between the easterly wall of the defendant's building and vault and the westerly wall of the store and vault of the plaintiffs, the builder in building the store and vault having omitted to cover the entire lot. This open space connected with the excavation in the street in front of the wall of defendant's vault. The grade of the street descended so that when the premises were in ordinary condition, the surface water flowed through the gutter in front of plaintiffs' store and passed off through the gutter in front of defendant's premises. Defendant constructed a dam from the sidewalk in front of plaintiffs' store which turned the water across the street into the gutter on the other side; but during a heavy rain the dam gave way and let water into the excavation, and it thus found its way under the foundation of and into the plaintiffs' vault and their sub-cellar, damaging the goods therein. Plaintiffs brought suit to recover damages and it was held that the defendant was liable without regard to any question of negligence, and that it was no defense that the dam was properly built,

and that defendant took due care to protect the premises. *Mairs v. Manhattan Real Estate Assoc.*, 89 N. Y. 498.

Water from the defendant's land ran over the plaintiff's land in a torrent and tore a deep gully in the plaintiff's field, destroying a valuable spring of clear water near his house. It also injured the foundations of his house, washed away a quantity of manure from his barn-yard, and did other damage. The jury found as a fact that the damage was caused by a diversion of the surface water from its former course by means of a ditch or furrow dug by the defendant on his land. The court held that the defendant was liable. *Hays v. Hinkleman*, 68 Pa. St. 324.

Removal of Obstructions.—In *White v. Sheldon* (Supreme Ct.), 8 N. Y. Supp. 212, it was held that the owner of the lower lands may enter upon the higher lands and abate the nuisance in such a manner as to restore the drainage to its natural condition when the owner of the upper lands has placed such obstructions upon his property as injuriously increases the flow of water on the lower estate.

It is not material that the increase and the injurious volume and quantity of water is first discharged from the drain or ditch upon the land of the upper proprietor. If the plaintiff is damaged by the collecting of surface water into a body and the casting of it in a volume upon his land, it is wholly immaterial whether the damage is done by directly casting it upon his premises by artificial means after it has been gathered up or by collecting and discharging it upon the higher lands near the boundary line. *Beach v. Gaylord*, 43 Minn. 476.

Railroad Ditches.—In *Brown v. Winona*, etc., R. Co. (Minn. 1893), 55 N. W. Rep. 123, it was held that when an owner improves his land for the purpose for which such land is ordinarily used, doing only what is necessary for that purpose and being guilty of no negligence in the manner of doing it, he is not liable, because as an incident of such improvement surface waters accumulate and flow in a stream upon the lands of others. The facts of the case were that the defendant railroad company constructed its railroad running from the east to the west, and for the purpose of laying its track, raised an embankment, taking the soil from along each side, thus making what was known as a "borrow pit." The two pits

water on the plaintiff's lands that the plaintiff might, by taking steps to protect his land, have avoided or prevented the damage.¹

The rule that an owner of land who collects water in a body and casts it upon the lower premises to their injury, is responsible in damages, is followed alike in the states which have adopted the common law, as well as those which have adopted the rule of the civil law.² But to confer a cause of action, the unlawful discharge of the water upon the plaintiff's lands must cause appreciable damage.³

were connected by a culvert through the embankment. On the north side the surface of the ground sloped for a considerable distance towards the embankment, so that surface water from rains and melting snows flowed towards the embankment, and before it was constructed flowed over the lands to the southward. The effect of the embankment was to stop the flow of surface water in a diffused manner over the surface of the ground to the south; to gather it into the north borrow pit, from which it flowed through the culvert to the borrow pit on the south side, and thence, at its lower or easterly end, it flowed in a stream upon the plaintiff's land. It was held that the plaintiff had no cause of action, upon the ground that only such water as naturally flowed over his lands was cast thereon, and that the railroad was constructed in the usual and ordinary manner, and no negligence in its construction had been shown, and that being an ordinary and lawful improvement of the land upon which it was constructed, made without negligence, the case came within the principle enunciated by the court. It is believed that this case is wholly without precedent and cannot be sustained. The principle upon which all the decisions proceed, is that if the owner of lands collects surface water into a body, he is bound to provide a means of discharge by drainage, and that if he fails to do so, the owner of the lower lands has a cause of action. Even in the case of agricultural lands, there is no decision which holds that the owner of a farm can collect all the surface water on his land and discharge it in one place, and cause it to flow in a destructive volume upon the lands of a lower proprietor.

1. In *Paddock v. Somes*, 102 Mo. 226, the court declared that there is no excuse from liability for a nuisance that it could not have been avoided without great expense to the defendant, or that

the plaintiff could have obviated the injury at slight expense.

In *Noonan v. Albany*, 79 N. Y. 478; 35 Am. Rep. 540, the court held that if a drain constructed on the defendant's land became choked, and the water in consequence flowed on plaintiff's land in a body, the plaintiff was not bound to protect himself against the consequences of the defendant's negligence by removing or causing the removal of the obstruction.

In *Mairs v. Manhattan Real Estate Assoc.*, 89 N. Y. 507, the court held that a landowner on whose premises water is wrongfully cast by his neighbor, is under no obligation to make the wall of his house impervious to the water.

In *Jutte v. Hughes*, 67 N. Y. 267, where an owner had paved his yard, thus rendering it less penetrable to water, and had conducted the water in leaders from the roofs of his houses to his yard in quantity beyond the capacity of the drains to carry away, and thus flowed the premises of his neighbor, it was held that he was absolutely bound to prevent the water which accumulated on his premises from causing injury to his neighbors, and that it was error to submit to the jury the question whether he had done everything that was possible under the circumstances and practicable in the way of drainage to carry off the water.

2. See *Barkley v. Wilcox*, 86 N. Y. 148; 40 Am. Rep. 519; *Illinois Cent. R. Co. v. Miller*, 68 Miss. 760, 764.

In the decisions cited above, almost all of the states, without exception, have adopted and approved of the rule stated in the text.

3. *Crohen v. Ewers*, 39 Ill. App. 34; *Peck v. Goodberlett*, 109 N. Y. 192; *Jeffers v. Jeffers*, 107 N. Y. 650. See also *Rutherford v. Holley*, 105 N. Y. 632.

But it was held in *Chapel v. Smith*, 80 Mich. 100, that no one has the right to flood the wild lands of another, or to add to the water upon them, al-

IX. PERCOLATING WATERS—(See also UNDERGROUND WATERS).—Water combined with the earth or passing through it by percolation, or by filtration or chemical attraction, has no distinctive character of ownership from the land itself; it belongs to the owner of the land as a part of the soil and, unlike the water of water-courses, may be appropriated by him, and detained and applied to his own uses, and the adjoining proprietor has no cause of action therefor, although the result be the destruction of the sources of the supply of a neighbor's well or spring. The owner of the land upon which the water is, may dig a well, make a reservoir, open a mine, drain his land by ditches, or otherwise change its natural condition, and if by so doing the underground sources of his neighbor's well or spring are disturbed, it is *damnum absque injuria*.¹

though no present special damage can be shown. And in *Barrow v. Landry*, 15 La. Ann. 681; 77 Am. Dec. 199, it was held that a change of the place of discharge confers a cause of action upon the lower proprietor, although the change be beneficial to his lands.

1. *Hanson v. McCue*, 42 Cal. 303; 10 Am. Rep. 299; *Cross v. Kitts*, 69 Cal. 217; 58 Am. Rep. 558; *Roath v. Driscoll*, 20 Conn. 533; 52 Am. Dec. 352; *Brown v. Illius*, 25 Conn. 594; 71 Am. Dec. 49; 27 Conn. 94; *Saddler v. Lee*, 66 Ga. 45; 42 Am. Rep. 62; *New Albany, etc., R. Co. v. Peterson*, 14 Ind. 122; 77 Am. Dec. 60; *Greencastle v. Hazelett*, 23 Ind. 186; *Taylor v. Fickas*, 64 Ind. 167; 31 Am. Rep. 114; *Chase v. Silverstone*, 62 Me. 175; 16 Am. Rep. 419; *Morrison v. Bucksport, etc., R. Co.*, 67 Me. 356; *Chesley v. King*, 74 Me. 164; 43 Am. Rep. 569; *Mosier v. Caldwell*, 7 Nev. 363; *Strait v. Brown*, 16 Nev. 317; 40 Am. Rep. 497; *Greenleaf v. Francis*, 18 Pick. (Mass.) 117; *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 573; 82 Am. Dec. 179; *Ocean Grove Camp-Meeting Assoc. v. Asbury Park Com'rs*, 40 N. J. Eq. 447; *Radcliff v. Brooklyn*, 4 N. Y. 200; 53 Am. Dec. 357; *Goodale v. Tuttle*, 29 N. Y. 459; *Pixley v. Clark*, 35 N. Y. 527; 91 Am. Dec. 72; *Delhi v. Youmans*, 45 N. Y. 362; 6 Am. Rep. 100, *aff'd* 50 Barb. (N. Y.) 316; *Johnstown Cheese Mfg. Co. v. Veghte*, 69 N. Y. 22; *Phelps v. Nowlen*, 72 N. Y. 42; 28 Am. Rep. 93; *Barkley v. Wilcox*, 86 N. Y. 147; 40 Am. Rep. 519; *Bloodgood v. Ayers*, 108 N. Y. 405; 2 Am. St. Rep. 443; *Reed v. State*, 108 N. Y. 414; *Van Wycklen v. Brooklyn*, 118 N. Y. 428; *Ellis v. Duncan*, 21 Barb. (N. Y.) 230; 26 How. Pr. (N. Y.) 601, n.; *Dillon v.*

Acme Oil Co., 49 Hun (N. Y.) 569; *Frazier v. Brown*, 12 Ohio St. 294; *Taylor v. Welch*, 6 Oregon 198; *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721; *Haldeman v. Bruckhart*, 45 Pa. St. 514; 84 Am. Dec. 511; *Lybe's Appeal*, 106 Pa. St. 626; 51 Am. Dec. 542; *Colling v. Chartiers Valley Gas Co.*, 131 Pa. St. 143; 139 Pa. St. 111; 17 Am. St. Rep. 791; *Chatfield v. Wilson*, 28 Vt. 49; 31 Vt. 358; *Clark v. Conroe*, 38 Vt. 473; *Chasemore v. Richards*, 7 H. L. Cas. 349; 5 H. & N. 982; *Acton v. Blundell*, 12 M. & W. 324; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282; *New River Co. v. Johnson*, 2 El. & El. 435; 105 E. C. L. 434; *Reg. v. Metropolitan Board of Works*, 3 B. & S. 710; 113 E. C. L. 708; *Galgay v. Great Southern R. Co.*, 4 Ir. C. L. 456.

Destruction of Springs by Mining.—The destruction of springs to the owner of the surface by reason of the ordinary working of the mines beneath the surface, does not render the owner of the minerals liable to the owner of the surface for the damage. *Coleman v. Chadwick*, 80 Pa. St. 81; 21 Am. Rep. 93.

If a spring depends upon its supply by filtration or percolation from the land of an adjoining owner, the destruction of the supply of the spring by the mining operations of the latter is not actionable. *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721; *Haldeman v. Bruckhart*, 45 Pa. St. 514; 84 Am. Dec. 511; *Sanderson v. Pennsylvania Coal Co.*, 86 Pa. St. 401; 27 Am. Rep. 711; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 145; 57 Am. Rep. 445; *Acton v. Blundell*, 12 M. & W. 324.

Limitation of Rule in Pennsylvania.—But the rule that the appropriation of

But if subterranean waters flow in a well-defined stream, the course of which is known, such stream is governed by the rules applicable to water-courses, and the owner of the soil may not appropriate it or divert it from its course to the injury of his neighbors.¹ If, however, there is no evidence that the spring or well in controversy is supplied by any defined, flowing subterranean stream, it will be presumed that it is formed by the ordinary percolation of the waters of the soil.²

X. POLLUTION—(See also NUISANCES, vol. 16, p. 922).—If the owner of land, surface water of which usually flows over his neighbor's land, places noxious substances upon his property which, becoming mingled with the surface water, flow upon the adjoining land, contaminating the surface water and the wells and springs thereon, the owner of the lower land has a cause of action against him for the damages caused by the pollution.³

percolating waters is not actionable seems to have been limited in *Pennsylvania*, and it seems to be the rule in that state that the destruction of a spring by the acts of an adjoining proprietor is not actionable only when it could not be foreseen and could not be avoided by the exercise of reasonable prudence and regard for the rights of others. *Collins v. Chartiers Valley Gas Co.*, 131 Pa. St. 143; 139 Pa. St. 111; 17 Am. St. Rep. 791. See also *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721; *Haldeman v. Bruckhart*, 45 Pa. St. 514; 84 Am. Dec. 511.

1. *Saddler v. Lee*, 66 Ga. 45; 42 Am. Rep. 62; *Hale v. McLea*, 53 Cal. 578; *Hansom v. McCue*, 42 Cal. 303; 10 Am. Rep. 299; *Redman v. Forman*, 83 Ky. 214; *Strait v. Brown*, 16 Nev. 316; 40 Am. Rep. 497; *Keeney v. Carillo*, 2 N. Mex. 480; *Delhi v. Youmans*, 50 Barb. (N. Y.) 316; 6 Am. Rep. 100; *aff'd* 45 N. Y. 362; *Smith v. Adams*, 6 Paige (N. Y.) 435; *Taylor v. Welch*, 6 Oregon 198; *Shively v. Hume*, 10 Oregon 76; *Frazier v. Brown*, 12 Ohio St. 300; *Whetstone v. Bowser*, 29 Pa. St. 59; *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721; *Lybe's Appeal*, 106 Pa. St. 626; 51 Am. Rep. 542; *Collins v. Chartiers Valley Gas Co.*, 131 Pa. St. 143; 17 Am. St. Rep. 791; *Dickinson v. Grand Junction Canal Co.*, 7 Ex. 282; *Chasemore v. Richards*, 5 H. & N. 982; 7 H. L. Cas. 349.

Strait v. Brown, 16 Nev. 317; 40 Am. Rep. 497, was a suit in equity to establish the right of the plaintiff to the waters of Duckwater Creek. The sources of the creek were springs, known as "Warm Springs," the waters

of which, after running a short distance through a natural surface channel, were discharged into a large slough, which had no natural surface outlet. The calcareous properties of the waters of the spring had formed a light porous limestone by which the natural channel, from the slough to the creek, had been closed; and, by some subterranean means not satisfactorily shown, the waters of the spring found their way to the creek. The defendants diverted the waters of the "Warm Springs" for the purpose of irrigation. The plaintiff had previously appropriated the waters of the creek pursuant to the rules of law applicable to the appropriation of the waters of water-courses in the Pacific coast states. It was held that the act of the defendants, in diverting the springs, was not a diversion of percolating waters, but was a diversion of a living stream and a violation of the rights acquired by the plaintiffs by virtue of their prior appropriation.

In *Smith v. Adams*, 6 Paige (N. Y.) 435, it was held that where a spring is supplied by a hidden stream passing through the earth, the owner of the land above, where the water of the spring issues from the earth, has no right to divert it by excavation or artificial works upon his own land to the injury of the landowners below, who are supplied with the waters of such spring in their natural course, or who have acquired a right by prescriptive use.

2. *Hanson v. McCue*, 42 Cal. 303; 10 Am. Rep. 299. See generally, UNDERGROUND WATERS.

3. *Gawtry v. Leland*, 31 N. J. Eq. 389;

Brown v. Illius, 27 Conn. 84; 71 Am. Dec. 49; *Kinnaird v. Standard Oil Co.*, 89 Ky. 468; *Jutte v. Hughes*, 67 N. Y. 267, *rev'd* 40 N. Y. Super. Ct. 126; *Daggett v. Cohoes* (Supreme Ct.), 7 N. Y. Supp. 882; *Crosland v. Pottsville*, 126 Pa. St. 511; 12 Am. St. Rep. 891; *Beard v. Murphy*, 37 Vt. 99; 86 Am. Dec. 693; *Winn v. Rutland*, 52 Vt. 481. See also *Tate v. Parrish*, 7 T. B. Mon. (Ky.) 325; *Hodgkinson v. Ennor*, 4 B. & S. 229; *Turner v. Mirfield*, 34 Beav. 390.

The principle upon which the majority of the cases seems to rest is that laid down in *Tenant v. Golding*, 2 Ld. Raym. 1089; Salk. 21; 6 Mod. 311, where it was held that if any man brings filth upon his land he must keep it within bounds so that it does no injury to his neighbor.

In *Gawtry v. Leland*, 31 N. J. Eq. 389, in which the complainant brought suit for an injunction, Runyon, Ch., said: "The flowing of the water is not denied, nor is it denied that it is combined with foul liquids and substances from the cesspools and gas-works of the defendants upon their premises; but it is insisted that the water is only surface water which collects upon the defendants' premises in considerable quantities, in one corner thereof, because of the fact that the complainants have raised the grade of an adjoining road belonging to them, and filled a ditch alongside thereof, through which the water from the defendant's premises previously was discharged; and it is said that this water so collected is made to overflow and run upon the complainant's land by the increase of the surface water in times of rain. The evidence shows that the water is of a very objectionable character, and a nuisance upon the complainant's premises. Although the right of the defendants to permit the surface water to collect and remain on their premises, so long as it does no injury to others, is not disputed, it is clear that it is their duty, if such water becomes offensive from the substances or liquids upon their lands, to prevent it from flowing upon the land of the complainants, and the fact that the offensive water is surface water will not discharge the defendants from the duty of so using their premises in respect thereto as not to injure their neighbors."

In *Hodgkinson v. Ennor*, 4 B. & S. 229, the defendant was engaged in lead

mining. Polluted water from his works was discharged into drains and found its way by natural means from the place of discharge into a stream. The defendant's land did not bound upon the stream. It was held that the plaintiff, a riparian owner, was entitled to maintain an action against the defendant for polluting the stream.

In *Turner v. Mirfield*, 34 Beav. 390, the defendant allowed noxious and offensive refuse water to flow from his manufactory into an old pit on his own land, whence it percolated underground into the plaintiff's colliery, and it was held that the plaintiff was entitled to an injunction.

In *Kinnaird v. Standard Oil Co.*, 89 Ky. 469, the defendant stored oil on its premises in such a way that the leaking oil penetrated the ground and thus polluted the spring on the plaintiff's lands. It was held that the defendant was liable to the plaintiff for the injury that resulted, although it might have been ignorant of the fact that the oil was affecting the water of the plaintiff's spring. The court declared that while the owner of land may appropriate to his own use hidden or undefined veins of water under his soil, and thus cut off the supply of water from a neighbor's well or spring, he has no right to contaminate the water so as to render it unhealthy or unfit for use when it reaches his neighbor's land.

Cemeteries.—In *Clark v. Lawrence*, 6 Jones Eq. (N. Car.) 83, it was held that if it can be clearly proved that a burial ground is so situated that the burial of the dead therein will endanger life or health, either by corrupting the surrounding atmosphere or by contaminating the water of springs or wells, a court of equity should grant injunctive relief. But compare *Green-castle v. Hazelett*, 23 Ind. 186; *Upjohn v. Richland Tp.*, 46 Mich. 542.

Dissenting Cases.—In some of the cases the rule stated in the text has not been followed. Thus, in *Brown v. Illius*, 27 Conn. 84; 71 Am. Dec. 49, it was held that where noxious substances, by penetration or by being buried within the soil, and not by mere surface flowage, have affected subterraneous currents by which a neighbor's well is supplied and have corrupted the water only in that mode, the party placing such substances on or within his soil is not liable, unless he acted maliciously, and that it makes no difference that he has been notified of the injury and

could prevent it by the use of reasonable care. This decision was given upon the ground that a property owner has no vested right or interest in the subterraneous waters of adjoining soil, and that if the abstraction of such waters does not constitute such an injury to him as gives him a cause of action, neither is the pollution of such waters actionable. A distinction seems to be made by the court between surface waters and subterraneous percolating waters, but it may well be doubted whether this distinction is founded upon any sound legal principle.

In *Greencastle v. Hazelett*, 23 Ind. 186, it was held that a party has no right or title to the surface water flowing down upon his lands, and that any interference therewith gives him no cause of action. Consequently, it was further held that he is not entitled to an injunction against a city enjoining it from forming a cemetery on the higher land in his immediate vicinity, on the ground that the burial of the dead therein will contaminate the surface water flowing therefrom to and over his lands. See also *Upjohn v. Richland Tp.*, 46 Mich. 542.

In *Dillon v. Acme Oil Co.*, 49 Hun (N. Y.) 565, an action was brought to enjoin the defendant from maintaining an oil refinery, on the ground that the acids, chemicals, and refuse matter therefrom contaminated the plaintiff's well. The noxious substances percolated through the soil till they reached the subterraneous waters which supplied the well, whence they were carried into the well. It was held that the wrong was not actionable, as the refinery was conducted without negligence and as skillfully as such work could be. The court in this case followed the decision in *Brown v. Illius*, 27 Conn. 84, in so far as it held that where noxious substances, by penetrating the soil, have affected subterraneous currents by which a well is supplied, and have corrupted the water, the party placing such substances on or within his soil is not liable unless he has acted maliciously.

Privies and Cesspools.—In *Haugh's Appeal*, 102 Pa. St. 42; 48 Am. Rep. 193, the court held that the construction and use of a privy or cesspool, the percolation from which flows to and corrupts the water in an adjoining well which is used for household purposes, is a nuisance *per se*, not justifiable on the ground of necessity.

In *Ball v. Nye*, 99 Mass. 582; 57 Am. Dec. 56, the defendant maintained a vault upon his land so that with his knowledge filthy water habitually filtered from it into his neighbor's lot, where it injured a cellar and well. The court held that the defendant was liable in damages, whether the water flowed over the surface or percolated through the soil beneath the surface, without other proof of negligence.

When a well is supplied with water which percolates through the earth and does not flow through any defined channel, although the owner of the well is not entitled to the water until it actually enters his well, the occupier of adjoining property will be restrained from using a cesspool therein in such a manner as to pollute the water coming from his property and supplying the well. *Wormersley v. Church*, 17 L. T., N. S. 190. See also *Norton v. Scholefield*, 9 M. & W. 665.

Defendant proposed to erect a privy on his property about eight feet from the dwelling house and cellar of the complainant and within twenty feet of a well on his property. It was held that the complainant was entitled to an injunction restraining the completion of the privy. *Wahle v. Reinbach*, 76 Ill. 322.

Plaintiff and defendant were adjoining landowners and each had dug a well on his own land, the plaintiff's land being at a lower level than the defendant's. The defendant turned sewage from his house into his well and thus polluted the water which percolated underground from the defendant to the plaintiff's land. As a consequence the water which flowed into the plaintiff's well was polluted with the sewage from defendant's well. It was held that no one has a right to use his own land in such a way as to be a nuisance to his neighbor, and that therefore if a man puts filth or poisonous matter on his land, he must take care that it does not escape so as to poison water which his neighbor has a right to use, although his neighbor may have no property therein at the time it is fouled, and that consequently the plaintiff had a right of action against the defendant for polluting the source of supply of his well. *Ballard v. Tomlinson*, 29 Ch. Div. 115.

Gasworks.—It has been held that a gas company is answerable for the damage arising from the corruption of plaintiff's ground and well by fluids

But in *Pennsylvania*, the courts have held that if the pollution arises from the use of land in an ordinary and usual manner, and if the owner thereof could not, by the exercise of reasonable care, prevent damage to his neighbor's property, the wrong is not actionable.¹ If a landowner permits a stagnant and offensive pool of surface water to accumulate on his land to the injury of his neighbors, his neighbors have a cause of action against him therefor.² But if a landowner has no interest in, or control over property lying above and adjoining his land, or over the persons owning or occupying such property, and if without any fault of his, noxious substances contaminate the surface water on the higher land which flows across his premises on to the property lying below, he is not answerable in damages to the owner of the lower property.³

percolating from its gas works. *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257. See also *Columbus Gas Light, etc., Co. v. Freeland*, 12 Ohio St. 392.

Similarly, a landowner may recover for the corrupting of his well through the escape of gas into the ground and thence into the waters of the well. *Sherman v. Fall River Iron Works Co.*, 5 Allen (Mass.) 213. See also *Ottawa Gas Light, etc., Co. v. Graham*, 35 Ill. 346.

1. In *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126; 57 Am. Rep. 445, the defendant operated a coal mine in the ordinary and usual manner upon his own land. He pumped the water which percolated into the mine from the mine into a stream, which formed the natural drainage of the land in which the mine was situated. The consequence was that the water of the stream was thereby increased, and its quality was so affected as to render it totally unfit for domestic purposes by the plaintiff and other riparian owners. It was held that as the contamination of the stream resulted from the operation of the mine in the usual and ordinary manner, and as the use of the defendant's land for mining purposes was a proper and reasonable use of its property, the plaintiff had no cause of action.

This decision was, however, somewhat limited in *Collins v. Chartiers Valley Gas Co.*, 131 Pa. St. 143; 139 Pa. St. 111; 17 Am. St. Rep. 791. In that case the defendant bored for natural gas. It knew that the wells in the neighborhood were supplied by a stratum of clear water underlying its land, and that there was a deeper stratum of salt water which would rise and mingle

with the fresh water when penetrated by boring. It was possible, at a moderate expense, to prevent the salt water from rising into the stratum of fresh water by the use of casing around the gas well. In sinking its gas well, the defendant neglected to use this casing. It was held as it had neglected to avail itself of reasonable means to prevent the contamination of the stratum of fresh water, it was liable to the plaintiff in damages.

2. *Barring v. Com.*, 2 Duv. (Ky.) 95. A stagnant and offensive pool of surface water is an actionable nuisance, although there be no house on the plaintiff's adjacent land. *Busch v. New York, etc., R. Co.*, 12 N. Y. Supp. 85.

3. *Brown v. McAllister*, 39 Cal. 573. But if the intermediate landowner had it in his power to control the pollution of the surface water on the higher land, it would seem that he would be liable. Thus, in *Charles v. Finchley Local Board*, 48 L. T. 569, the plaintiff was the owner of a house and land, in front of which ran a natural water-course. The Finchley Local Board drained surface water through a pipe into the water-course, and in 1880 gave permission to a third person to make a connection from his premises to their surface water drain. This third person, without permission, constructed a further connection with the drain which carried sewage from his cesspool on his premises through the drain into the water-course, thus polluting the water and causing a nuisance to the plaintiff. It was held that inasmuch as the Local Board had the right at common law to close the unauthorized communication, and were also empowered to do so by statute,

XI. PRESCRIPTIVE RIGHTS—(See also PRESCRIPTION, vol. 19, p. 6).—Following the principle that there can be no prescription where there is no adverse user, and that there can be no adverse user without creating a right of action, it is held in those states which follow the common-law rule as to the obstruction and repulsion of surface waters, that no lapse of time gives a man a right to drain surface water in its natural state upon his neighbor's land; a result which necessarily follows from the fact that neither the discharge of the water in its natural condition nor its obstruction or repulsion gives rise to a cause of action.¹

In the states in which the rule of the common law has been adopted, the owner of the lower lands may, by the continued maintenance of an embankment or other obstruction for the necessary period, without interruption by suit or otherwise, acquire a right by prescription, to dam back surface water and overflow the higher lands.²

We have seen³ that in all the states, it is an actionable wrong for the proprietor of the upper lands to collect surface water in a ditch, drain, or other artificial stream, and cast it in a volume on the lower lands; but the right to so collect and discharge surface waters may be acquired by the continued discharge of surface water in this manner for the prescriptive period.⁴ But in order

and were under no obligation to commence proceedings for an injunction against the third person, the plaintiff was entitled to an injunction to restrain them from permitting the continuance of the nuisance.

1. *Parks v. Newburyport*, 10 Gray (Mass.) 28; *White v. Chapin*, 12 Allen (Mass.) 518; *Cassidy v. Old Colony R. Co.*, 141 Mass. 178; 23 Am. & Eng. R. Cas. 85; *Swett v. Cutts*, 50 N. H. 439; 9 Am. Rep. 276; *Delhi v. Youmans*, 50 Barb. (N. Y.) 316; *White v. Sheldon*, 35 Hun (N. Y.) 193; *Pettigrew v. Evansville*, 25 Wis. 227; 3 Am. Rep. 50; *Greatrex v. Hayward*, 8 Exch. 291.

2. *Louisville, etc., R. Co. v. Mossman*, 90 Tenn. 157. See also *Tootle v. Clifton*, 22 Ohio St. 247; 10 Am. Rep. 732.

Public Domain.—In *Ogburn v. Connor*, 46 Cal. 346; 13 Am. Rep. 213, the proprietor of the lower land obstructed the flow of water from the higher land while the latter was still a part of the public domain and the property of the *United States*. Thereafter, the higher land was purchased from the *United States*, and it was held that the owner of the lower land could not acquire a prescriptive right as against the *United States* to flood the higher lands with water while they were a part of the

public domain, and that the purchaser thereof might commence an action for the injury at any time within the statutory period after his purchase from the national government.

Abandonment and Reconstruction of Railroad.—In *Little Rock, etc., R. Co. v. Chapman*, 39 Ark. 463; 17 Am. & Eng. R. Cas. 51; 43 Am. Rep. 280, the defendant had built its railroad so as to obstruct the flow of water from the upper lands, but abandoned it. The railroad was cut through and the water was allowed to pass off. Afterwards the defendant built another road bed which also obstructed the flow, and for which suit was brought. It was held that the Statute of Limitations commenced to run at the time of the completion of the second road bed, and not at the time of the first obstruction.

Each overflow caused by the obstruction of surface water is for the purpose of the Statute of Limitations regarded as an independent wrong and gives a separate cause of action for the damages resulting to the crops or other property upon the land overflowed. *Carriger v. East Tennessee, etc., R. Co.*, 7 Lea (Tenn.) 338.

3. *Supra*, this title, *Drainage of Surface Water*.

4. *Augusta v. Moulton*, 75 Me. 284;

to establish a prescriptive right to discharge waters upon lower lands, the proprietor of the upper lands must have used the same ditch or channel for the prescriptive period. He cannot change the method of discharge and claim a right to discharge waters in the altered manner.¹ If, however, a discharge of the water upon the lower land is by virtue of a license, consent, or permission of

Dickinson v. Worcester, 7 Allen (Mass.) 19; *White v. Chapin*, 12 Allen (Mass.) 516; *Conklin v. Boyd*, 46 Mich. 56; *Gregory v. Bush*, 64 Mich. 37; *Chapel v. Smith*, 80 Mich. 112; *Leidlein v. Meyer* (Mich. 1893), 55 N. W. Rep. 367; *Boynton v. Longley*, 19 Nev. 69; 3 Am. St. Rep. 781; *Ross v. Mackeney*, 46 N. J. Eq. 140; *Schnitzuis v. Bailey*, 48 N. J. Eq. 409; *Eshleman v. Martic Tp.*, 152 Pa. St. 68; *Louisville, etc., R. Co. v. Hays*, 11 Lea (Tenn.) 382; 14 Am. & Eng. R. Cas. 264; 47 Am. Rep. 291; *Norton v. Volentine*, 14 Vt. 246; 39 Am. Dec. 220; *Phinizy v. Augusta*, 47 Ga. 268. See also *Shields v. Arndt*, 4 N. J. Eq. 234.

Absence of Damage.—In *White v. Chapin*, 12 Allen (Mass.) 516, the plaintiff brought an action for obstructing a ditch through which he drained his lands. Foster, J., said: "The fact that the running of the water did no appreciable or actual injury to the owner of the lot, is immaterial. The law implies nominal damages for the invasion of a right and every use may be deemed adverse which tends to impose a servitude or burden upon the estate of another."

Extinguished by Non-User or Abandonment.—A prescriptive right to collect and discharge waters upon lower lands may be lost by a non-user of the right for the same term as was required to establish it. *Shields v. Arndt*, 4 N. J. Eq. 234. And if the owner of the dominant estate, in order to put an end to the complaints of the servient owners and prevent a law suit, himself constructs works which obstruct and extinguish the servitude at the request and by agreement with the owner of the servient estate, he thereby makes a tacit renunciation of his rights. *Delahoussaye v. Judice*, 13 La. Ann. 587; 71 Am. Dec. 521.

Ditch in Highway.—The plaintiff's land was bounded by a highway, along the further side of which a ditch for the accommodation of surface water had been maintained by the highway commissioners for more than the prescriptive period. The plaintiff used

the ditch for the discharge of surface waters. Thereafter the highway commissioners abandoned the ditch as originally constructed, and constructed a new ditch on the side of the highway next to plaintiff's lands. Plaintiff brought an action, in which he claimed that the ditch on the near side of the highway would wash out a channel and would necessitate the building of bridges for the purpose of obtaining access to his property. The ditch was wholly within the limits of the highway. It was held that he had acquired no prescriptive right to have the ditch maintained on the side of the road farthest from his land. *Wilson v. Duncan*, 24 Iowa 491.

1. *Boynton v. Longley*, 19 Nev. 76; 3 Am. St. Rep. 781.

Alteration of Drain.—In *Cotton v. Pocasset Mfg. Co.*, 13 Met. (Mass.) 429, it was held that a right to empty a town drain upon the land of an individual, could not be acquired by twenty years' use, unless the drain be one and the same and the use thereof uninterrupted during that number of years. If the drain during these years be enlarged, deepened, and varied in its course and termination, the town cannot acquire such right as against the owner of the land, by using the drain less than twenty years, without it is thus enlarged and altered. It is also held that a person who enters a drain from his cellar into a town drain, which is afterwards enlarged, deepened, and varied in its course and termination, when he deepens his cellar and lays a drain therefrom deeper than it was before and enters it into the altered town drain, cannot acquire a right thus to drain his cellar by the use of the town drain for twenty years after it is altered.

In 1861 the owner of land drained his land into a ditch through the land of his neighbor. In 1871 a new ditch was made near the first, the old one being filled up. The owner of the higher land used a new ditch until 1882. It was held that he did not thereby acquire a prescriptive right to have the surface water from his land

the owner of the lower lands, there is no adverse user, and no prescriptive right can be acquired.¹

XII. EAVES-DRIP.—The owner of a building cannot lawfully discharge the rain water which falls upon his roof upon his neighbor's premises, either by collecting it in gutters or eaves-troughs and then turning it in a body upon the adjoining lands,² or by permitting to fall from the eaves of his house in drops.³ He must

drained over the land of his neighbor. *Total v. Bonnefoy*, 123 Ill. 653. The court remarked: "We do not think that the time of the use of the new ditch can be added to or tacked on to the time of the use of the old ditch so as to make a prescriptive period of twenty years."

Measure of Prescriptive Right.—In *Chapel v. Smith*, 80 Mich. 100, it was held that the measure of the prescriptive right is not the dimensions of the drain, but the quantity of water discharged from it upon the lower land.

Increase of Quantity.—In *Davidson v. Hutchinson*, 44 N. J. Eq. 474, the plaintiff and defendant were the owners of adjoining lands. More than twenty years before the commencement of the suit, one of defendant's grantors cut a ditch on his land near the division line. He extended the ditch so as to cast the water upon the lands of plaintiff's grantor. Plaintiff's grantor also, more than twenty years before the commencement of the suit, cut a ditch on his land to and into the ditch on the lands of the defendant, and water was thereby carried from plaintiff's lands into the drain and on to the land of the defendant. Some years before the commencement of the suit, the plaintiff's grantor put down a tile drain, sinking it at least two feet deeper than the old ditch. Defendant raised an obstruction to the flow of water from the drain, and plaintiff thereupon brought a suit for a mandatory injunction directing the removal of the obstructions. It was held that the prescriptive right of the plaintiff to discharge water over the defendant's lands was not limited to an open ditch, and that the use of tiles to conduct the water was not an abuse of his privilege, but that an increase of the flow of the water was.

1. *Conner v. Woodfill*, 126 Ind. 85; 22 Am. St. Rep. 568; *Delahoussaye v. Judice*, 13 La. Ann. 587; 71 Am. Dec. 521; *Gillis v. Donalson*, 16 La. Ann. 275; *Boynton v. Longley*, 19 Nev. 68; 3 Am. St. Rep. 781; *White v. Sheldon*, 35 Hun (N. Y.) 193; 8 N. Y. Supp. 212.

2. *Adams v. Walker*, 34 Conn. 466; 91 Am. Dec. 742; *Conner v. Woodfill*, 126 Ind. 85; 22 Am. St. Rep. 568; *Copper v. Dolvin*, 68 Iowa 757; 56 Am. Rep. 72; *Beach v. Gaylord*, 43 Minn. 476; *Hooten v. Barnard*, 137 Mass. 36; *Schwab v. Cleveland*, 28 Hun (N. Y.) 458.

The owner of the building cannot collect the waters which fall upon his roof into gutters, and thence, by means of a conducting pipe, discharge them on his own land at such a place and in such a manner that they must necessarily be precipitated upon lower lands in an injurious volume. *Beach v. Gaylord*, 43 Minn. 476. See also *Bel lows v. Sackett*, 15 Barb. (N. Y.) 96; *Jutte v. Hughes*, 67 N. Y. 268, *rev'g* 40 N. Y. Super. Ct. 126.

Suit by Landlord of Leased Building.—The building of a roof with eaves which discharge water by a spout upon adjoining premises, is an injury for which the landlord of such premises can recover, as reversioner, while they are under demise, if the jury think there is a damage to the reversion. *Tucker v. Newman*, 11 Ad. & El. 40; 39 E. C. L. 21.

3. *Tanner v. Volentine*, 75 Ill. 624; *Martin v. Simpson*, 6 Allen (Mass.) 102; *Shipley v. Fifty Associates*, 106 Mass. 198; 8 Am. Rep. 318; *Bellows v. Sackett*, 15 Barb. (N. Y.) 96; *Hazeltine v. Edgmand*, 35 Kan. 202; 57 Am. Rep. 157; *Gould v. McKenna*, 86 Pa. St. 302; 27 Am. Rep. 705.

Martin v. Simpson, 6 Allen (Mass.) 102, was an action of tort brought by the tenant of a building to recover damages sustained by reason of the falling of the wall of defendant's adjoining building upon the building occupied by the plaintiff. The evidence tended to show that the building occupied by the plaintiff at its eaves touched the wall of the defendant, and that just prior to the fall of that wall by which the injury to the building occupied by the plaintiff was occasioned, there was a heavy shower of rain, during which a great quantity of water flowed down the plaintiff's roof and against the wall, by

put proper eaves troughs or gutters upon his building, and keep them in proper repair, if the neglect to do so would injure his neighbor.¹ If, however, the defendant has constructed a gutter or eaves troughs of sufficient capacity to carry off such rains as might ordinarily be expected, he is not liable for injuries caused to the plaintiff's premises by an extraordinary rain

which the mortar between the stones was softened and washed out to such an extent as to weaken the wall. The court held that if the roof of the building occupied by the plaintiff was so constructed that the water which fell and accumulated thereon was projected therefrom, so as to be thrown over the line of the land in the plaintiff's occupation, and in and upon the premises of the defendant, in such quantities and in such manner as to weaken, impair, or in any way injure the defendant's wall, by means whereof the injury was in part occasioned, the plaintiff could not recover. Bigelow, C. J., said: "No one has a right, by an artificial structure of any kind, upon his own land, to cause the water which falls and accumulates thereon in rain or snow to be discharged upon land of an adjacent proprietor. Such an erection, if it occasions the water to flow, either in the form of a current or stream, or only in drops, works a violation of the adjoining proprietor's right of property, and cannot be justified, unless a right is shown by express grant or by prescription."

Plaintiff and defendant owned adjoining lots in a village. A two-story frame building was situated on defendant's lot, the eaves of which projected over the line between it and plaintiff's property. Plaintiff commenced the erection of a brick building on his ground, and when the foundation wall was constructed, he asked defendant to make some provision for preventing the water, which would fall from his roof, from falling on the wall. Defendant accordingly caused a tin spout to be constructed under the eaves, which would receive the water from the roof and discharge it upon the roof of a one-story addition in the rear of the building. When plaintiff's wall was within a foot or two of the tin spout, it was discovered that it hung immediately over the wall, and that the wall could not be completed without removing it. The workmen employed on plaintiff's building accordingly removed it. They also sawed

off the eaves of defendant's building to within a quarter of an inch of the line of plaintiff's wall. A few days after this, and before any other provision was made for conveying the water from the roof, a violent rain storm occurred, and the water which fell from the roof poured against plaintiff's wall and caused it to fall. It was held that the defendant was liable for the damage. *Copper v. Dolvin*, 68 Iowa 757; 56 Am. Rep. 872.

Buildings Divided by Party-Wall.—A party-wall divided the buildings of the plaintiff and the defendant. The defendant increased the height of his building and in so doing added eighteen or twenty feet to the party-wall. He constructed his roof in such a manner that it turned the water from his building on the roof of the plaintiff below. In the winter time large icicles formed on the wall as carried up, overhanging plaintiff's building, and, becoming detached, fell upon the roof and damaged it. It was held that the roof of defendant's building as constructed was a nuisance, and that the plaintiff was entitled to an injunction. *Brooks v. Curtis*, 4 Lans. (N. Y.) 287.

Nominal Damages.—If the plaintiff proves an invasion of his rights by the defendant by the unlawful discharge of water from the defendant's roof on plaintiff's land, the defendant is entitled to a verdict for at least nominal damages. *Hooten v. Barnard*, 137 Mass. 36.

The simple projection of eaves on a cornice over the plaintiff's land must be considered as a nuisance as to him, imparting a damage which the law can estimate without proof of special damage. *Fay v. Prentice*, 1 C. B. 838; 50 E. C. L. 837.

1. *Underwood v. Waldron*, 33 Mich. 239; *Hazeltine v. Edgmand*, 35 Kan. 214; 57 Am. Rep. 157.

In *Barry v. Peterson*, 48 Mich. 263, it was held that the liability of the owner of a building for the consequences of rain dripping from his roof is not absolute, and only exists when the injury arises from some fault or neglect of duty.

such as no experience or prudent foresight could have guarded against.¹

But, in an action to recover damages for discharging rain water from the roof of the defendant's premises against the wall of the plaintiff's building, the defendant cannot relieve himself from liability by showing that if the plaintiff's wall had been well built no damage would have been sustained.²

The owners of buildings in cities must so construct them that snow falling and ice forming on the roofs shall not be precipitated upon persons lawfully using the city streets. If the roof of a building is so constructed as to permit the snow falling on it to be precipitated upon the street, it is, in the judgment of the law, a nuisance, and the owner is liable to persons injured by the falling snow.³

The right to discharge the water from the eaves upon adjoining lands may be acquired by a continued adverse use, for the prescriptive period, of the adjoining lands for the purpose of receiving such water.⁴ But an easement of eaves-drip does not justify the erection of spouts to collect the rain water and the discharge of the water on the adjoining land in a body.⁵ Merely raising the height of the building on the dominant tenement is not an unlawful use of the easement, and the owner of the building is entitled to the right of eaves drop from the premises as altered, if the servient tenement is not subjected to any greater burden by the alteration.⁶ The right to have the rain water drip from one's roof on adjacent land is an interest in land within the meaning of the Statute of Frauds, and cannot be acquired by a parol license.⁷

1. Gould *v.* McKenna, 86 Pa. St. 297; 27 Am. Rep. 297. See also Meister *v.* Lang, 28 Ill. App. 624.

Ordinary and Extraordinary Rains.—By ordinary rains are meant all usual and always to-be-expected rains in various seasons of each year; and by extraordinary rains such as do not recur, nor are reasonably to be expected annually. Meister *v.* Lang, 28 Ill. App. 624.

2. Gould *v.* McKenna, 86 Pa. St. 297; 27 Am. Rep. 705.

3. Shipley *v.* Fifty Associates, 106 Mass. 194; 8 Am. Rep. 318; Smethurst *v.* Barton Square Church, 148 Mass. 261; 12 Am. St. Rep. 550; Garland *v.* Towne, 55 N. H. 55; 20 Am. Rep. 164; Walsh *v.* Mead, 8 Hun (N. Y.) 387.

Liability of Landlord.—The owner is liable although the building is let and occupied by a tenant who is bound to make repairs; Walsh *v.* Mead, 8 Hun (N. Y.) 387; if he retains control of the roof. Shipley *v.* Fifty Associates, 106 Mass. 194; 8 Am. Rep. 318. He is not liable when it does not appear that the tenant might not by the use of

reasonable care have prevented the accident. Clifford *v.* Atlantic Cotton Mills, 146 Mass. 47; 4 Am. St. Rep. 279. See also Leonard *v.* Storer, 115 Mass. 86; 15 Am. Rep. 76.

4. Cherry *v.* Stein, 11 Md. 1; Car-brey *v.* Willis, 7 Allen (Mass.) 364; 83 Am. Dec. 688; Morton *v.* Volentine, 14 Vt. 246; 39 Am. Dec. 220. See also Neale *v.* Seeley, 47 Barb. (N. Y.) 314.

Burden of Proof.—The burden is on the person claiming the right to show an open, continuous, and adverse use of the servitude; and that burden is not satisfied by proof that his building has been in the same condition for more than twenty years, without any evidence of a discharge of the water therefrom under a claim of right. Hooten *v.* Barnard, 137 Mass. 36.

5. Reynolds *v.* Clarke, 2 Ld. Raym. 1399.

6. Harvey *v.* Walters, L. R., 8 C. P. 162; Thomas *v.* Thomas, 2 C. M. & R. 34.

7. Tanner *v.* Volentine, 75 Ill. 624.

XIII. MUNICIPAL CONTROL AND REGULATION.—It is a well established and universal rule that, in the absence of any constitutional provision or statutory enactment to the contrary, a city incurs no liability to abutting owners for consequential injuries to their property resulting from the improvement, regulating, grading, or regrading of the city streets, pursuant to authority conferred upon the municipality, if the work be executed in a prudent, careful, and skillful manner, and so as to cause no unnecessary damage to the adjacent property.¹ Construction of drains, sewers, or gutters falls within this principle. The work is within the discretion of the city, and for the mere failure or refusal to exercise the discretionary power conferred upon it, the city incurs no responsibility.²

When a city has constructed a sewer or drain, there is no obligation upon it to continue it in use. It may wholly discontinue or abandon it, without incurring liability to abutting owners, if the discontinuance or abandonment does not leave them in any worse condition than they would be if the sewer or drain had never been made.³ And if a city has provided a means of drainage of abutting property by the gutters and sewers of a street,

1. *Montgomery v. Townsend*, 84 Ala. 478; *Roll v. Augusta*, 34 Ga. 326; *Rome v. Omberg*, 28 Ga. 47; *Atlanta v. Green*, 67 Ga. 386; *Atlanta v. Word*, 78 Ga. 276; *Nevins v. Peoria*, 41 Ill. 502; 89 Am. Dec. 392; *Shawneetown v. Mason*, 82 Ill. 337; 25 Am. Rep. 321; *Indianapolis v. Huffer*, 30 Ind. 235; *Cairo, etc., R. Co. v. Stevens*, 72 Ind. 281; 5 Am. & Eng. R. Cas. 58; 38 Am. Rep. 139; *Weis v. Madison*, 75 Ind. 245; 39 Am. Rep. 135; *North Vernon v. Voegler*, 103 Ind. 314; *Russell v. Burlington*, 30 Iowa 262; *Freburg v. Davenport*, 63 Iowa 119; 50 Am. Rep. 737; *M. E. Church v. Wyandotte*, 31 Kan. 721; *Atchison v. Challiss*, 9 Kan. 603; *Cumberland v. Willison*, 50 Md. 138; *Gregg v. Baltimore*, 56 Md. 256; *Hitchins v. Frostburg*, 68 Md. 100; 20 Am. & Eng. Corp. Cas. 401; *Lee v. Minneapolis*, 22 Minn. 13; *Henderson v. Minneapolis*, 32 Minn. 319; 6 Am. & Eng. Corp. Cas. 486; *Carr v. Northern Liberties*, 35 Pa. St. 324; 78 Am. Dec. 342; *Allentown v. Kramer*, 73 Pa. St. 406.

2. *Denver v. Capelli*, 4 Colo. 25; 34 Am. Rep. 62; *Evansville v. Decker*, 84 Ind. 327; 42 Am. Rep. 86; *Freburg v. Davenport*, 63 Iowa 119; 50 Am. Rep. 737; *Atchison v. Challiss*, 9 Kan. 603; *Flagg v. Worcester*, 13 Gray (Mass.) 601; *Follmann v. Mankato*, 45 Minn. 457; *Stewart v. Clinton*, 79 Mo. 603; 7 Am. & Eng. Corp. Cas. 511; *Gould*

v. Booth, 66 N. Y. 62; *Lynch v. New York*, 76 N. Y. 60; 32 Am. Rep. 271; *Springfield v. Spence*, 39 Ohio St. 665; 2 Am. & Eng. Corp. Cas. 620; *Carr v. Northern Liberties*, 35 Pa. St. 324; 78 Am. Dec. 342.

3. *Atchison v. Challiss*, 9 Kan. 603.

In this case, Valentine, J., said: "After a city has constructed a drain or sewer to carry off surface water, may it ever, for any cause, abandon or discontinue it and make no further use of it? This is probably a more important question, so far as this case is concerned, than the other. Upon this question we have not been referred by counsel to any authorities, and we have not taken the time to hunt for any. Indeed, it seems scarcely necessary to hunt for authorities, for the proposition that a city has such power, seems to be only a necessary corollary from the proposition that a city has the power to construct drains when and where it chooses, of the kind and capacity it chooses, or not to construct any at all if it so chooses. The proposition of abandoning or discontinuing a drain, or filling it up with the intention never to use it again, is a very different proposition from the one of negligently allowing a drain to become obstructed. For the first, the city is not liable; for the second, it generally is. The first is the exercise of that discretionary or quasi-judicial power possessed by

and subsequent changes of the grade have rendered such means useless, there is no obligation on the city to provide new means for the same purpose.¹ It follows from these principles that no action lies against a city for the injury occasioned to land bounding on a street by the accumulation of water on the surface of the street, which the city has neglected to drain.² So, too, if by reason of the change of grade, or alteration of the conformation of the ground by the construction or grading of a street, the flow of surface water is affected, without any negligence on the part of the city in the performance of the work, and flows upon adjoining lots to their injury, it is, in the absence of any statutory enactment or constitutional provision, *damnum absque injuria*, and the owner has no resource against the corporation.³ Liability is not incurred

cities; the second is the neglect to perform a ministerial duty. Cities may often make mistakes in the first instance in constructing drains, and when they do, it would seem that they should have the power to correct their mistakes, and they should always have the power to change and alter drains; that they should always have the power of abandoning or discontinuing certain drains and building others. Otherwise cities would be very much embarrassed in doing what would seem to be best for the general welfare of the city, and could never correct mistakes or errors previously made, if any person should object. Of course cities have no power, discretionary or otherwise, to create nuisances. They probably could not abandon or discontinue a sewer or drain so as to leave an individual in a worse condition than if no sewer or drain had ever been constructed. It is claimed that a city is liable whenever a private individual would be liable under the same circumstances. This is generally true, but not always so. For if it were always true, would an individual be liable in a case like the one at bar? Every individual has or ought to have, absolute, exclusive, and uncontrolled dominion over his own property, subject only to the qualified maxim, *sic utere tuo ut alienum non lædas*. He is the owner of the soil, and of everything connected therewith, and his dominion over the same reaches to an undefined extent upwards and downwards. He owns all the water that falls upon his own soil, and may retain it without allowing any portion thereof to reach the premises of a lower proprietor. And we know of no principle of law or equity that would prevent him from so filling up or rais-

ing his own premises, if such were necessary for the better enjoyment of the same, so that no water except what should fall upon his own premises should ever reach the same, whatever inconvenience it might cause an upper proprietor. *Livingston v. McDonald*, 21 Iowa 160; 89 Am. Dec. 563. And this seems from the authorities to be a continuing right which the proprietor of real estate never surrenders except by voluntary grant."

In *Collins v. Waltham*, 151 Mass. 198, there was a drain in the highway which sometimes was stopped up, and the court held that the city owed the plaintiff no duty to keep it open.

1. *Henderson v. Minneapolis*, 32 Minn. 319; 6 Am. & Eng. Corp. Cas. 486.

2. *Flagg v. Worcester*, 13 Gray (Mass.) 601; *Russell v. Burlington*, 30 Iowa 262.

3. *Clark v. Wilmington*, 5 Harr. (Del.) 243; *Magarity v. Wilmington*, 5 Houst. (Del.) 530; *Herring v. District of Columbia*, 3 Mackey (D. C.) 572; *Roll v. Augusta*, 34 Ga. 326; *Evansville v. Decker*, 84 Ind. 329; 42 Am. Rep. 86; *Davis v. Crawfordsville*, 119 Ind. 1; 12 Am. St. Rep. 361; *Freburg v. Davenport*, 63 Iowa 119; 50 Am. Rep. 737; *Atchison v. Challiss*, 9 Kan. 603; *Cumberland v. Willison*, 50 Md. 138; *Collins v. Waltham*, 151 Mass. 196; *Woodbury v. Beverly*, 153 Mass. 245; *Bainerd v. Newton*, 154 Mass. 255; *Turner v. Dartmouth*, 13 Allen (Mass.) 291; *Brayton v. Fall River*, 113 Mass. 226; 18 Am. Rep. 470; *Flagg v. Worcester*, 13 Gray (Mass.) 601; *Perry v. Worcester*, 6 Gray (Mass.) 546; *Parks v. Newburyport*, 10 Gray (Mass.) 28; *Kennison v. Beverly*, 146 Mass. 497; 20 Am.

by the corporation if the consequence of raising the grade of a street in accordance with lawful authority be to obstruct the flow of surface water from a lot, and cause it to accumulate thereon.¹

& Eng. Corp. Cas. 438; *Lee v. Minneapolis*, 22 Minn. 13; *Alden v. Minneapolis*, 24 Minn. 254; *Rychlicki v. St. Louis*, 98 Mo. 497; 25 Am. & Eng. Corp. Cas. 160; 14 Am. St. Rep. 651; *Foster v. St. Louis*, 71 Mo. 157; 4 Mo. App. 157; *Imler v. Springfield*, 55 Mo. 119; 17 Am. Rep. 649; *Stewart v. Clinton*, 79 Mo. 603; 7 Am. & Eng. Corp. Cas. 511; *Schmidt v. Rowse*, 35 Mo. App. 288; *West Orange v. Field*, 37 N. J. Eq. 600; 45 Am. Rep. 670; *Miller v. Morristown*, 47 N. J. Eq. 62; *Gould v. Booth*, 66 N. Y. 62; *Kavanagh v. Brooklyn*, 38 Barb. (N. Y.) 232; *Acker v. New Castle*, 48 Hun (N. Y.) 312; *Wilson v. New York*, 1 Den. (N. Y.) 595; 43 Am. Dec. 719; *Lynch v. New York*, 76 N. Y. 60; 32 Am. Rep. 271; *Watson v. Kingston*, 114 N. Y. 88; 28 Am. & Eng. Corp. Cas. 233; *Bush v. Portland*, 19 Oregon 45; 20 Am. St. Rep. 789; *Wakefield v. Newell*, 12 R. I. 75; 34 Am. Rep. 598; *Smith v. Tripp*, 13 R. I. 152; *Noble v. St. Albans*, 56 Vt. 522; *Heth v. Fond du Lac*, 62 Wis. 228; 7 Am. & Eng. Corp. Cas. 506; 53 Am. Rep. 279.

Surface water flowed down a series of streets into Newton street, Waltham, by the open street gutters, and thence overflowed adjoining lands. Benefit street, a private way, branched off Newton street at a right angle. The plaintiff's land was situated on Benefit street and about one hundred and fifty feet from Newton street. The water passed from Newton street on to the adjoining land, and thence on to plaintiff's lots. The streets were substantially at the grade of the surrounding land, although the grade of the land had been changed and the direction in which the surface water flowed had been altered thereby. It was held that, assuming that some street gutters might be found by the jury to constitute artificial channels, yet it did not appear that the gutters in question amounted to such channels, or that they brought down more water than the streets would have brought without them, and that as the water was only cast upon the plaintiff's land by the ordinary construction and grading of the highway, the city was not liable. *Collins v. Waltham*, 151 Mass. 196.

The complaint in an action against

the city alleged that the city opened new streets, some running parallel to Main street and some intersecting it; that it so established the grade of the new streets as to drain and collect the surface water from a large scope of land and diverted it from its natural course into Main street; and that the water so diverted overflowed the plaintiff's land. It was held that the complaint only alleged consequential injury from the grading and improvement of the streets of the locality; and did not set up a cause of action arising from the collecting of water into a channel, and the casting thereof in a body on the plaintiff's property. *Davis v. Crawfordsville*, 119 Ind. 1; 12 Am. St. Rep. 361.

The city is not bound to make waterways or drains for the purpose of draining lots below grade of the water on them. *Gilfeather v. Council Bluffs*, 69 Iowa 310. See also *Atchison v. Chellis*, 9 Kan. 603.

There can be no recovery if surface water is merely turned on adjoining property by the vacating of an alley. *Schmidt v. Rowse*, 35 Mo. App. 288.

But in *Rice v. Flint*, 67 Mich. 401, it was held that if a city raises the grade of a street so as to dam up the surface water and prevent it from flowing where it has been accustomed, setting back the water in the gutter in front of one's property, and causing it to flow upon his premises to his injury, the municipality is responsible.

But if the water is caused to flow on one's premises by the raising of the grade of a street unlawfully and without authority, the city is liable. *Addy v. Janesville*, 70 Wis. 401; 22 Am. & Eng. Corp. Cas. 437.

1. *Corcoran v. Benicia*, 96 Cal. 1; *Morrison v. Bucksport*, etc., R. Co., 67 Me. 357; *Henderson v. Minneapolis*, 32 Minn. 319; 6 Am. & Eng. R. Cas. 486; *Follmann v. Mankato*, 45 Minn. 457; *Hoyt v. Hudson*, 27 Wis. 656; 9 Am. Rep. 473; *Waters v. Bay View*, 61 Wis. 642; 7 Am. & Eng. Corp. Cas. 486. But compare *Maguire v. Cartersville*, 76 Ga. 84.

But the city is liable if the obstruction is caused by the negligence of the city in grading the street. *Princeton v. Gieske*, 93 Ind. 102.

A city, too, may prevent surface water from flowing on the street from adjoining property without incurring any liability.¹

The adoption of a plan for the grading of a street involves the exercise of discretionary and judicial powers on the part of the municipal authorities, and no liability attaches for damages sustained by reason of a defect in the plan.² An authority conferred upon municipal corporations or officers to determine where drains and sewers shall be built, is in the nature of a judicial power involving the exercise of a large discretion, and depending upon considerations affecting the public health and general convenience. Therefore, for a mere error of judgment in the plan or system adopted, a city cannot be made to respond. If a municipality adopts a plan, however inefficient, and constructs its drains and sewers in conformity thereto, and injury results in consequence of the plan being defective, or of the drains or sewers being deficient in size and inadequate to accommodate all the water which, if the drains were larger, would naturally flow through them, there is no resulting liability.³ But any particular plan adopted by a city must be a reason-

1. Keith v. Brockton, 136 Mass. 119; 6 Am. & Eng. Corp. Cas. 133.

2. Foster v. St. Louis, 71 Mo. 157; 4 Mo. App. 564; Hardy v. Brooklyn, 7 Abb. N. C. (N. Y.) 403.

3. Denver v. Capelli, 4 Colo. 27; 34 Am. Rep. 62; Denver v. Rhodes, 9 Colo. 561; 20 Am. & Eng. Corp. Cas. 411; Magarity v. Wilmington 5 Houst. (Del.) 530; Americus v. Eldridge, 64 Ga. 524; 37 Am. Rep. 80; Rozell v. Anderson, 91 Ind. 591; North Vernon v. Voegler, 103 Ind. 316; Atchison v. Challis, 9 Kan. 603; Thurston v. St. Joseph, 51 Mo. 510; 11 Am. Rep. 463; Child v. Boston, 4 Allen (Mass.) 51; Emery v. Lowell, 104 Mass. 16; Mills v. Brooklyn, 32 N. Y. 491; Carr v. Northern Liberties, 35 Pa. St. 324; 78 Am. Dec. 342; Bear v. Allentown, 148 Pa. St. 80; Fair v. Philadelphia, 88 Pa. St. 309; 32 Am. Rep. 455; Collins v. Philadelphia, 93 Pa. St. 272.

It must, however, be noted that there are decisions which seem to adopt a contrary view, and to hold that a city must exercise due care and skill in the selection of a plan, and must furnish drains and sewers of sufficient capacity to carry off all the water which may reasonably be expected to accumulate. See Spangler v. San Francisco, 84 Cal. 17; 18 Am. St. Rep. 158; Dickson v. Baker, 65 Ill. 518; Aurora v. Lode, 93 Ill. 521; Indianapolis v. Huffer, 30 Ind. 235; Wels v. Madison, 75 Ind. 241; 39 Am. Rep. 135; Evansville v. Decker, 84 Ind. 325;

42 Am. Rep. 86; Ellis v. Iowa City, 29 Iowa 229. These cases may possibly be distinguished on the ground that the necessity for the sewer or drain was occasioned by the act of the municipality in accumulating the water, and consequently it was bound to furnish adequate means of drainage.

In Atchison v. Challis, 9 Kan. 611, Valentine, J., said: "Whether a city will construct drains of any kind and where it will construct them are purely discretionary. This principle is so well settled that it is not necessary to cite authorities in support of it. This discretionary power exercised by cities is by many courts considered as a kind of *quasi* judicial power. Now, if a city is not bound to construct a drain of any kind, by what system of reasoning can it be made to appear that if it shall construct a drain it must construct one that shall be sufficient in all cases and for every emergency? Any drain is better than no drain. Any drain, instead of being an injury to a party, is so far as it operates a positive benefit. If it carries off half the water that falls upon his premises, instead of the whole, how can that be said to be an injury? Is it not an actual benefit to the extent that it operates, and if a benefit, upon what principle can a city be made liable? A city, in exercising its discretionary or *quasi* judicial powers, acts not merely for a private individual or individuals, but for the general welfare of all its citizens, and in

able one, and the manner of its execution is, with respect to the right of the citizen, a mere ministerial duty; and for any negligence or unskillfulness in the execution or construction of the work, whereby injury is inflicted upon private property, the municipality will be held responsible.¹ And if the municipal authorities, in the construction of sewers and digging of ditches in the improvement of streets, cause a large quantity of rain water, which naturally flowed in another direction, to be directed in such a manner as to flow on abutting premises in destructive quantities, the corporation is liable to the abutting owner in damages, without regard to the efficiency of the plan, and whether the work was done negligently or not.² The accumulation in one channel of a large volume of water by the act of the city, places upon it the duty to see to it that suitable provision is made for the escape of the wa-

draining the property of its citizens the drains may be so constructed as to carry off all the water that may fall or accumulate on the premises of an individual or only a portion thereof. And they may be so constructed as to carry off all the water that may fall or accumulate on the premises of one person and only a portion of what may fall or accumulate on the premises of some other persons. We think it is true that if a city constructs a drain, every individual interested in the drain has the right to rely upon the drain operating to the extent of its capacity, and if the city, through negligence, allows the drain to become obstructed, so that injury results to some private individual, the city as a rule, becomes liable. But we know of no principle that would give any party the right to demand or expect that the drain should operate to an extent beyond its capacity. This question, we think, has been fully settled by the decisions, *Mills v. Brooklyn*, 32 N. Y. 489; *Barry v. Lowell*, 8 Allen (Mass.) 127; *Dermont v. Detroit*, 4 Mich. 435. Nor has any person the right to demand or expect that the drain shall carry water from his premises unless it was constructed for the purpose of draining a street or alley alone. He has no right to expect or demand that it shall drain his premises. In the case of *Leavenworth v. Casey*, *McCahon* (Kan.) 125, a different doctrine is laid down. It is there said that a city is bound to make a sewer of sufficient size to guard against accidental obstructions and extraordinary freshets. And it is no excuse for a failure so to construct it that the engineer or other person who constructed it, thought it sufficient."

1. *Hitchins v. Frostburg*, 68 Md. 100; 20 Am. & Eng. Corp. Cas. 401. See also *North Vernon v. Voegler*, 103 Ind. 316.

2. *Eufaula v. Simmons*, 86 Ala. 517; *Conniff v. San Francisco*, 67 Cal. 49; *Savannah v. Cleary*, 67 Ga. 153; *Smith v. Atlanta*, 75 Ga. 110; *Reid v. Atlanta*, 73 Ga. 523; *Nevins v. Peoria*, 41 Ill. 502; 89 Am. Dec. 392; *Aurora v. Reed*, 57 Ill. 29; 11 Am. Rep. 1; *Aurora v. Gillett*, 56 Ill. 132; *Jacksonville v. Lambert*, 62 Ill. 519; *Dickson v. Baker*, 65 Ill. 518; *Bloomington v. Brokaw*, 77 Ill. 194; *Shawneetown v. Mason*, 82 Ill. 337; 25 Am. Rep. 321; *Aurora v. Love*, 93 Ill. 521; *Weis v. Madison*, 75 Ind. 249; 39 Am. Rep. 135; *Evansville v. Decker*, 84 Ind. 325; 42 Am. Rep. 86; *North Vernon v. Voegler*, 89 Ind. 77; *Sullivan v. Phillips*, 110 Ind. 320; *Davis v. Crawfordsville*, 119 Ind. 1; 12 Am. St. Rep. 361; *Patoka Tp. v. Hopkins*, 131 Ind. 142; *New Albany v. Ray*, 3 Ind. App. 321; *Monticello v. Fox*, 3 Ind. 489; *Hitchins v. Frostburg*, 68 Md. 100; 20 Am. & Eng. Corp. Cas. 401; *Dickinson v. Worcester*, 7 Allen (Mass.) 19; *Manning v. Lowell*, 130 Mass. 21; *Pennoyer v. Saginaw*, 8 Mich. 534; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552; *Cubit v. O'Dett*, 51 Mich. 347; *Defer v. Detroit*, 67 Mich. 346; *Rice v. Flint*, 67 Mich. 401; *Chapel v. Smith*, 80 Mich. 100; *O'Brien v. St. Paul*, 25 Minn. 331; 33 Am. Rep. 470; *Blakely Tp. v. Devine*, 36 Minn. 53; *Pye v. Mankato*, 36 Minn. 373; 1 Am. St. Rep. 671; *Follmann v. Mankato*, 45 Minn. 457; *Rychlicki v. St. Louis*, 98 Mo. 497; 25 Am. & Eng. Corp. Cas. 160; 14 Am. St. Rep. 651; *Arn v. Kansas City*, 14 Fed. Rep. 236; *Torpey v. Independence*, 24 Mo. App.

ter into natural water-courses or other channels which will carry it off without injury to private property; and if, by reason of the insufficiency of the drain or sewer provided, the accumulated waters are cast upon private property to its injury, the city must respond in damages.¹

If surface water is collected in gutters and made to flow to the mouth of a sewer, where, by reason of the insufficiency of the sewer, it accumulates in large quantities and thence flows back upon private property, the municipality must respond in damages.²

Where the plan of a municipal work, such as gutters, drains, or sewers, has been determined upon, the work of constructing them is ministerial, and must be performed in a skillful, prudent, and careful manner, so as not to injure private property, and the municipality is liable in a civil action for damages caused by the

288; *Vale Mills v. Nashua*, 63 N. H. 136; *West Orange v. Field*, 37 N. J. Eq. 600; 45 Am. Rep. 670; *aff'g* 36 N. J. Eq. 118; *Miller v. Morristown*, 47 N. J. Eq. 62; *Slack v. Lawrence Tp.* (N. J. 1890), 19 Atl. Rep. 663; *Byrnes v. Cohoes*, 67 N. Y. 204; *aff'g* 5 Hun (N. Y.) 602; *Noonan v. Albany*, 79 N. Y. 470; 35 Am. Rep. 540; *Vogel v. New York*, 92 N. Y. 10; 2 Am. & Eng. Corp. Cas. 537; 44 Am. Rep. 349; *Seifert v. Brooklyn*, 101 N. Y. 136; 54 Am. Rep. 664; *Bradt v. Albany*, 5 Hun (N. Y.) 592; *Butler v. Edgewater* (Supreme Ct.), 6 N. Y. Supp. 174; *West Bellevue v. Huddleson*, 23 W. N. C. (Pa.) 240; *Limerick, etc., Turnpike Co.'s Appeal*, 80 Pa. St. 425; *Elliott v. Oil City*, 129 Pa. St. 570; *Weir v. Plymouth*, 148 Pa. St. 566; *Inman v. Tripp*, 11 R. I. 520; 23 Am. Rep. 520; *Winn v. Rutland*, 52 Vt. 481; *Whipple v. Fair Haven*, 63 Vt. 221; *Gillison v. Charleston*, 16 W. Va. 282; 37 Am. Rep. 763; *Derinzy v. Ottawa*, 15 Ont. 712; 30 Am. & Eng. Corp. Cas. 514.

Damages from Different Causes.—If the damage to the plaintiff is occasioned partly by an unlawful discharge of water, for which the city is liable, and partly by natural drainage and percolation, for which the city is not liable, the jury should estimate, as best they can from the evidence, how much is due to the unlawful discharge of water, and should not include in the verdict any portion of the amount due to the other causes. If the nature of the case admits it, the plaintiff must prove the amount of damage due to the cause alleged, and for which the city is responsible, distinguishing

it from that due to other causes. *Elgin v. Welch*, 16 Ill. App. 483.

Street Railway.—A city is liable for injuries caused to private property by the diversion of surface water thereon by the construction of a street railway which it has authorized to be built. *Damour v. Lyons City*, 44 Iowa 276; *Torpey v. Independence*, 24 Mo. App. 288. But compare *Callahan v. Des Moines*, 63 Iowa 705; *Swenson v. Lexington*, 69 Mo. 157.

Plaintiff brought suit against a city to recover damages for the flooding of his lot by reason of the insufficiency of the sewer to carry off all the water. It appeared that the injury was partly caused by the owner of an adjacent lot filling it up and stopping a natural drain. It was held that the city was not liable for the entire damage. *Paris v. Cracraft*, 85 Ill. 294.

1. *Weis v. Madison*, 75 Ind. 253; 39 Am. Rep. 135; *Indianapolis v. Lawyer*, 38 Ind. 348; *Evansville v. Decker*, 84 Ind. 327; 42 Am. Rep. 86; *Crawfordsville v. Bond*, 96 Ind. 236; *Byrnes v. Cohoes*, 67 N. Y. 204.

2. *Hitchins v. Frostburg*, 68 Md. 100; 20 Am. & Eng. Corp. Cas. 401.

In *Dickson v. Baker*, 65 Ill. 518, the city discharged a large quantity of water on plaintiff's lands. A change in the grade of the street had made a sewer necessary to prevent the surface water from flowing upon the plaintiff's premises. The city had constructed a sewer for the purpose, but it was insufficient. The evidence showed that its insufficiency might have been known to the city authorities in the exercise of reasonable judgment and care. The

careless or unskillful manner of performing the work.¹ The city is liable if it acts negligently in the work of grading its streets, and thereby turns water upon abutting property.²

Such water ways as a city has provided, it must keep in repair and free from obstructions, so that, up to their original capacity, they shall be sufficient.³ If the sewer is defective, and, by reason of the defect, water is discharged on neighboring premises to their injury, it is no defense that the sewer was a part of a general plan of construction adopted by the city.⁴ But against extraordinary and unprecedented freshets municipal corporations are not bound to provide, but they are bound to make provisions for such as may be reasonably expected to occur, even though their occurrence be at irregular and wide intervals of time. Ordinary diligence requires that the corporate officers should take into consideration the past history of the waters, and make reasonable provision for freshets of a character similar to those which have occurred previously, and were not of an extraordinary character.⁵

court held that the city was liable in damages, though the insufficiency of the sewer was the result of an error in judgment as to the size of the sewer required.

1. *Eufaula v. Simmons*, 86 Ala. 518; *Lehn v. San Francisco*, 66 Cal. 76; *Spangler v. San Francisco*, 84 Cal. 17; 18 Am. St. Rep. 158; *Denver v. Rhodes*, 9 Colo. 564; 20 Am. & Eng. Corp. Cas. 411; *Smith v. Alexandria*, 33 Gratt. (Va.) 208; *Emery v. Lowell*, 104 Mass. 16; *Thurston v. St. Joseph*, 51 Mo. 510; 11 Am. Rep. 463; *Foster v. St. Louis*, 71 Mo. 157; 4 Mo. App. 564; *Gilluly v. Madison*, 63 Wis. 518; 52 Am. Rep. 299.

2. *Cotes v. Davenport*, 9 Iowa 227; *Ellis v. Iowa City*, 29 Iowa 229.

If a city, which has authority to grade its streets, leaves the work of constructing gutters, culverts, and drains in such an unfinished, careless, and negligent state as to cause water to flow upon abutting property, the city is liable. *Wallace v. Muscatine*, 4 Greene (Iowa) 373. See also *Cotes v. Davenport*, 9 Iowa 227.

3. *Denver v. Capelli*, 4 Colo. 25; 34 Am. Rep. 62; *Denver v. Rhodes*, 9 Colo. 561; 20 Am. & Eng. Corp. Cas. 411; *Savannah v. Cleary*, 67 Ga. 153; *Evansville v. Decker*, 84 Ind. 325; 42 Am. Rep. 86; *Kranz v. Baltimore*, 64 Md. 491; *Hitchins v. Frostburg*, 68 Md. 100; 20 Am. & Eng. Corp. Cas. 401; *Emery v. Lowell*, 104 Mass. 16; *Child v. Boston*, 4 Allen (Mass.) 41; *Bates v. Westborough*, 151 Mass. 174; *Taylor v. Austin*, 32 Minn. 247; *Haney*

v. Kansas City, 94 Mo. 334; *McInery v. St. Joseph*, 45 Mo. App. 296; *Rowe v. Portsmouth*, 56 N. H. 291; 22 Am. Rep. 464; *New York v. Furze*, 3 Hill (N. Y.) 612; *Barton v. Syracuse*, 36 N. Y. 154; *McCarthy v. Syracuse*, 46 N. Y. 194; *Smith v. New York*, 66 N. Y. 295; *Allentown v. Kramer*, 73 Pa. St. 406; *Chalkley v. Richmond*, 88 Va. 402.

After a street had been completely graded and guttered, the city proceeded to lay a pipe drain across it. An excavation ten or fifteen feet in depth was made, the soil therefrom being banked on each side to a height of two or three feet. The bank extended across the street. During a heavy rain, the water was dammed back by the bank of earth, overflowed on the sidewalk, and poured into the plaintiff's cellar. It was held that the city was liable for negligently failing to keep the street gutters clear, and also because the laying of the pipe drain had not been prudently conducted. *Denver v. Rhodes*, 9 Colo. 554; 20 Am. & Eng. Corp. Cas. 411.

4. *Lehn v. San Francisco*, 66 Cal. 76.

5. *Spangler v. San Francisco*, 84 Cal. 17; 18 Am. St. Rep. 158; *Denver v. Rhodes*, 9 Colo. 564; 20 Am. & Eng. Corp. Cas. 411; *Evansville v. Decker*, 84 Ind. 328; 43 Am. Rep. 86; *Madison v. Ross*, 3 Ind. 236; 54 Am. Dec. 481; *Allen v. Chippewa Falls*, 52 Wis. 430; 38 Am. Rep. 748; *Damour v. Lyons City*, 44 Iowa 276; *Wright v. Wilmington*, 92 N. Car. 156; 15 Am. & Eng. Corp. Cas. 282; *Fairlawn Coal Co. v. Scranton*, 148 Pa. St. 231.

The fact that the city is indebted beyond the constitutional limit, is no defense to an action for damage to property by flooding it.¹ But there can be no recovery against the city for damages caused by water accumulating on the plaintiff's lot, in consequence of the negligent manner in which the gutters have been constructed, if the plaintiff could have prevented the injury by the use of ordinary efforts or at a moderate expense.²

XIV. SURFACE WATERS IN HIGHWAYS—(See also DRAINS AND SEWERS, vol. 6, p. 1; HIGHWAY, vol. 9, p. 362; STREETS, vol. 24, p. 1).—In grading and improving highways, the commissioners are not bound to provide for the drainage of the surface water flowing or brought upon the road by reason of the improvement. The inconveniences resulting therefrom are regarded as the natural consequence of maintaining the highway, and are presumed to have been contemplated and paid for when the highway was laid out.³ Nor is the adjacent landowner under greater obligation to provide for the drainage of the surface water flowing upon his land, which he may so improve as to change the direction of the water and cause it to be discharged into the highway at the established grade.⁴ But the highway commissioners cannot collect the surface water of the highway and of the adjoining lands in an artificial channel, and cause it to flow upon the lands of a private individual where it would not otherwise have gone, or in a greatly increased quantity,⁵ and a reciprocal inhibition would seem by implication to rest upon the adjacent landowner.⁶ And the owner of adjoining lands may prevent the flow of surface waters upon his lands by the construction of an embankment or obstacle,⁷ a similar right being accorded the commissioners, for the protection of the highway,⁸ subject to liability for unnecessary damage.⁹

1. *Bartle v. Des Moines*, 38 Iowa 414.

2. *Simpson v. Keokuk*, 34 Iowa 568; *Bartle v. Des Moines*, 38 Iowa 417.

3. *Turner v. Dartmouth*, 13 Allen (Mass.) 291; *Benjamin v. Wheeler*, 8 Gray (Mass.) 409; *Flagg v. Worcester*, 13 Gray (Mass.) 601; *Barry v. Lowell*, 8 Allen (Mass.) 127; *Gould v. Booth*, 67 N. Y. 62; *Acker v. New Castle*, 48 Hun (N. Y.) 312; *Kennison v. Beverley*, 146 Mass. 467.

4. Where a defendant lot owner had erected on his lot a building so constructed that all the water falling thereon was discharged by pipes or spouting on an alley, whence it flowed upon the premises of the plaintiff, it was held that the defendant was not liable for the damage occasioned thereby. *Phillips v. Waterhouse*, 69 Iowa 199.

5. *Young v. Com'rs of Highways*, 134 Ill. 569, *aff'g* 34 Ill. App. 178; *Davis v. Crawfordsville*, 119 Ind. 1;

Sullivan v. Phillips, 110 Ind. 320; *Pakota Tp. v. Hopkins*, 131 Ind. 142; *Franklin v. Fisk*, 13 Allen (Mass.) 211; 90 Am. Dec. 194; *Cubit v. O'Dett*, 51 Mich. 347; *Slack v. Lawrence Tp.* (N. J. 1890), 19 Atl. Rep. 663; *O'Brien v. St. Paul*, 25 Minn. 331; *Moran v. McClearns*, 63 Barb. (N. Y.) 185; *Ashberry v. West Seneca*, 11 N. Y. Supp. 306; *Byrnes v. Cohoes*, 67 N. Y. 204; 5 Hun (N. Y.) 602. See also *Limerick, etc., Turnpike Co.'s Appeal*, 80 Pa. St. 425.

6. *Phillips v. Waterhouse*, 69 Iowa 199.

7. *Bangor v. Lansile*, 51 Me. 521; *Franklin v. Fisk*, 13 Allen (Mass.) 211; 90 Am. Dec. 194. See also *Limerick, etc., Turnpike Co.'s Appeal*, 80 Pa. St. 425.

8. *Acker v. New Castle*, 48 Hun (N. Y.) 312; *Gould v. Booth*, 66 N. Y. 62.

9. It is the duty of a city, in filling

But in *Illinois*, where the rule of the civil law is followed, it is held that when the commissioners of highways undertake to drain the highway, the same rules are to be applied to the drainage of the road as to the drainage of farms. Consequently, as the owner of farming land may, in the interests of good husbandry, accelerate the natural flow of the surface water by the construction of tile and other drains without being guilty of an unlawful aggravation of the servitude of flowage over the lower lands, the commissioners of the highways may accelerate and assist the natural drainage of the highway by the construction of drains which carry off the water more rapidly in its natural direction, and the owner of the lands upon which the water naturally flows must receive it, and has no cause of action.¹

XV. DIVERSION, REPULSION, AND DRAINAGE BY RAILROADS—(See also *RAILROADS*, vol. 19, p. 775).—The rights and duties of a railroad company in the construction, maintenance, and operation of its railroad are, except when altered by statutory enactment, the same as the rights and duties of individual landowners in the management and improvement of their lands; and its liability for interference with or alteration of the flow of surface water is the same.²

The cuts and embankments of a railroad and the necessary ditches will unavoidably modify the flow of surface water, and sometimes cause damage by keeping it back or changing the course of its flow. In states which follow the rule of the common law, injury which will result from the turning back of surface water by the construction of an embankment, which is thereby made to overflow the remainder of the tract of land through which the railroad is constructed, and a part of which is appropriated for railroad purposes, is to be considered by the jury or commissioners, and included in the award as a part of the consequential damages arising from the taking of the property.³ But damages for interfering with the flow of surface waters can only be recovered when a portion of the claimant or petitioner's land is taken. If the railroad is not constructed on his land, but on adjacent

a street, to prevent damage to the adjacent landowner, where practicable, by leaving openings in the bank, by constructing temporary culverts, or otherwise. *Cotes v. City of Davenport*, 9 Iowa 227; *Ross v. City of Clinton*, 46 Iowa 606; *Aurora v. Love*, 93 Ill. 521; *Indianapolis v. Lawyer*, 38 Ind. 348.

1. *Com'rs of Highways v. Whitsitt*, 15 Ill. App. 318; *Palmer v. O'Donnell*, 15 Ill. App. 324; *Young v. Com'rs of Highways*, 134 Ill. 569, *aff'g* 34 Ill. App. 178; *Graham v. Keene*, 34 Ill. App. 87.

2. *Drake v. Chicago, etc., R. Co.*, 70 Iowa 62; 29 Am. & Eng. R. Cas. 514; *Bourdier v. Morgan's L. R. Co.*, 35 La.

Ann. 947; *Atchison, etc., R. Co. v. Hammer*, 22 Kan. 763; 31 Am. Rep. 216; *Morrison v. Bucksport, etc., R. Co.*, 67 Me. 357; *Jenkins v. Wilmington, etc., R. Co.*, 110 N. Car. 438.

3. *Grand Rapids, etc., R. Co., v. Horn*, 41 Ind. 479; *Walker v. Old Colony, etc., R. Co.*, 103 Mass. 10; 4 Am. Rep. 509; *Woodbury v. Beverly*, 153 Mass. 245; *Pflegar v. Hastings, etc., R. Co.*, 28 Minn. 510; 5 Am. & Eng. R. Cas. 85; *Raleigh, etc., R. Co. v. Wicker*, 74 N. Car. 220; *Bell v. Norfolk Southern R. Co.*, 101 N. Car. 21; 36 Am. & Eng. R. Cas. 651.

Well.—The destruction of the sources of supply of a well is also a subject of

property, he is not entitled to compensation.¹ It follows from these principles, that a landowner through whose lands a railroad has been constructed and a portion of whose property has been taken therefor, has, in the common-law states, no cause of action for the obstruction of the flow of surface waters or for their repulsion upon his remaining lands. It is assumed that the damage resulting therefrom was included in the award of compensation, as it should have been.² In the case of a grant to a railroad company of a right of way through the grantor's lands, the grant includes as a part of the thing granted, the right to make all necessary embankments, ditches, etc., and if the flow of surface water from the remaining lands of the grantor is obstructed, by an embankment made in the usual manner and in the exercise of due skill and care in the construction of the railroad, the damage caused thereby is *damnum absque injuria*, and the grantor has no cause of action against the company.³

If the railroad has not been constructed through the plaintiff's lands, but over adjoining property, the liability of the company is simply that of an adjoining landowner, and, in the common-law states, the obstruction of the surface water is not actionable.⁴

In those states which follow the rule of the civil law, there is no presumption that, when the railroad acquired title to its way, compensation was made for such injuries as would result from dam-

compensation, when the well is situated on the land of which a portion is taken for the railroad. *Parker v. Boston R. Co.*, 3 Cush. (Mass.) 107; 50 Am. Dec. 709.

1. *Cassidy v. Old Colony R. Co.*, 141 Mass. 174; 23 Am. & Eng. R. Cas. 85.

2. *Cairo, etc., R. Co. v. Stevens*, 73 Ind. 278; 5 Am. & Eng. R. Cas. 58; 38 Am. Rep. 139; *Morrison v. Bucksport, etc., R. Co.*, 67 Me. 353; *Clark v. Hannibal, etc., R. Co.*, 36 Mo. 202; *Moss v. St. Louis, etc., R. Co.*, 85 Mo. 86; *O'Connor v. Fond du Lac, etc., R. Co.*, 52 Wis. 526; 38 Am. Rep. 754; *Hanlin v. Chicago, etc., R. Co.*, 61 Wis. 515; 20 Am. & Eng. R. Cas. 78; *Johnson v. Chicago, etc., R. Co.*, 80 Wis. 641.

In *Drake v. Chicago, etc., R. Co.*, 63 Iowa 302; 17 Am. & Eng. R. Cas. 45; 50 Am. Rep. 746, it was held that, irrespective of the question whether the rule of the civil law or the so-called common-law doctrine should be followed, a railroad company which had acquired only an easement for its right of way could not lawfully obstruct the flow of surface water by the maintenance of an embankment. But in a second appeal in the same case (70 Iowa 59; 29 Am. & Eng. R. Cas. 514), *SeEVERS, J.*, who delivered the opinion of the

court, expressed his individual opinion that the fact that the company had only acquired an easement and not a fee, did not alter the company's rights.

3. *Benson v. Chicago, etc., R. Co.*, 78 Mo. 504; 20 Am. & Eng. R. Cas. 96. See also *Munkers v. Kansas City, etc., R. Co.*, 60 Mo. 334.

4. *Atchison, etc., R. Co. v. Hammer*, 22 Kan. 763; 31 Am. Rep. 216; *Kansas City, etc., R. Co. v. Riley*, 33 Kan. 374; 20 Am. & Eng. R. Cas. 116; *Cairo, etc., R. Co. v. Houry*, 77 Ind. 364; 5 Am. & Eng. R. Cas. 62; *Hill v. Cincinnati, etc., R. Co.*, 109 Ind. 511; 29 Am. & Eng. R. Cas. 502; *Greeley v. Maine Cent. R. Co.*, 53 Me. 200; *Jordan v. St. Paul, etc., R. Co.*, 42 Minn. 172; 41 Am. & Eng. R. Cas. 1; *Abbott v. Kansas City, etc., R. Co.*, 83 Mo. 271; 20 Am. & Eng. R. Cas. 103; 53 Am. Rep. 581; *Jones v. Wabash, etc., R. Co.*, 18 Mo. App. 251; *Wagner v. Long Island R. Co.*, 2 Hun (N. Y.) 633; *Conhocton Stone Road Co. v. Buffalo, etc., R. Co.*, 3 Hun (N. Y.) 523.

A railroad company, when it constructed its road, made a ditch along it which carried off the water from the plaintiff's adjoining land to a natural channel. The ditch was allowed to fall into disrepair, and became so

ming back the surface water by embankment or otherwise.¹ Consequently, it has been held, agreeably to the rule of the civil law, that the lands of railroad companies are subject to the easement or servitude of drainage over them of such water as naturally flows over them from higher ground, and that an obstruction of, or improper interference with, the flow of surface waters, to the damage of the owner of the upper lands is an actionable wrong.² It is the duty of the company to provide for the adequate drainage of the adjoining lands by the construction of culverts, ditches, or other means.³ The culverts, etc., must be of ample capacity to carry off the flow of surface water from ordinary and

choked up that the water could no longer flow through it. It was held that, as the flow of the surface water had not been changed by the building of the road to the plaintiff's injury, the company was not bound to keep the ditch open for his benefit, and that he had no cause of action. *Louisville, etc., R. Co. v. McAfee*, 30 Ind. 291.

1. *Carriger v. East Tennessee, etc., R. Co.*, 7 Lea (Tenn.) 388; *Louisville, etc., R. Co. v. Hays*, 11 Lea (Tenn.) 389; 14 Am. & Eng. R. Cas. 264; 47 Am. Rep. 291.

In *Drake v. Chicago, etc., R. Co.*, 63 Iowa 308; 17 Am. & Eng. R. Cas. 45; 50 Am. Rep. 746, it was held that if the effect of a railroad embankment would be to obstruct the passage of surface water, but sufficient drainage could easily be secured by a ditch or culvert, it could not be presumed that the company in condemning a right of way was desirous of securing and paying for the privilege of obstructing the passage of the surface water. It was so held irrespective of the question whether the rule of the common law or the rule of the civil law would be adopted by the court.

2. *Gillham v. Madison Co. R. Co.*, 49 Ill. 484; 95 Am. Dec. 627; *Jacksonville, etc., R. Co. v. Cox*, 91 Ill. 500; *Sullens v. Chicago, etc., R. Co.*, 74 Iowa 659; 7 Am. St. Rep. 501; *Bourdier v. Morgan's L. & T. R. Co.*, 35 La. Ann. 947; *Philadelphia, etc., R. Co. v. Davis*, 68 Md. 281; 34 Am. & Eng. R. Cas. 143; *Carriger v. East Tennessee, etc., R. Co.*, 7 Lea (Tenn.) 388; *Louisville, etc., R. Co. v. Hays*, 11 Lea (Tenn.) 382; 14 Am. & Eng. R. Cas. 264; 47 Am. Rep. 291; *Louisville, etc., R. Co. v. Mossman*, 90 Tenn. 157. See also *Drake v. Chicago, etc., R. Co.*, 63 Iowa 302; 17 Am. & Eng. R. Cas. 45; 50 Am. Rep. 746; 70 Iowa 62; 29 Am. & Eng. R. Cas. 514; *Moore v. Chicago, etc.,*

R. Co., 75 Iowa 263; *Noe v. Chicago, etc., R. Co.*, 76 Iowa 360.

Modified Doctrine.—In those states which follow the modified doctrine referred to above, the practical result of the decisions in cases involving the obstruction of surface water by railroad embankments is that it is an actionable wrong, if it is reasonably within the power of the company to provide a means of drainage. See *Little Rock, etc., R. Co. v. Chapman*, 39 Ark. 463; 17 Am. & Eng. R. Cas. 51; 43 Am. Rep. 280; *Waldrop v. Greenwood, etc., R. Co.* 28 S. Car. 157; 34 Am. & Eng. R. Cas. 204.

3. *Philadelphia, etc., R. Co. v. Davis*, 68 Md. 281; 34 Am. & Eng. R. Cas. 143; *Carriger v. East Tennessee, etc., R. Co.*, 7 Lea (Tenn.) 388; *Louisville, etc., R. Co. v. Hays* 11 Lea (Tenn.) 382; 14 Am. & Eng. R. Cas. 264; 47 A. R. 291; *Louisville, etc., R. Co. v. Mossman*, 90 Tenn. 157; *Little Rock, etc., R. Co. v. Chapman*, 39 Ark. 463; 17 Am. & Eng. R. Cas. 51; 43 Am. Rep. 280.

Texas Statute.—In *Texas*, the rule stated in the text has been adopted by statute. By Tex. Rev. Stat. art. 4171, it is provided that "in no case shall any railroad construct a road-bed without first constructing the necessary culverts or sluices, as the natural lay of the land requires, for the necessary drainage thereof." Under this statute, the company must construct such sluices, culverts, or ditches as are required to pass off the surface water by the way it flowed before the railway was built. *Gulf, etc., R. Co. v. Helsey*, 62 Tex. 593; 20 Am. & Eng. R. Cas. 89; *Gulf, etc., R. Co. v. Halliday*, 65 Tex. 512; *Austin, etc., R. Co. v. Anderson*, 79 Tex. 433. See also *Gulf, etc., R. Co. v. Donahoo*, 59 Tex. 129.

In *Gulf, etc., R. Co. v. Helsey*, 62 Tex. 593; 20 Am. & Eng. R. Cas. 89,

usual rains ;¹ but they need not be so constructed as to provide for extraordinary floods and excessive rainfalls, which cannot reasonably be foreseen.² The right to obstruct the flow of surface waters may, however, be acquired by railroad companies by the continued maintenance of an embankment or other obstacle to the flow for the prescriptive period.³

Railroad companies, like individuals, cannot gather the surface waters on their lands into ditches and drains, and discharge them in a body on lower lands to their injury.⁴

Stayton, J., said: "The intent of the statute is evident, and it was doubtless intended in this class of cases to furnish a simple rule by which would be avoided the difficulty, which has been so often felt in adjusting the rights of persons under the conflicting decisions arising out of the application of the doctrine of the common and civil-law rules. It was intended thereby to compel railways to construct such culverts or sluices as were necessary to permit water, not confined within water-courses, as that term is usually understood in the legal works, to flow after a railway is constructed as it did before, in accordance with the natural lay of the land ; to compel them to permit the flow of surface water as it aforesaid had naturally done, and culverts or sluices which do not permit this, are not the necessary culverts or sluices as contemplated by the law. If a railway undertakes to change the flowing of surface water, it must see to it that such change does not operate to the injury of the landowner."

A railroad company, whose railroad passes through a city, cannot excuse its failure to construct a sufficient culvert by showing the road was constructed according to the directions and under the supervision of the city engineer. *Alton, etc., H. R. Co. v. Deitz*, 50 Ill. 210; 99 Am. Dec. 509.

A statute of *Maine* provided that, if a railroad corporation should neglect to do certain acts in relation to crossing highways as required by the county commissioners, "those injured may recover damages in an action on the case." It was held that the statute only gave a cause of action in favor of towns, county and turnpike corporations; and that it did not include damages suffered by individuals on account of the flow of surface water being obstructed by embankments. *Morrison v. Bucksport, etc., R. Co.*, 67 Me. 353.

1. *Cornish v. Chicago, etc., R. Co.*,

49 Iowa 378; *Philadelphia, etc., R. Co. v. Davis*, 68 Md. 281; 34 Am. & Eng. R. Cas. 143; *Gulf, etc., R. Co. v. Holliday*, 65 Tex. 512.

In *Carriger v. East Tennessee, etc., R. Co.*, 7 Lea (Tenn.) 388, it was held that railroad companies must be conclusively presumed to know the habits of streams adjacent to the track, and that they must provide against the recurrence of extraordinary and unusual accumulations of water which had once happened.

2. *Philadelphia, etc., R. Co. v. Davis*, 68 Md. 290; 34 Am. & Eng. R. Cas. 143; *Baltimore, etc., R. Co. v. Sulphur Spring Ind. School Dist.*, 96 Pa. St. 65; 2 Am. & Eng. R. Cas. 166; 42 Am. Rep. 529; *Sabine, etc., R. Co. v. Hadnot*, 67 Tex. 503; 30 Am. & Eng. R. Cas. 197.

3. *Louisville, etc., R. Co., v. Mossman*, 90 Tenn. 157.

4. *Springfield, etc., R. Co. v. Henry*, 44 Ark. 360; *Newgass v. St. Louis, etc., R. Co.*, 54 Ark. 140; *Toledo, etc., R. Co. v. Morrison*, 71 Ill. 616; *St. Louis, etc., R. Co. v. Capps*, 72 Ill. 188; *Chicago, etc., R. Co. v. Hoag*, 90 Ill. 339; *Jacksonville, etc., R. Co. v. Cox*, 91 Ill. 500; *East St. Louis, etc., R. Co. v. Eisentraut*, 134 Ill. 96; *reviewing* 34 Ill. App. 569; *Kankakee, etc., R. Co. v. Horan*, 23 Ill. App. 259; *Chicago, etc., R. Co. v. Connors*, 25 Ill. App. 561; *Chicago, etc., R. Co. v. Riley*, 25 Ill. App. 569; *Curtis v. Eastern, R. Co.*, 14 Allen (Mass.) 55; 98 Mass. 428; *Rathke v. Gardner*, 134 Mass. 14; 14 Am. & Eng. R. Cas. 281; *Hogenson v. St. Paul, etc., R. Co.*, 31 Minn. 224; 14 Am. & Eng. R. Cas. 291; *Olson v. St. Paul, etc., R. Co.*, 38 Minn. 419; 34 Am. & Eng. R. Cas. 152; *Illinois Cent. R. Co. v. Miller*, 68 Miss. 760; *McCormick v. Kansas City, etc., R. Co.*, 70 Mo. 359; 35 Am. Rep. 431; *Benson v. Chicago, etc., R. Co.*, 78 Mo. 504; 20 Am. & Eng. R. Cas. 96; *Fremont, etc., R. Co. v. Marley*, 25 Neb. 138; 13 Am. St. Rep. 482;

XVI. MEASURE OF DAMAGES—(See also DAMAGES, vol. 5, p. 1).—If land is flooded and the value thereof totally destroyed by the defendant's wrongful act, the owner is entitled to recover the actual cash value of the land at the time of the destruction of its value, with legal interest thereon to the time of the trial.¹

If land is permanently injured by the defendant's act, but the value is not totally destroyed, the owner may recover the difference between the actual cash value immediately preceding the injury and the actual cash value immediately after the injury, with legal interest thereon to the time of the trial.²

Mitchell v. New York, etc., R. Co., 36 Hun (N. Y.) 177; *Staton v. Norfolk, etc., R. Co.*, 109 N. Car. 337; *Jenkins v. Wilmington, etc., R. Co.*, 110 N. Car. 446; *Deigleman v. New York, etc., R. Co.*, 12 N. Y. Supp. 83; *Gulf, etc., R. Co. v. Donahoo*, 59 Tex. 128; *Waterman v. Connecticut, etc., R. Co.*, 30 Vt. 610; 73 Am. Dec. 326; *Davidson v. Oregon, etc., R. Co.*, 11 Oregon 136; *Gilbert v. Savannah, etc., R. Co.*, 69 Ga. 396. But compare *Brown v. Winona, etc., R. Co.* (Minn. 1893), 55 N. W. Rep. 123.

In *Curtis v. Eastern R. Co.*, 98 Mass. 428, a railroad opened springs in the construction of its road bed, and collected the water and conducted it in an artificial ditch to a point from which it was discharged upon the plaintiff's land. It was held that the company was liable for the tort though the water reached the plaintiff's land by trickling from the ditch through the soil of an embankment and mingled with surface drainage.

Formation of Ice.—A railroad company turned the waste water from its bank on the plaintiff's premises. The water spread and froze, causing damage to the plaintiff. But for the freezing no damage would have resulted to the plaintiff. It was held that the company could not escape liability on the ground that the freezing of the water was an action of nature, and that, as the result might have been foreseen, the wrongful act of the company must be deemed the proximate cause of the injury. *Chicago, etc., R. Co. v. Hoag*, 90 Ill. 339.

Cutting Embankment to Discharge Accumulated Water.—Defendant was the owner of a railway and railway embankment. It was authorized by statute to take lands for the railroad, and it also had authority to build and maintain the embankment, which was built on sloping ground and so situated that

the land on one side was higher than on the other. Owing to an extraordinary rainfall the higher land was flooded, and the water, pressing against the embankment, endangered its safety. In order to preserve the embankment, defendant cut openings through it and let the water flow through on plaintiff's land, flooding it and injuring his crops. It was held that the defendant's act in discharging the water on plaintiff's land was not justifiable, and that it was liable for the damage. *Whalley v. Lancashire, etc., R. Co.*, 13 Q. B. Div. 131; 17 Am. & Eng. R. Cas. 66.

But a railroad company is only liable for its own acts. If water is turned into its ditches by other adjoining proprietors without right and without its consent, it is not liable for damages resulting from the overflow of its ditches by reason thereof; and, in the absence of proof, it cannot be presumed that such parties have the right to turn water into the railroad ditches, or that they did so with the consent of the railway company. *Chicago, etc., R. Co. v. Glenney*, 118 Ill. 487. See also *Brown v. McAllister*, 39 Cal. 573. But compare *Charles v. Finchley Local Board*, 48 L. T. 569.

1. *Trinity, etc., R. Co. v. Schofield*, 72 Tex. 499.

2. *Trinity, etc., R. Co. v. Schofield*, 72 Tex. 499; *Owens v. Missouri Pac. R. Co.*, 67 Tex. 679; 30 Am. & Eng. R. Cas. 205.

If there is no evidence of a permanent injury to the soil, it is proper to withdraw the question from the jury. *Green v. Taylor, etc., R. Co.*, 79 Tex. 607.

It has, however, been held that the plaintiff can only recover the damages done up to the commencement of the action, and consequently cannot recover the difference between the market value immediately before and immedi-

When land is temporarily, but not permanently, injured by the defendant's act, it has been held that the plaintiff is entitled to recover the amount necessary to repair the injury and put the land in the condition in which it was immediately preceding the injury, with interest thereon to the time of the trial.¹ But the courts do not uniformly follow this rule. Thus, where a bar of gravel had been washed on plaintiff's land, it was held that the measure of damage was the depreciation in the value of the premises, and not the cost of removing the gravel.²

If the injury is only temporary, but in consequence of it, the owner is deprived of the use of the property or of a house, he may recover the value of such use, in addition to the amount necessary to repair the injury.³ The damage to the use of the premises is properly measured by the diminished rental of the premises during the continuance of the defendant's wrongful act.⁴ The probable benefits to be derived from the cultivation of the soil are regarded as too speculative and uncertain to afford a criterion of damage, and no recovery can be had therefor.⁵ And the plaintiff cannot recover the decrease in the rental value of the premises in addition to the losses sustained by injury to his realty, garden crops, household goods, and supplies. Such a recovery would be in effect a double recovery for the same damage.⁶

When the plaintiff is the owner of premises rented to tenants, he can only recover for injury to the building or premises, or for loss sustained by him in consequence of the flowage of the water; he cannot recover damages for inconvenience to his tenants or injury to their personal property.⁷ And a landlord has no such interest in the growing crops of his tenant as to enable him to maintain an action for an injury thereto.⁸

With respect to crops, it has been held that, if the plaintiff's crop has been destroyed, the measure of damages is the value of

ately after the flooding occurred. *Benson v. Chicago, etc., R. Co.*, 78 Mo. 504; 20 Am. & Eng. R. Cas. 96.

1. *Trinity, etc., R. Co. v. Schofield*, 72 Tex. 499; *Gulf, etc., R. Co. v. Hellsley*, 62 Tex. 593; 20 Am. & Eng. R. Cas. 89; *Van Pelt v. Davenport*, 42 Iowa, 308; 20 Am. Rep. 622; *Galveston, etc., R. Co. v. Tait*, 63 Tex. 223.

But if the pleadings contain no allegations of temporary injury to the plaintiff's land, a verdict for temporary damage cannot be sustained, although it may be supported by the evidence. *Gulf, etc., R. Co. v. Frederickson* (Tex. 1892), 19 S. W. Rep. 124.

The fact that the land, after being flooded, broke up in clods and was foul with weeds, may be proved, not as a distinct element of damage, but as showing the effect of the overflow.

Noe v. Chicago, etc., R. Co., 76 Iowa 362.

2. *Easterbrook v. Erie R. Co.*, 51 Barb. (N. Y.) 94.

3. *Trinity, etc., R. Co. v. Schofield*, 72 Tex. 499; *Sabine, etc., R. Co. v. Joachimi*, 58 Tex. 456; 11 Am. & Eng. R. Cas. 539; *Sabine, etc., R. Co. v. Brouard*, 69 Tex. 617; 34 Am. & Eng. R. Cas. 199.

4. *Eufaula v. Simmons*, 86 Ala. 518; *Chicago v. Huenerbein*, 85 Ill. 593; *Murray v. Archer* (Supreme Ct.), 5 N. Y. Supp. 326.

5. *Chicago v. Huenerbein*, 85 Ill. 593.

6. *Indianapolis v. Huffer*, 30 Ind. 235.

7. *Dixon v. Baker*, 65 Ill. 521; 16 Am. Rep. 591.

8. *Drake v. Chicago, etc., R. Co.*, 70 Iowa 62; 29 Am. & Eng. R. Cas. 514.

the crop growing upon the land at the time it was destroyed by the flood, with interest from the date of its destruction.¹

If crops were damaged in consequence of the negligence or wrongful act of the defendant, but not totally destroyed, it has been declared that the measure of damages is the difference between the actual cash value of the crops while they stood upon the land immediately before the injury, and their actual cash value immediately after the injury, with interest thereon to the time of the trial.² It has further been said that the correct mode of ascertaining the value of a growing crop at any period of its existence is to prove what that character of crop was worth at or near the place where it was grown when matured, and to make proper estimates and allowances from ascertained or ascertainable facts for the contingencies and expenses attending its further cultivation and care.³

But in opposition to these decisions it has been held, in an action in which the plaintiff sought to recover damages for injuries to his house, grounds, garden, fruit trees, etc., that the measure of damage is the difference between the value of the premises before the injury happened and the value immediately after the injury.⁴ And it has also been held that ungrown crops are part of the realty, and that, when a growing crop is injured, the measure of damage is the diminution in value of the plaintiff's property, and not the value of the crop based upon estimates of its productiveness.⁵

Whether the injury amounts to a total or only partial destruction of value, or whether it be permanent or temporary, as well as the extent of the injury and the consequent amount of damages, are all questions for the jury under proper instruction.⁶ If the overflow of the premises created sickness and rendered them more unhealthy than otherwise, this is an element of damage, and evidence of facts tending to prove this may properly be received.⁷ And if there is evidence that waters were wrongfully turned upon the plaintiff's lands from malice or wantonness on the part of the defendant, the plaintiff may recover exemplary as well as compensatory damages.⁸

XVII. REMEDIES.—In an action to recover damages to real estate caused by the flowing of water thereon, it is necessary to

1. *Gulf, etc., R. Co. v. Holliday*, 65 Tex. 521; *Trinity, etc., R. Co. v. Schofield*, 72 Tex. 496; *Sabine, etc., R. Co. v. Smith*, 73 Tex. 1; *Texas, etc., R. Co. v. Bayliss*, 62 Tex. 570; *Texas, etc., R. Co. v. Young*, 60 Tex. 201.

2. *Trinity, etc., R. Co. v. Schofield*, 72 Tex. 496, 498; *Sabine, etc., R. Co. v. Joachimi*, 58 Tex. 456; 11 Am. & Eng. R. Cas. 539.

3. *Gulf, etc., R. Co. v. McGowan*, 73 Tex. 355.

4. *Chase v. New York Cent. R. Co.*, 24 Barb. (N. Y.) 273.

5. *Drake v. Chicago, etc., R. Co.*, 63 Iowa 302; 17 Am. & Eng. R. Cas. 45; 50 Am. Rep. 746. Compare *Lomeland v. St. Paul, etc., R. Co.*, 35 Minn. 412; 26 Am. & Eng. R. Cas. 596.

6. *Trinity, etc., R. Co. v. Schofield*, 72 Tex. 496.

7. *Eufaula v. Simmons*, 86 Ala. 518.

8. *Hughes v. Anderson*, 68 Ala. 280; 44 Am. Rep. 147.

allege and prove possession, either actual or constructive, in the plaintiff at the time the injury was done.¹ If the cause of the overflow is the maintenance of an embankment, the owner of the flooded land cannot maintain an action for damages, unless the embankment was erected or changed so as to increase the damage to his lands since he acquired title.² The recovery cannot include damages sustained after the commencement of the action.³ Each overflow is regarded as a distinct trespass, and the Statute of Limitations begins to run against the plaintiff's cause of action only from the time when the overflow occurred, and not from the time of completion of the embankment, sewer, or other work causing it.⁴ If the question whether there is a water-course is raised by the pleadings in an action for obstructing a channel, a verdict and judgment for the defendant is *res adjudicata*, and the plaintiff cannot maintain a second action for obstructing the same channel, although he alleges that the obstruction has been made wider and deeper.⁵

A court of chancery has jurisdiction to restrain a defendant from collecting surface water and precipitating it in large quantities upon the plaintiff's land.⁶ But an injunction should only issue if the injury will be serious, or such as would continue in the future;⁷ and on conflicting testimony as to the fact of diversion and the existence of drainage, the chancellor may, in the exercise of his discretion, refuse to issue an injunction.⁸ If a city or town is threatening to construct a drain, the effect of which will be to flood the abutting lots, two or more owners of such lots may sue jointly for an injunction.⁹

SURGEON.—See PHYSICIANS AND SURGEONS, vol. 18, p. 427.

SURNAME.—See NAME, vol. 16, p. 112.

SURPLUS.—That which is left from a fund which has been appropriated for a particular purpose; the remainder of a thing; the overplus; the residue.¹⁰

1. Gillison v. Charleston, 16 W. Va. 282; 37 Am. Rep. 763.

2. Chicago, etc., R. Co. v. Henneberry, 28 Ill. App. 110.

3. Whipple v. Fair Haven, 63 Vt. 221; Hughes v. Anderson, 68 Ala. 280; 44 Am. Rep. 147; Benson v. Chicago, etc., R. Co., 78 Mo. 504; 20 Am. & Eng. R. Cas. 96.

4. Wells v. New Haven, etc., R. Co., 151 Mass. 46; 44 Am. & Eng. R. Cas. 491; Louisville, etc., R. Co. v. Hays, 11 Lea (Tenn.) 382; 14 Am. & Eng. R. Cas. 264; 47 Am. Rep. 291. See also Hughes v. Anderson, 68 Ala. 280; 44 Am. Rep. 147; Polly v. McCall, 37 Ala. 20.

5. Hahn v. Miller, 68 Iowa 745. But compare Goodale v. Tuttle, 29 N. Y. 459.

6. Whipple v. Fair Haven, 63 Vt. 221; Foot v. Bronson, 4 Lana. (N. Y.) 47; Field v. West Orange, 36 N. J. Eq. 118; 37 N. J. Eq. 600; Soule v. Passaic, 47 N. J. Eq. 28; Slack v. Lawrence Tp., (N. J. 1890), 19 Atl. Rep. 663; Hicks v. Silliman, 93 Ill. 255; Dayton v. Drainage Com'rs, 128 Ill. 271.

7. Davis v. Longreen, 8 Neb. 43; Pettigrew v. Evansville, 25 Wis. 240; 3 Am. Rep. 50.

8. Warmack v. Brownlee, 84 Ga. 196.

9. Sullivan v. Phillips, 110 Ind. 320.

10. Bouv. Law Dict., citing Page v. Leapingwell, 18 Ves. 466.

An insurance company was subject to be taxed on its capital and accumulated surplus. The court said: "The term surplus, as applied to an insurance company, is the fund it has in excess of

SURPLUSAGE.—See INDICTMENT, vol. 10, pp. 519, 552, 557; PLEADING, vol. 18, p. 467; SCANDAL AND IMPERTINENCE.

SURPLUS MONEY.—(See also EXECUTIONS, vol. 7, p. 117; FORECLOSURE OF MORTGAGES, vol. 8, p. 185; TRUST DEEDS AND POWER OF SALE MORTGAGES).

I. Mortgage Foreclosure (See FORECLOSURE OF MORTGAGES, vol. 8, p. 185), 958.

1. *Sale Under Decree*, 958.

a. *Generally*, 958.

b. *What Claims Considered*, 958.

c. *Character of Surplus*, 959.

d. *Who Entitled to Surplus—General Rule*, 960.

e. *Dower in Surplus*, 960.

f. *Homestead in Surplus*, 961.

g. *Right of Lessee for Years*, 961.

h. *Sale Under Junior Mortgage—Right of Mortgagor*, 961.

2. *Sale Under a Power* (See TRUST DEEDS AND POWER OF SALE MORTGAGES), 962.

II. Execution Sale (See EXECUTIONS, vol. 7, p. 117), 962.

1. *Who Entitled to Surplus*, 962.

2. *Power of Court to Control*, 964.

3. *Rival Claimants*, 964.

I. MORTGAGE FORECLOSURE.—(See FORECLOSURE OF MORTGAGES, vol. 8, p. 185)—1. **Sale Under Decree**—a. **GENERALLY.**—When, upon a sale under a decree of foreclosure, a surplus remains after the mortgage debt and expenses of sale are paid, it is customary to bring the same into court to be there distributed according to the rights of the parties.¹ And the court may order a reference if it deems such course expedient.² When an application is made for the surplus after satisfaction of the decree, all the parties to the foreclosure suit are entitled to notice, that they may contest the right of the applicant, and assert their own.³

b. **WHAT CLAIMS CONSIDERED.**—On a reference as to surplus money, the referee can take into consideration only absolute liens—those which subject the property to be sold, in contradistinction to any equitable claims not matured into liens.⁴

its capital stock after payment of its debts." *State v. Parker*, 34 N. J. L. 482.

"**Surplus earnings** is an amount owned by the company over and above the capital and actual liabilities." *People v. Board of Com'rs*, 76 N. Y. 74.

In a Devise.—A testator bequeathed all his personalty to his wife, "having full confidence that she will leave the *surplus* to be divided at her decease, justly amongst my children." It was held that "surplus" in this devise meant what was left of the personal estate unconsumed, or undisposed of by the widow in her lifetime, and not the balance left after the payment of the debts of the testator. *In re Pennock's Estate*, 20 Pa. St. 268.

1. *Clark v. Carnall*, 18 Ark. 209.

2. *Mutual L. Ins. Co. v. Salem*, 3 Hun (N. Y.) 117. In this case it was said that the object of the reference is to inform the court of the legal and

equitable titles to the money; and on the coming in of the report and testimony, the court, sitting in equity, has the most ample power to confirm, or set aside, or refer back the same for further proofs, as to its conscience shall seem just and equitable.

3. And if an order be made for the payment of such money without notice to the parties, or an appearance by them, it is error, for which the order will be reversed. *Smith v. Smith*, 13 Mich. 258.

4. *King v. West*, 10 How. Pr. (N. Y.) 333; *Husted v. Dakin*, 17 Abb. Pr. (N. Y.) 137.

Mechanic's Lien.—If notice of a mechanic's lien has been filed, though such lien has not been prosecuted to judgment, it will constitute a lien upon the surplus money arising from the foreclosure of a prior mortgage. *Livingston v. Mildrum*, 19 N. Y. 440. In

c. CHARACTER OF SURPLUS.—This question depends upon whether the sale was made before or after the death of the mortgagor; in the first event the surplus is personalty,¹ in the latter, realty.²

this case it was contended that until such lien had been established by judgment, the court could not take notice of or protect it; but in reference to this position, Selden, J., in delivering the opinion of the court said: "Suppose notice of a mechanic's lien to be filed between two mortgages upon a single house and lot; upon a foreclosure under the first mortgage, could the second mortgagee be entitled to the surplus, if any, without regard to the intervening lien, for the reason that the latter had not been established by judgment? If so, then the notice amounts to nothing, and the whole object of the act would be defeated. The object of the law is to give a lien from the time of filing the notice for such sum as shall ultimately prove to be due; and it is the duty of all courts to aid in carrying this object into effect."

Judgment Dormant Pending Foreclosure Suit.—In an action to subject mortgaged land to sale, and to ascertain and marshal liens thereon, a judgment creditor, who was properly made a party while his judgment was alive, will not lose his right to share in the distribution of the surplus remaining after satisfaction of prior liens, by the fact that, pending the action, his judgment became dormant. *Dempsey v. Bush*, 18 Ohio St. 376; *Lawrence v. Belger*, 31 Ohio St. 175; *Fort v. Litmer*, 31 Ohio St. 215.

1. *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497; 19 Am. Rep. 293; *Varnum v. Meserve*, 8 Allen (Mass.) 160; *Wilson v. Davison*, 2 Rob. (Va.) 285; 2 Minor Inst. (3d ed.) 285.

2. *Polley v. Seymour*, 2 Y. & C. 721; *Brown v. Bigg*, 7 Ves. 279; *Matson v. Swift*, 8 Beav. 374; *Clay v. Willis*, 1 B. & C. 364; 8 E. C. L. 156; *Wright v. Rose*, 2 Sim. & Stu. 323; *Dunning v. Ocean Nat. Bank*, 61 N. Y. 500; 19 Am. Rep. 293; *Fleiss v. Buckley*, 22 Hun (N. Y.) 551.

So, where a mortgage on real estate is foreclosed by sale after the death of the mortgagor, and a surplus left after paying the mortgage debt is paid to the administrator, the widow cannot claim such surplus as personal property, exempt to her under the statute. *Beard v. Smith*, 71 Ala. 568.

In *Dunning v. Ocean Nat. Bank*, 61 N. Y. 500; 19 Am. Rep. 293, Dwight, Com., in delivering the opinion of the court, said: "I desire to add a few words upon a question much discussed on the argument, which is, whether the money in litigation could have been collected by the administrator on the theory that it was personal property. This depends upon the correct application of the doctrine of 'equitable conversion.' In order to become personal estate for the purposes of administration, the money must have belonged to the decedent as personalty. Whatever once descended to her heirs or devisees cannot be divested from them, except for the purpose of liquidating some superior claim. After that has been satisfied, any surplus belongs to the heir or devisee, on the theory that it stood in the place of, and represents the original fund. The conversion of the land into money was only made for a special purpose, and that having been accomplished, the surplus, by a fiction of equity, is reconverted into land. The truth of this view can be easily shown by supposing that the mortgaged property had consisted of several lots, and no more had been sold on the foreclosure than was necessary to satisfy the mortgage. The unsold residue would then, of course, belong to Mrs. Dunning's heirs or devisees. Could it possibly have made any difference, if the lots had happened to be sold and a surplus realized? If so, this would be to make the rights of heirs and devisees depend upon accident rather than upon principle."

Surplus Not Made Personalty by Devise of the Property in Trust to Pay Debts.—A mortgaged lands in fee to B & Co., with a power of sale upon trust to repay themselves the moneys advanced, and to pay over the surplus to A, his executors or administrators. Before any sale was made, A died, having devised all his real and personal property to C and D (whom he also made executors), upon trust to sell and pay debts. During the lifetime of C and D, B & Co. sold the estate, and paid the surplus into the hands of E, who was agent for C and D. Whilst the money remained in E's hands, C and D died; E also

d. WHO ENTITLED TO SURPLUS.—GENERAL RULE.—As the surplus in money, remaining after the mortgage debt is paid off, stands in place of the equity of redemption, such fund will be regarded in equity as belonging to the party who was entitled to, or had a lien upon, that right.¹

e. DOWER IN SURPLUS.—It is well settled that if foreclosure and distribution of the surplus take place in the lifetime of the husband, the widow is not entitled to dower therein; but, on the other hand, if the mortgage be foreclosed after the death of the husband, and a surplus remain, or even if before that occurrence, and any part of the surplus still remains within the control of the court, the widow is dowable of such surplus.²

died soon after, leaving the defendant his executor. The plaintiffs, having taken out administration *de bonis non*, with the will of A annexed, brought an action for money had and received against the defendant. It was held that it could not be maintained; for the money in the defendant's hands was equitable and not legal assets, and, therefore, would not have been recoverable by C and D in their representative character. *Clay v. Willis*, 1 B. & C. 364; 8 E. C. L. 156.

Massachusetts Doctrine.—The courts of this state hold that the executor or administrator may bring the action for the surplus, when the mortgage provides that it shall be paid to the mortgagor, his "executors or administrators." They recognize the doctrine that a surplus, under such circumstances, is usually real estate, but declare that the equity of redemption in mortgaged lands is but a trust estate, and that the legal title to the money is in the executor or administrator by force of the contract with the mortgagee, and that when he collects it he holds it in trust for the heirs or devisees, as the case may be. *Varnum v. Meserve*, 8 Allen (Mass.) 160.

1. *Wright v. Rose*, 2 Sim. & Stu. 323; *Shaw v. Hoadley*, 8 Blackf. (Ind.) 165; *Moses v. Murgatroyd*, 1 Johns. Ch. (N. Y.) 130; 7 Am. Dec. 478; *Habersham v. Bond*, 2 Ga. Dec. 46; *Varnum v. Meserve*, 8 Allen (Mass.) 160.

Right of Purchaser.—An order of seizure and sale of real estate under a mortgage, where there is a mortgage on the property inferior in rank to that of the seizing creditor, which order provides that the purchaser shall pay the amount claimed as due, cash, and assume the residue of the mortgage debt, not yet due, and the balance, if any, of

the price of the adjudication, cash, complies with *Louisiana Code Proc. Art. 707*, providing that "the purchaser shall apply the surplus of the price, if there be any, to paying the special mortgages existing on the property subsequent to that of the suing creditor," and does not preclude the purchaser from retaining the surplus of the purchase price, if any there be, to pay the mortgage second in rank. *Citizens' Bank v. Webre* (La. 1892), 10 So. Rep. 728.

2. *Titus v. Neilson*, 5 Johns. Ch. (N. Y.) 452; *Hawley v. Bradford*, 9 Paige (N. Y.) 200; *Bell v. Mayor, etc.*, of N. Y., 10 Paige (N. Y.) 49; *Matthews v. Duryse*, 45 Barb. (N. Y.) 69; *Blydenburgh v. Northrop*, 13 How. Pr. (N. Y.) 289; *Hinchman v. Stiles*, 9 N. J. Eq. 454; *Rands v. Kendall*, 15 Ohio 671; *Taylor v. Fowler*, 18 Ohio 567; 51 Am. Dec. 469; *Culver v. Harper*, 27 Ohio St. 464; *Fox v. Pratt*, 27 Ohio St. 512.

But if the equity of redemption be held by several, to some of whom shall have been distributed their respective portions of the surplus on final decree, without demurrer or objection by the wife, they will not be required to refund, nor will contribution be enforced against the interests of others which shall not have been so distributed. *State Bank v. Hinton*, 21 Ohio St. 509.

Inchoate Dower Interest in Surplus.—It is a much disputed question whether a wife, who joins her husband in a mortgage upon his land, is entitled to have the residuum of the subject mortgaged not required to satisfy the mortgage debt, whether it consists of lands unsold, or the proceeds of land sold under decree of foreclosure, so appropriated as to secure to her her dower therein in the event she survives her husband. Thus in *Denton v. Nanny*, 8 Barb. (N.

f. HOMESTEAD IN SURPLUS.—The surplus arising from a sale of land under a mortgage containing a waiver of homestead exemption, is subject to the exemption as against subsequent judgment creditors;¹ and in case of the mortgagor's death, such surplus will be, to the extent of the exemption, invested in a homestead for his widow and children.²

g. RIGHT OF LESSEE FOR YEARS.—By a sale of mortgaged premises under a judgment of foreclosure, the estate of a lessee for years of the mortgagor is absolutely extinguished, and hence, if a surplus be realized from the sale, the tenant is not entitled to any part thereof.³

h. SALE UNDER JUNIOR MORTGAGE—RIGHT OF MORTGAGOR.—When a sale is made under a junior mortgage, the mortgagor,

Y.) 618, where there were surplus moneys in court arising from the sale of mortgaged premises, it was held that the widow was entitled, as against judgment creditors, to have one third of the amount invested for her benefit and kept invested during the joint lives of herself and husband, and during her life, in the event that she survived her husband, as and for her dower in such surplus. And to the same effect are *Vartie v. Underwood*, 18 Barb. (N. Y.) 561; *Blydenburgh v. Northrop*, 13 How. Pr. (N. Y.) 288. These cases do not appear to have been affirmed by the court of appeals; and there are many cases in the courts of the same state that are opposed to them. *Titus v. Neilson*, 5 Johns. Ch. (N. Y.) 452; *Bell v. Mayor, etc., of N. Y.*, 10 Paige (N. Y.) 49; *Frost v. Peacock*, 4 Edw. Ch. (N. Y.) 678. The doctrine has also been disapproved by the courts of other states. *Newhall v. Lynn Five Cent Sav. Bank*, 101 Mass. 428; 3 Am. Rep. 387; *Kauffman v. Peacock*, 115 Ill. 212; *Dean v. Phillips*, 17 Ind. 406. In 1 *Scribner on Dower*, p. 480, § 30, while the justice of the doctrine is recognized, it is doubted that a court of chancery, in the exercise of its ordinary jurisdiction, can enforce it. The same view is laid down in 2 *Jones on Mort.* (4th ed.), § 1694.

1. *Hill v. Johnston*, 29 Pa. St. 362; *Quinn's Appeal*, 86 Pa. St. 447; *Smith v. Rumsey*, 33 Mich. 183; *Lozo v. Sutherland*, 38 Mich. 168; *Anderson v. Odell*, 51 Mich. 492; *Vermont Sav. Bank v. Elliott*, 53 Mich. 256.

Pre-existing Incumbrance.—Where land is purchased, subject to a pre-existing incumbrance, the homestead right of the purchaser is contingent upon the payment of such incumbrance;

but the right attaches as against everyone, except those claiming under the incumbrance, and if the land is sold to satisfy such incumbrance, and a surplus be realized, the homestead right will attach thereto, to the extent of the exemption. *People v. State*, 7 Ill. App. 294.

2. *McTaggart v. Smith*, 14 Bush (Ky.) 414.

3. In *Burr v. Stenton*, 52 Barb. (N. Y.) 377, the court, by Gilbert, J., said: "By the sale under the judgment of foreclosure, the estate of Stenton, the lessor, and Boughton, the tenant, in the land, were absolutely barred and extinguished. There being a surplus, the question is, whether the tenant is entitled to any part of it. I think he is not. He had, it is true, an estate in the land, but it was a chattel interest only. All his estate was a right to the temporary use and possession of the premises, for a stipulated remuneration by the payment of rent, and it rested solely in contract. Chancellor Kent defines a lease for years to be 'a contract for the possession and profits of land for a determinate period, with the recompense of rent.' (4 Kent's Com. 85.) When the lessor's title was cut off by the foreclosure, this contract or lease became void. The estate of the lessee did not survive the contract by which it was created."

But one holding mortgaged premises under a lease containing a general covenant of quiet enjoyment, upon foreclosure and sale under the mortgage, is entitled to receive out of the surplus realized the value of the use of the premises for the residue of his term, less the rents reserved, and other payments to be made by him under the lease, without regard to the amount produced by the sale. *Clarkson v. Skidmore*, 46 N. Y. 297.

and not a senior mortgagee, is entitled to the surplus arising therefrom;¹ for the equity of redemption being the property of the mortgagor, and constituting the subject of the sale, the legal presumption is that the purchaser of it bids for its value only—bids such a sum as he deems the lands are worth in excess of the prior mortgage debt.²

2. Sale Under a Power.—See TRUST DEEDS AND POWER OF SALE MORTGAGES.

II. EXECUTION SALE—(See EXECUTIONS, vol. 7, p. 117)—**1. Who Entitled to Surplus.**—When a sale produces more than the amount of the execution, the officer is responsible for the surplus to the defendant in execution,³ or to parties having liens and claims on

1. *Firestone v. State*, 100 Ind. 226; *Hanger v. State*, 27 Ark. 667. See also *Western Ins. Co. v. Eagle F. Ins. Co.*, 1 Paige (N. Y.) 284. For the lands in the hands of the purchaser of the equity of redemption are primarily liable for the debt of a prior mortgagee. *Hanger v. State*, 27 Ark. 667.

Usury.—On a proceeding for the distribution of surplus moneys realized from the sale of mortgaged premises under a decree for the foreclosure of the first mortgage, the holders of a fourth mortgage may set up usury in a third mortgage before the referee; and if the third mortgage is tainted with usury, it is void as to the holders of the fourth mortgage, and as to them, is not a lien on the surplus moneys, either at law or in equity. *Mutual L. Ins. Co. v. Bowen*, 47 Barb. (N. Y.) 618.

2. *Firestone v. State*, 100 Ind. 226; *Hanger v. State*, 27 Ark. 667. See also *Western Ins. Co. v. Eagle F. Ins. Co.*, 1 Paige (N. Y.) 284.

A judgment against the owner of the equity of redemption, docketed after decree, though before the sale, constitutes a lien on the surplus arising from the sale; but otherwise, if docketed after the sale. *Sweet v. Jacocks*, 6 Paige (N. Y.) 355; 31 Am. Dec. 252.

Mortgage Binding Mortgagor to Insure for Benefit of Mortgagee; Forfeiture by Mortgagor.—In *Ulster Co. Sav. Inst. v. Leake*, 73 N. Y. 161; 29 Am. Rep. 115, the plaintiff, as mortgagee, was the holder of a mortgage binding the mortgagor to insure for his benefit; the mortgagor procured an insurance, "loss payable to the mortgagee." The policy was forfeited as to the mortgagor. There was an independent contract between the plaintiff and the insurers making valid and effectual all their policies held by him as

mortgagee, and making provision for subrogation in the event they should become void as to the interest of the mortgagor. A loss occurred which the insurers paid to the plaintiff, and took an assignment of the mortgage, subject to payment of the balance due the mortgagee. The mortgage was foreclosed, and in a contest over the surplus arising from the sale, it was held that the insurers were entitled to the surplus, the mortgagor having forfeited her rights under the policy and not being injured by the assignment, and the forfeiture not having been waived by the insurers.

3. *State v. Reed*, 5 Ired. (N. Car.) 357; *State v. Pool*, 5 Ired. (N. Car.) 105; *Parker v. Grelier*, 18 La. Ann. 167; *Fitch's Appeal*, 10 Pa. St. 461; 51 Am. Dec. 495. And no stipulation which the officer may make with the purchaser shall estop the debtor from claiming it. *Parker v. Grelier*, 18 La. Ann. 167.

In *Creps v. Baird*, 3 Ohio St. 278, the facts were as follows: The sheriff of Wood county, under and by virtue of a writ of execution issued from the court of said county, on a judgment in favor of one Wilson against the plaintiff, sold certain property of the latter to the defendant, for the sum of \$1400; the said court caused an order to be entered, finding due on said property at the time of sale, the sum of \$357.76 of back taxes, and ordering said sheriff to pay to the county treasurer that amount out of the proceeds of the sale; which the sheriff accordingly did, without notice from the plaintiff; this order was held by the supreme court to be erroneous and was reversed. The amount paid for back taxes was surplus remaining after payment of the judgment. It was held that if the surplus money remaining

the property sold,¹ such liens and claims being transferred to, and

after satisfaction of the judgment, and to which the debtor is entitled, is, upon the motion of a purchaser upon execution by order of court, and without the consent of the debtor, applied in payment of taxes due upon the land when sold, after reversal of the order, such debtor may recover the sum so applied, from said purchaser, in an action of assumpsit for money paid to his use; and *further*, that such action may be maintained, though there has been no order of distribution directing such surplus to be paid to the judgment debtor, there being no other claimant of the money.

But where a constable, having an execution in favor of B. against E. and being indemnified by B., levied on and sold, as the property of E., a mule, which was claimed by J., under a bill of sale from E., and J. brought trespass against the constable and B., for taking and carrying away the mule, and recovered its value, before J.'s recovery, E. disclaimed title to the mule, but afterwards brought an action against the constable for the surplus remaining in his hands after satisfying B.'s execution; it was held that the constable's levying on and selling the mule did not amount to an estoppel, but only to an admission of title in E. and of his right to the surplus, which admission having been conclusively rebutted, he was not entitled to recover. *Etters v. Wilson*, 12 Rich. (S. Car.) 145.

Officer's Right of Set-Off.—Where a surplus remains in the hands of the sheriff after satisfying the execution, he cannot appropriate it in discharge of a private debt due him by the defendant in execution, but must seek his remedy at law. *Fitch's Appeal*, 10 Pa. St. 461; 51 Am. Rep. 495. See also *Miles v. Richwine*, 2 Rawle (Pa.) 199; 19 Am. Dec. 638; *Irwin v. Workman*, 3 Watts (Pa.) 357.

1. *State v. Reed*, 5 Ired. (N. Car.) 357.

In *Van Nest v. Yoemans*, 1 Wend. (N. Y.) 87, two tracts of land belonging to the defendant were sold by virtue of an execution in favor of one Day, and brought the sum of \$746; the amount due on the execution was \$411.83, leaving a surplus in the hands of the sheriff of \$334.17. Immediately after the sale an order was presented to the sheriff, signed by the defendant, requiring him to pay the surplus moneys to one Yeomans, to whom the defendant was in-

debted by bond. On the day of sale, and before the moneys were paid over, a *fiери facias* was delivered to the sheriff in the above entitled cause, directing a sum not exceeding \$400, to be levied; and notice was given to the sheriff that he would be required to appropriate the surplus moneys toward the satisfaction of that execution. A motion was made for an order to that effect. The court, by Woodworth, J., said: "The plaintiff is entitled to the effect of his motion. He was a judgment creditor and had a lien upon the property sold. Had the sale taken place under his judgment, he might have become the purchaser, and would have had the benefit of the property, to the extent of its value, subject only to the anterior lien of the judgment on which the property was sold. Of this right he ought not to be deprived by the act of the defendant, giving a preference to another creditor, by means of an order or direction to the sheriff, to pay over the surplus moneys. The right of a junior judgment creditor to redeem, if such a proceeding was allowed, might frequently be of no use; for if the property was sold at its full value, and the surplus paid to the defendant or to his order, it would be of no benefit to the junior judgment creditor to redeem. The only way, therefore, in which his judgment can be rendered availing is to direct the sheriff to pay over the surplus moneys to him." See also *Ball v. Ryers*, 3 Cai. (N. Y.) 84; *People v. Ulster Common Pleas*, 13 Wend. (N. Y.) 628.

Senior Executions Returned Unsatisfied—Right Under Junior Execution.—

Where, after a sale under execution, the sheriff applied the larger part of the proceeds in discharge of preceding executions, other executions prior to that issued in favor of the plaintiff remained in the sheriff's hands, entitled to payment, but instead of paying them out of the surplus, they were returned unsatisfied; and no part of the balance was ever paid upon them, and no demand was ever made upon him to pay them out of such balance; it was held that the sheriff could not claim to withhold the amount due upon such junior execution, because earlier executions had been therefore issued to him, where such earlier executions had been returned by him as unsatisfied. *Salter v. Bowe*, 32 Hun (N. Y.) 236. See also

following, the property when it passes from the defendant into the hands of the officer.¹

2. Power of Court to Control.—The court has control over surplus money arising on a sheriff's sale, if the property, at the time of the sale, was subject to, or bound by subsequent judgments and executions.²

3. Rival Claimants.—If a surplus has been realized by the sale, to which there are conflicting claims, the proper course for the officer to pursue is to pay the money into court and make return of the

Paton v. Westervelt, 2 Duer. (N. Y.) 362; *Cross v. Williams*, 63 How. Pr. (N. Y.) 191.

Replevin Bail.—Where one becomes replevin bail for the stay of execution, and has paid part of the judgment, and subsequently, when his principal's property is sold on an execution issued thereon, becomes the purchaser thereof for a sum exceeding the balance due, he has the right, against junior creditors who have executions at the time in the sheriff's hands, to retain so much of the surplus as is necessary to satisfy the sum paid by him as such bail. *Colgrove v. Cox*, 22 Ind. 43.

Conveyance Before Judgment—Right of Grantee of Debtor.—And a grantee of real estate, sold under an execution against the grantor, on a judgment entered prior to the conveyance, is entitled to the surplus remaining after satisfaction of same, in preference to a creditor by judgment subsequent to the grant. *Every v. Edgerton*, 7 Wend. (N. Y.) 259.

Contract of Sale Before Judgment—Right of Contract Purchaser.—When lands are sold at a sheriff's sale, on a judgment against the vendor prior to the date of a contract for sale of same, for a sum greater than that named in the contract, the contract purchaser is entitled to the surplus in preference to a creditor whose judgment was obtained after the date of the contract. *Siter's Appeal*, 26 Pa. St. 178.

Purchaser of Sheriff's Certificate.—One purchasing a sheriff's certificate, made on a sale of lands, under a judgment which was satisfied by such sale, cannot, when the same land is sold under an older judgment and a surplus left after satisfying same, obtain such surplus, or have it applied to the judgment under which his certificate was given. *Smith v. Caswell*, 1 How. Pr. (N. Y.) 133.

1. *Averill v. Loucks*, 6 Barb. (N. Y.) 470; *Eddy v. Smith*, 13 Wend. (N. Y.) 488; *Bodine v. Moore*, 18 N. Y. 347;

De La Vergne v. Evertson, 1 Paige (N. Y.) 181; 19 Am. Dec. 411; *Bartlett v. Gale*, 4 Paige (N. Y.) 503; *Kennedy v. Hammond*, 16 Mo. 341; *Doniphan v. Paxton*, 19 Mo. 288; *White v. Watkin*, 23 Mo. 429; *Cook v. Dillon*, 9 Iowa 407; 74 Am. Dec. 354; *Chase v. Parker*, 14 Iowa 207.

2. *Willows v. Ball*, 5 Bos. & Pul. 376; *Turner v. Fendall*, 1 Cranch (U. S.) 117; *Ball v. Ryers*, 3 Cai. (N. Y.) 84; *Van Nest v. Yeomans*, 1 Wend. (N. Y.) 87; *Williams v. Rogers*, 5 Johns. (N. Y.) 163. And a second execution actually levied is an equitable lien on the surplus money remaining after payment of a prior execution out of money raised by the sale, and the court can and will protect this equitable right of its suitor, and order such money to be brought into court and applied to the satisfaction of the execution next in priority. *Stebbins v. Walker*, 14 N. J. L. 90; 25 Am. Dec. 499, *overruling Thompson v. Pierson*, 3 N. J. L. 571. In this case the court, by Hornblower, C. J., said: "Creditors, however vigilant, cannot proceed *pari passu* in pursuit of their rights; there must be a *prius* and a *posterius* in judgments and executions, and a debtor, whose property consists in one entire thing, however valuable, would have it in his power to defeat every execution but the first. Under our statute (Rev. Laws 671) a defendant may elect to have his land first sold under a *fieri facias*. Suppose, then, several executions, all levied in succession on goods and lands, the aggregate amount may be several thousand dollars, the first execution perhaps less than one hundred dollars; the defendant elects to have his land sold first; it is sold accordingly, and brings its value, shall the sheriff deduct the pittance due on the first execution and pay over the surplus to the defendant, to the utter disappointment of the subsequent execution creditors; and that, too, after their judgments and

facts, and leave the parties in interest to apply to the court to determine the priority of their respective claims.¹

SURPRISE.—(See CONTINUANCES, vol. 3, p. 813 ; MISTAKE, vol. 15, p. 625 ; NEW TRIAL, vol. 16, p. 532 ; SPECIFIC PERFORMANCE, vol. 22, p. 908).

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| <p>I. Definition, 965.</p> <p>II. As Ground for Equitable Relief, 966.</p> <p>1. General Principles, 966.</p> <p>2. Rescission of Contracts, 966.</p> | <p>3. Specific Performance (See also SPECIFIC PERFORMANCE, vol. 22, p. 908), 969.</p> <p>III. As Ground for New Trial (See NEW TRIAL, vol. 16, p. 532), 970.</p> |
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I. DEFINITION.—(For mistake mingled with surprise and fraud, see MISTAKE, vol. 15, p. 625 ; for surprise as a ground for continuance, see CONTINUANCES, vol. 3, p. 813 ; as a ground for a new trial, see NEW TRIAL, vol. 16, p. 532).

Surprise, in equity, is said to be the act by which a party who is entering into a contract is taken unawares ; by which sudden confusion or perplexity is created, which renders it proper that a court of equity should relieve the party so surprised.²

executions have become liens upon that very land ? Yet such would be the result of the doctrine contended for. It may be said that this is arguing *ab inconvenienti*, and from the hardship of the rule. It is, indeed, difficult to bring one's mind to believe that a rule so inconvenient, so hard and unjust, can be a lawful one ; and I think it is not. Our judgments and executions are not vain and nugatory things ; they cannot be turned aside by the devices and ingenuity of defendants ; they are incumbrances and liens which fasten upon a man's property ; and they will hold on to and pursue that property till it has been fairly exhausted in payment of debts."

1. In *McDonald v. Allen*, 37 Wis. 108 ; 19 Am. Rep. 754, the plaintiff on 30th of March, 1874, received two executions issued upon judgments rendered against one Beekman ; one in favor of Wright, and one in favor of the defendant, Allen. The Wright execution had preference by reason of a prior attachment in the suit in which it was rendered. These executions were levied upon certain property of the judgment debtor, which was sold April 22d. The Wright execution was satisfied, and there remained in the sheriff's hands a surplus of \$1,710.96. Allen's execution was issued for \$1,589.50. On April 23d (the day after the sale), the Finley Shoe, etc., Co. placed in the sheriff's hands an attachment against Beekman

for a debt of \$294.60 ; and the day following Cadys & Awl placed in his hands another attachment against Beekman for \$997.13. It was held that the sheriff had a reasonable time after the sale in which to pay over the balance to Allen on his execution, and that failing to pay same the next day was not negligence ; and that when the attachments were placed in his hands with notice of the claim of priority in their favor, it was his duty to pay the money into court, and return the execution with the facts, notifying the parties in interest of what he had done.

Where the facts are undisputed, or may be clearly and easily ascertained, contests concerning surplus money from sales on execution may be determined upon motion instead of by petition in equity or another action. *Polk Co. v. Sypher*, 17 Iowa 358 ; 85 Am. Dec. 568.

But not where the precise extent of the equitable rights of the claimants is complicated. *Willows v. Ball*, 5 Bos. & Pul. 376 ; *Williams v. Rogers*, 5 Johns. (N. Y.) 162 ; *Stebbins v. Walker*, 14 N. J. L. 90 ; 25 Am. Dec. 499.

2. Bouv. L. Dict., tit. *Surprise*.

Judge Story, after examining the definitions of some other authors, says : "The truth is that there does not seem anything technical or peculiar in the word 'surprise' as used in courts of equity. The common definition of Johnson sufficiently explains its sense. He

II. AS GROUND FOR EQUITABLE RELIEF—1. General Principles.—

The word surprise is sometimes loosely used to denote fraud or mistake, but wherever courts of equity have given relief on the ground of surprise alone, it will be found that the transaction reveals no more than a constructive fraud on the one hand, and does not reveal what may be technically called a mistake on the other.¹

2. Rescission of Contracts.—Courts of equity will not under all circumstances relieve persons from hard bargains on the ground that they have been taken by surprise.² But in many cases, courts have given relief from unconscionable contracts where one has been suddenly and unexpectedly placed in a position in which he

defines it to be the act of taking unawares; the state of being taken unawares; sudden confusion or perplexity. When a court of equity relieves on the ground of surprise, it does so upon the ground that the party has been taken unawares; that he has acted without due deliberation and under confused and sudden impressions." 1 Story Eq. Jur. (13th ed.), § 120, note 2. See also *Evans v. Llewellyn*, 2 Bro. Ch. 150; 1 Cox 333.

1. In 1 Story Eq. Jur. (13th ed.), § 120, note 2, the author, after defining the term, continues: "There may be cases where the word 'surprise' is used in a more lax sense and where it is deemed presumptive of or approaching to fraud. But it will always be found that the true use of it is where something has been done which was unexpected and operates to mislead or confuse the parties on the subject, and on that account has been deemed a fraud. See *Earl of Bath and Montague's Case*, 3 Ch. Cas. 56, 74, 114; *Irnham v. Child*, 1 Bro. C. C. 92; *Marquis of Townshend v. Stangroom*, 6 Ves. 338; *Twining v. Morrice*, 2 Bro. Ch. 326; *Willan v. Willan*, 16 Ves. 86."

2. In the *Earl of Bath and Montague's Case*, 3 Ch. Cas. 56, Powel, B., said: "It is said that this is a deed that was obtained by surprise and circumvention. Now I perceive this word 'surprise' is of a very large and general extent. They say that if the deed be not read to or by the party, that is a surprise; nay, the mistake of a counsel that draws the deed, either in his recitals or other things, that is a surprise of a counsel, and the surprise of counsel must be interpreted the surprise of the client. . . . If these things be sufficient to let in a court of equity to set aside deeds found by the verdict to be good in law, then no man's property can be safe. I hardly know any sur-

prise that should be sufficient to set aside a deed after a verdict unless it be mixed up with fraud, and that expressly proved." On page 74, Lord Chief Justice Treby said: "I confess I am still at a loss for the very notion of surprise, for I take it to be either falsehood or forgery; that is—though I take it they would not use the word in this case—fraud. If that be not the meaning of it, to be something done unawares nor with all the precaution and deliberation, as possibly a deed may be done. . . . A man was informed by his kinsman that his son was dead and so got him to settle his estate upon him. This is called, in the civil law, *surreptio*. . . . Now the civilians define that thus: '*Surreptio est cum per falsam rei narrationem aliquid extorquetur*;' when a man will by false suggestion prevail upon another to do that which otherwise he would not have done. And I make no doubt that equity ought to set aside that, but then this is probably called a fraud." On page 114, Lord Somers said: "Now for this word 'surprise,' it is a word of a general signification, so general and so uncertain that it is impossible to fix it. A man is surprised in every rash and indiscreet action, or whatsoever is not done with so much judgment as it ought to be. But I suppose the gentlemen who use that word in this case, mean such surprise as is attended and accompanied with fraud and circumvention. Such a surprise may, indeed, be a good ground to set aside a deed so obtained in equity and hath been so in all times." See also *McRea v. Malloy*, 93 N. Car. 163, and *Graham v. Pancoast*, 30 Pa. St. 89, where it is said that a court of equity will not decree the rescission of an executed contract except upon proof of fraud or mistake; that inadequacy of consideration, improvidence, surprise and hardship are not sufficient.

could not properly exercise his own judgment; especially if he acted under the persuasion of those upon whose judgment he relied,¹ or if a false representation was made to him, even though it

1. In *Evans v. Llewellyn*, 1 Cox 333, it appeared that one Henry Hutson was seised in fee, according to the custom of gavelkind, of one moiety of an estate, the whole being subject to an estate for life of his mother. Hutson married a sister of the plaintiffs and by his will devised all his interest in the premises to her in fee. After his death, she married the defendant Llewellyn. During coverture, without levying a fine, she made a will whereby she devised all her interest in said estate to her husband Llewellyn. The mother of Hutson and Llewellyn's wife both having died, Llewellyn took possession of the property as his own and shortly afterwards married again, thus terminating his right to hold any part of the estate as tenant by the curtesy. He afterwards learned that the will, under which he claimed, was void; whereupon he summoned the plaintiffs, who were the heirs at law of his former wife under whose will he claimed, to meet him at the office of his solicitors. The heirs, who were ignorant and in poor circumstances and knew nothing of their title to the property until then informed of it, readily yielded to the persuasions of Llewellyn and his solicitors and conveyed to Llewellyn all their interest in the premises for a grossly inadequate consideration. At their suit it was decreed that the deed should be set aside and that the defendant should account for the rents and profits received after his second marriage, out of which he might retain the consideration paid the plaintiffs for the estate. Lord Kenyon, then Master of the Rolls, said: "The parties present were Mr. Llewellyn, his friend whom he brought to countenance the transaction, and Mr. Maddock, his solicitor. I must lay very great stress on Mr. Maddock's evidence, for he told the plaintiff what was enough to influence any but a very firm man, that, as he understood the defendant's great kindness to the family of the plaintiffs and as the sister's intention to give the estate to the defendant was clear, the plaintiff ought not in equity and conscience to take advantage of the blunder. . . . I am called upon for principles upon which I decide this case, but where there are many members of a case it is not always easy to lay down

a principle upon which to rely. However, here I say the party was taken by surprise. He had not sufficient time to act with caution; and, therefore, though there was no actual fraud, it is something like fraud, for an undue advantage was taken of the situation."

In *Wheeler v. Smith*, 9 How. (U. S.) 55, it appeared that the plaintiff was the nephew and sole heir at law of one Charles Bennett, who left a will in which limited provision was made for the plaintiff; the bulk of the estate being placed in the hands of his executors in trust, to be by them used for such purposes as they considered most beneficial to the town and trade of Alexandria. The statute 43 Eliz. respecting charitable uses having been repealed in the State of *Virginia*, the trust attempted to be created was void. At an interview between the heir and the executors of the will, shortly after the death of the uncle, the heir was informed that, in the opinion of able lawyers, among whom was one of the executors, a lawyer of ability for whom he entertained a profound respect, the will was valid. In order to save a suit and expense to the estate, as they said, they offered him twenty-five thousand dollars to release his claim on the estate, and, at their persuasion, he consented to do so, the transaction being rapidly consummated, without time for the heir to take legal advice or consult his friends. He afterwards filed a bill to set aside the devise and also the compromise he made with the executors, and both forms of relief were granted. McLean, J., speaking of the compromise, said: "The complainant, it seems, had studied law, but it is manifest from the facts before us that he was but little acquainted with business; was an inefficient and dependent man, easily misled, especially by those for whose abilities and characters he entertained a profound respect. From the high character of the executors, no one can impute to them any fraudulent intent in this transaction. Looking to what they considered to be the object of the testator, they felt themselves authorized, if not bound, to effectuate his purposes by making this compromise with his heir at law. They had no personal interest beyond that which was common

were made in good faith,¹ or if he was importunately pressed by the other party and acted without time for deliberation and consultation with his friends.²

to the citizens of Alexandria, and we admit that they must have acted under a sense of duty from a misconception of their power under the will. But in making the compromise, the parties did not stand on equal ground. The necessities and character of the complainant were well known to the executors. Having the confidence expressed in the validity of the devise, they could hardly have felt themselves authorized to pay to the plaintiff twenty-five thousand dollars for the relinquishment of a pretended right." See also *Miller v. Simonds*, 72 Mo. 669; *Gibbs v. New York L. Ins., etc., Co.*, 14 Abb. N. Cas. (N. Y.) 1.

1. If a party innocently by mistake misrepresents a fact which is material and which the other party relies on as true, it is cause for rescinding the contract on the ground that it operated as a surprise and an imposition on the party seeking the relief. *Smith v. Mitchell*, 6 Ga. 458; *Reese v. Wyman*, 9 Ga. 430; *Bailey v. Jones*, 14 Ga. 384. See also *Jordan v. Stevens*, 51 Me. 78; 81 Am. Dec. 556; *Alker v. Alker* (Supreme Ct.), 12 N. Y. Supp. 676.

Withholding Material Facts.—In *Pusey v. Desbouvrie*, 3 P. Wms. 315, it appeared that the daughter of a freeman of London had a legacy of ten thousand pounds left by her father's will on condition that she should release her orphanage share. After her father's death, she accepted the legacy and released the share, but her brother, who was the executor of the will, failed to inform her that she had a right to have an account taken of the estate in order to determine which course she would pursue. On a bill afterwards filed by her against her brother, the release was set aside and she was awarded her orphanage share, which amounted to forty thousand pounds. Talbot, Lord Ch., said: "It is true it appears the son did inform the daughter that she was bound either to waive the legacy given by the father or release her right to the custom, and so far she might know that it was in her power to accept either the legacy or orphanage part. But I hardly think she knew that she was entitled to have an account taken of the personal es-

tate of her father and first to know what her orphanage part did amount to, and when she should be fully apprised of this, then, and not till then, she was to make her election, which very much alters the case. For probably she would not have elected to accept her legacy had she known or been informed what her orphanage part amounted unto before she waived it and accepted the legacy."

Judge Story, in his *Equity Jurisprudence* (13th ed.), vol. 1, § 118, commenting on this decision, said: "It is apparent from this language that the decision of his Lordship rested upon mixed considerations and not exclusively upon mere mistake or ignorance of the law by the daughter. There was no fraud in her brother, but it is clear that she relied upon her brother for knowledge of her rights and duties in point of law, and he, however innocently, omitted to state some most material legal considerations affecting her rights and duties. She acted under this misplaced confidence and was misled by it, which of itself constituted no inconsiderable ground for relief. But a far more weighty reason is that she acted under ignorance of facts, for she neither knew nor had any means of knowing what her orphanage share was when she made her election. It was, therefore, a clear case of surprise in matters of fact as well as of law."

2. In *Coffman v. Lookout Bank*, 5 Lea (Tenn.) 232; 40 Am. Rep. 31, it appeared that the son of the plaintiff had forged notes upon which were the names of the plaintiff and other persons as indorsers and had discounted them at the defendant bank. The information of the forgery was suddenly sprung upon the father at a private interview between him and the officers of the bank, one of whom was a lawyer. Afflicted with shame and mortification at the family disgrace, the father was induced, without time to consult legal counsel or other friends, to execute his promissory note to the bank for the amount of money obtained by the son on the forged notes. He filed a bill to enjoin the prosecution of an action at law upon the note so executed and to have the same canceled on the ground of surprise, and it was held that he was

In some cases courts of equity have granted relief against judgments, obtained in such a manner as to surprise and disarm those against whom such judgments were rendered.¹

To justify the rescission of a contract on the ground of surprise, the evidence should be so strong as to leave no doubt in the mind of the court as to the merits of the case.²

3. Specific Performance—(See also SPECIFIC PERFORMANCE, vol.

entitled to the relief sought. The court said: "When a court of equity relieves on the ground of surprise, it does so because something has been done which was unexpected, and operated to mislead or confuse the party on the sudden, and on that account has been deemed a fraud. *Earl of Bath and Montague's Case*, 3 Ch. Cas. 56, 74, 114; *Evans v. Llewellyn*, 2 Bro. C. C. 150. The mere fact that a transaction has been improvident and precipitate, and entered into without independent professional advice, will not vitiate it, if the parties were on equal terms, in a situation to act for themselves, and fully understood what was done. If the parties were not on equal terms, and one of them, from ignorance, agitation, or undue importunity, is unable to protect himself, equity will protect him. *Kerr on Fraud* 143; 1 *Sto. Eq. Jur.*, § 222. The absence of professional advice is, in such cases, a material circumstance, especially if the other contracting party has such aid. *Kempson v. Ashbee*, L. R., 10 Ch. 19; *Baker v. Bradley*, 7 De G. M. & G. 621. The English courts have said that a contract made with full legal advice on the one side and none on the other, will rarely stand the test of judicial scrutiny. *Clarkson v. Hanway*, 2 P. Wms. 205; *Murray v. Palmer*, 2 Sch. & Lef. 474. And see *Connelly v. Fisher*, 3 Tenn. Ch. 382. Beyond all question the complainant was in no condition of mind, in the brief interview between him and the bank officers on the occasion when the note in controversy was given, under the terrific domestic calamity suddenly sprung upon him, to act freely and intelligently. Without imputing any improper motives to the bank officers, it is obvious that the course taken by them led to that surprise which was unexpected, and operated to mislead and confuse the complainant, and must, in view of the condition of his mind and the absence of friends, be held to amount to legal fraud."

1. In *Webb v. Parker*, 41 Ga. 478, it appeared that the plaintiff had brought an action of ejectment for the recovery of a certain lot. It was stipulated by counsel that a copy-plat and grant might be used in evidence instead of the original, and defendant's counsel informed plaintiff's counsel that he had such a copy and agreed to produce it at the trial. The copy was accordingly produced and introduced in evidence, plaintiff's counsel relying on the statement of defendant's counsel as to its correctness. It turned out that the copy produced was erroneous and on that account the defendant prevailed in the action. The plaintiff then filed a bill in equity to enjoin the defendant from disposing of the land and to obtain a new trial, and it was held that he was entitled to relief on the ground of mistake, surprise, and misplaced confidence in the statements of defendant's counsel in relation to the copy-plat and grant, whether intentional or otherwise.

In *Jones v. Kincaid*, 5 Lea (Tenn.) 677, it appeared that a general order was entered by consent of the bar, continuing all litigated cases until the next term. At a subsequent day of the term a judgment was taken in a litigated case, the defendant and his counsel having left the court relying on the order of continuance. It was held that the defendant was entitled to equitable relief to the extent that the judgment against him was unjust.

But in *Harrison v. Harrison*, 1 Litt. (Ky.) 137, the court said: "Surprise is sometimes the ground of a new trial at law, and may authorize the interposition of the chancellor, after the hour for a new trial at law is passed; but never ought the chancellor thus to interpose where the party could have availed himself of it by applying for a new trial; that is, where the surprise was known in time, as well as the means of defeating it, so that the party could have redressed himself by applying for a new trial in the court of law."

2. *Marquis of Townshend v. Stan-*

22, p. 908).—If there has been any surprise in the making of a contract which renders it unfair or inequitable to enforce a specific performance thereof, a court of equity will not grant that relief, but will leave the parties to their rights at law.¹

III. AS GROUND FOR NEW TRIAL.—(See **NEW TRIAL**, vol. 16, p. 532.)

SURREBUTTER—(See also **PLEADING**, vol. 18, p. 416).—The plaintiff's answer of fact to the defendant's rebutter.²

SURREJOINER—(See also **PLEADING**, vol. 18, p. 467).—Plaintiff's answer of fact to the defendant's rejoinder.³

SURRENDER—See **LANDLORD AND TENANT**, vol. 12, p. 758g.

SURRENDER BY BAIL.—(See also **ARREST**, vol. 1, p. 719; **BAIL**, vol. 2, p. 1.)

I. Definition, 970.

II. Right to Surrender, 970.

1. *Extent of Right*, 970.

2. *To Whom Made*, 973.

3. *After Default*, 973.

4. *When Surrender is Prevented by Operation of Law*, 975.

I. DEFINITION.—The right of bail to surrender the principal, who is presumed at all times to be in the custody of his bail, and for whose future appearance bail is responsible, follows by necessary implication from the bail's undertaking that the principal shall appear at a certain time and place.⁴ This right is recognized everywhere, and there is a practical accord as to what constitutes a surrender, which may be defined as a rendering by the bail or surety, of the person for whose appearance he stands responsible, into the custody of the officer who made the arrest, or of the sheriff, marshal, or jailer.⁵

II. RIGHT TO SURRENDER—1. **Extent of Right.**—Bail may surrender their principal, in criminal as well as in civil cases, before the day stipulated for the appearance of the principal; and such surrender discharges the bail.⁶ The bail, for the purpose of effecting a surren-

groom, 6 Ves. 332; *Masterton v. Beers*, 1 Sweeney (N. Y.) 406; *Lyman v. United Ins. Co.*, 17 Johns. (N. Y.) 375; *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 597; 7 Am. Dec. 559.

1. *Marquis of Townshend v. Stangroom*, 6 Ves. 332; *Mortlock v. Buller*, 10 Ves. 305; *Twining v. Morrice*, 2 Bro. C. C. 326; *Higgins v. Jenks*, 3 Ware (U. S.) 21; *Bowen v. Waters*, 2 Paine (U. S.) 1.

In *Twining v. Morrice*, 2 Bro. C. C. 326, Lord Kenyon said that the court was not bound specifically to execute every contract, and if there was any sort of surprise that made it not fair and honest to call for an execution, he would not give the extraordinary relief of a specific performance. Neither would he order the contract to be de-

livered up, but would let the purchaser go to law. This doctrine was approved by Lord Eldon in *Marquis of Townshend v. Stangroom*, 6 Ves. 332, and in *Mortlock v. Buller*, 10 Ves. 305.

2. *Stephen's Pleading* 59. It is subject to the same general rules as the replication. 4 Min. Inst. 673; 1 Chit. Pl. 690.

3. *Stephen's Pleading* 59. It is subject to the same general rules as the replication. 4 Min. Inst. (2d ed.) 673; 1 Chit. Pl. 690.

4. 3 Bl. Com. 290; *Bac. Abr.*, vol. 1, p. 572.

5. *Anderson's L. Dict.*, p. 998.

6. *Hawkin's P. C.*, bk. 2, ch. 15, § 3; 2 Hale, P. C., 124 (ed. 1778); 1 Chitty's *Crim. Law* (Phila. ed. 1819) 104; *Harp v. Osgood*, 2 Hill (N. Y.) 217; *Clark*

der, may take the principal wherever he can be found,¹ within or

v. Gordon, 82 Ga. 613; *State v. Meyers*, 61 Mo. 414; *Kiser v. State*, 13 Tex. App. 201; *State v. Rowe*, 103 Ind. 118; *Sternberg v. State*, 42 Ark. 127; *Hughes v. State*, 28 Tex. App. 499; *Shields v. Smith*, 78 Ind. 425; *People v. McFarland*, 9 Ill. App. 275; *Matthews v. State*, 92 Ala. 89; *State v. Benzion*, 79 Iowa 467; *Kellogg v. State*, 43 Miss. 57; *State v. Cunningham*, 10 La. Ann. 393; *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 145; *Koch v. Coots*, 43 Mich. 30; *Fisher v. Fallows*, 5 Esp. 571; *Ruggles v. Corey*, 3 Conn. 419; *Parker v. Bidwell*, 3 Conn. 84; *Worthen v. Prescott*, 60 Vt. 68; *Pyewell v. Stow*, 3 Taunt. 425; *Payne v. Spencer*, 6 M. & S. 234.

In *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 145, Thompson, J., said: "A recurrence to a few cases in the books, showing the relation in which the law considers the bail as standing towards his principal, will render it obvious that the power with which he is clothed is not one restricted in its exercises to any particular place. Sir William Blackstone (3 Com. 290) says the security given for the appearance of a party arrested is called bail, because the defendant is delivered to the surety, and is supposed to continue in his friendly custody, instead of going to jail. Bail, in the language of the books, are said (6 Mod. 231) to have their principal always upon a string, which they may pull whenever they please, and surrender him in their own discharge. They may take him up, even upon a Sunday, and confine him until the next day, and then surrender him. The doing so on Sunday is no service of process, but rather like the case where the sheriff arrests a party who escapes, for that is only a continuance of the former imprisonment. Lord Hardwicke says (1 Atk. 237; *Ex p. Gibbons*), it is the constant language of courts that bail are their principals' jailors, and that it is upon this notion that they have an authority to take them; and that as the principal is at liberty only by the permission and indulgence of the bail, they may take him up at any time. The same principle is recognized in Shower (Anonymous case 214), where it is said by the court that bail are but jailors *pro tempore*; and in case a man absconds, and his bail cannot find him, they shall

have a warrant to take him out of any pretended place of privilege, in order to surrender him, because he is a prisoner to the court, and they may call him at pleasure. If the principal is to be considered as standing in the situation of a prisoner who has escaped from the arrest of the sheriff, according to the language of one of the cases, can there be any reasonable doubt but a sheriff, in such case, would have a right to pursue and arrest his prisoner in a neighboring state; and, by parity of reasoning, bail must have the like authority. The cases I have referred to are sufficient to show that the law considers the principal as a prisoner, whose jail liberties are enlarged or circumscribed, at the will of his bail; and, according to this view of the subject, it would seem necessarily to follow that, as between the bail and his principal, the controlling power of the former over the latter may be exercised at all times and in all places; and this appears to me indispensable for the safety and security of bail."

Where an officer of the army has been sentenced by a court martial for a misdemeanor, his bail in an action in another state are not entitled to his body until such sentence has been executed. *U. S. v. Bishop*, 3 Yeates (Pa.) 37.

Where the principal is in prison, awaiting sentence on conviction of another crime, his bail may surrender him by a mere formal declaration to the sheriff, without the necessity of going through the idle show of the sheriff's leading the principal out of the cell, and the bail's leading him back into it again and there formally delivering him to the sheriff. *State v. Trahan*, 31 La. Ann. 715.

The bail is discharged by the surrender, without regard to whether he has been indemnified by the principal. *Brownlow v. Forbes*, 2 Johns. (N. Y.) 101.

1. *Parker v. Bidwell*, 3 Conn. 84; *Pease v. Burt*, 3 Day (Conn.) 485; *Com. v. Brickett*, 8 Pick. (Mass.) 138; *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 145; *Respublica v. Gaoler*, 2 Yeates (Pa.) 263; *Johnson v. Tompkins*, 1 Baldw. (U. S.) 578; *State v. Lingerfelt*, 109 N. Car. 775.

Bail may follow the principal into another jurisdiction and take him out of the custody of persons who have subsequently become bail for him in

without the jurisdiction, and even in another state ;¹ may break open a door to get at him if necessary ;² may command the assistance of the sheriff and his officers ;³ and may depute to others the power to take or arrest.⁴ If the bail dies pending the *scire facias* against him, the surrender may be made by the personal representative.⁵

the latter district, so as to prevent their surrendering him there. *Sharpless v. Knowles*, 2 Cranch (C. C.) 129.

1. *Broome v. Hurst*, 4 Yeates (Pa.) 123; *Com. v. Brickett*, 8 Pick. (Mass.) 139; *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 145; *Smith v. Catlett*, 1 Cranch (C. C.) 56.

In *Broome v. Hurst*, 4 Yeates (Pa.) 123, it was held that a principal who had attended court as a suitor and on the trial had suffered a non-suit, was properly taken by his special bail in another cause as he was setting off in a stage on his return to another state.

2. *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 145; *Read v. Case*, 4 Conn. 166; 10 Am. Dec. 110.

The general rule of law requires that the bail, before breaking the outer door of his principal's house to arrest him, should signify the cause of his coming and request admission, yet if the personal safety of the bail, or his substitute, be in danger from intended or threatened violence of the principal, he may break and enter without giving the preliminary notice. *Read v. Case*, 4 Conn. 166; 10 Am. Dec. 110. But if more force is used than necessary, they will become trespassers *ab initio* and liable for false imprisonment. *Pease v. Bert*, 3 Day (Conn.) 485.

In *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 145, it was said: "Another question presented was, whether the bail had a right to break open the outer door of the plaintiff's house to make the arrest. The verdict authorizes us to presume that a demand was made before entry; for this fact was submitted to the jury as being necessary to be shown by the defendant, to render the entry lawful. That the bail may break open the outer door of the principal, if necessary, in order to arrest him, follows, as a necessary consequence, from the doctrine that he has the custody of the principal; his power is analogous to that of the sheriff, who may break open an outer door to take a prisoner, who has escaped from arrest. But the case of *Sheers v. Brooks* (2 H. Bl. 120) goes the whole length of this doctrine.

Lord Loughborough there says, when a party is bailed, the bail have a right to go into the house of the principal as much as he has himself. They have a right to be constantly with him, and to enter when they please and take him. The right to break open the plaintiff's house, in the case before us, is fortified by the circumstance of his having been taken a few days before on the bail-piece. His situation, in point of fact, as well as in judgment of law, was somewhat analogous to that of a party escaping from arrest."

3. *Ex p. La Fonta*, 2 Rob. (La.) 495.

4. *State v. Mahon*, 3 Harr. (Del.) 568; *Boardman v. Fowler*, 1 Johns. Cas. (N. Y.) 413; *Parker v. Bidwell*, 3 Conn. 84; *Coolidge v. Cary*, 14 Mass. 115; *Dick v. Stoker*, 1 Dev. (N. Car.) 91; *Meddowcroft v. Sutton*, 1 Bos. & Pul. 61; *Fisher v. Fallows*, 5 Esp. 171.

5. *Wheeler v. Wheeler*, 7 Mass. 169.

Constitutionality of Statute.—In *State v. Rowe*, 103 Ind. 118, the provision of the *Indiana* statute that bail at any time before final judgment on the forfeited recognizance might surrender the principal in open court, or to the sheriff, and be discharged upon payment of costs, was attacked as unconstitutional, on the ground that it was, in effect, the remission of a forfeiture, and, therefore, within the exclusive power of the governor under the constitution; but the court held the contention untenable; *distinguishing* the case of *Butler v. State*, 97 Ind. 373.

Miscellaneous Matters.—It was held in *Matthews v. State*, 92 Ala. 89, that, under *Alabama* Code, § 4429, providing that bail may, at any time, discharge themselves by surrendering the principal, and § 4430, which provides that the surrender must be to the sheriff, and that the sheriff may discharge the principal on his giving new bail, a surety could not be discharged by the giving of a second bond without the surrender of the principal.

It is no defense to an action on a bail bond that continuances have been allowed without the consent of the surety, as he has at all times the right to

2. To Whom Made.—It may be laid down as a general rule that the surrender must be made to an officer authorized to admit to bail or to commit to jail. The statutes sometimes affect the question of to whom the surrender may be made.¹

3. After Default.—Bail cannot, as matter of right, surrender the principal and claim a discharge after the liability has been fixed

discharge his obligation by surrendering the principal. *State v. Benzion*, 79 Iowa 467.

Pleading.—The plea of surrender must state to whom it was made. *Davison v. Mull*, 1 Hayw. (N. Car.) 364. And the evidence to sustain such plea must show an unequivocal act of delivery, accompanied by such declarations or acknowledgments as show its purpose, so that the officer may be surely liable should he permit an escape. *Bomar v. Poole*, 2 Spears (S. Car.) 119; *Rountree v. Waddill*, 7 Jones (N. Car.) 309.

In an action against a surety upon a recognizance, a plea that the surety surrendered his principal, and confessing the cause of action as to costs upon the default, is not good, because it does not aver that the principal had been surrendered before there had been a default, on the recognizance. *People v. McFarland*, 9 Ill. App. 275.

An answer in such case by special bail, that after judgment against S., principal debtor, they surrendered his body "in execution; that by virtue of said execution the sheriff of M. county imprisoned said S. in the jail of said county, in said cause, until he was discharged by due process of law and by the judge of M. circuit court," though awkwardly drawn, is good on demurrer. *Shields v. Smith*, 78 Ind. 425.

1. To Sheriff or Jailer.—*Kellogg v. State*, 43 Miss. 57. In this case the surrender was made by the bail to the sheriff of the county in which the indictment was pending. See also *Lee v. State*, 51 Miss. 665.

In *Sternberg v. State*, 42 Ark. 127, the surrender was to the sheriff. The statute provided that the surrender should be to the jailer. The court said that no doubt the bail might make a valid surrender of the principal to the sheriff, he being *ex officio* jailer, although he had power to appoint a jailer for whose conduct he was responsible. The court in this case distinguished the *Kentucky* cases of *Schneider v. Com.*, 3 Metc. (Ky.) 410, and *Bruce v. Cobgan*, 2 Litt. (Ky.) 288, which held, under an analogous statute, that the surrender

must be made to the jailer and not to the sheriff; the *Arkansas* court saying that in those cases it appeared that the sheriff was not the jailer.

To Court or Justice.—In *Stegars v. State*, 2 Blackf. (Ind.) 104, it was held that the surety in a recognizance before a justice of the peace for the appearance of the principal at the circuit court to answer a criminal charge, could not discharge himself by a surrender to the justice, he not being considered as having a ministerial officer at all times attending upon him, and the statute having made ample provision for surrender to the sheriff. The court said that the right of surrender to the justice did not exist even before the removal of the recognizance.

In *Whitton v. Harding*, 15 Mass. 535, no question was made but that, under the *Massachusetts* statute of 1803, a surrender might be made before a justice of the peace; and so under the *Vermont* statute, *Abells v. Chipman*, 1 Tyler (Vt.) 377; and in *Tennessee*, *Stewart v. Massengale*, 1 Overt. (Tenn.) 479. It was held in these cases that where the surrender was made before a justice of the peace it must be a matter of record, and could not be proved by parol.

In *Com. v. Bronson*, 14 B. Mon. (Ky.) 291, it was said that if the court to which the prisoner was bound to appear was in session, the surrender should be to that court; but that if the court was not in session, to the justice or tribunal who took the recognizance.

In *Indiana*, the bail may make the surrender in open court or to the sheriff. *State v. Rollins*, 52 Ind. 168.

In *Sloan v. Bryant*, 28 N. H. 67, it was said that bail could not make an effectual surrender of the principal in court in the absence of an action pending against the principal or bail.

To Deputy Sheriff.—In *State v. Le Cerf*, 1 Bailey (S. Car.) 410, it was held that the surrender to a deputy sheriff of a party under bail to appear and answer to a criminal prosecution would not discharge his sureties from their liability on the recognizance, the

by default or otherwise, unless such right is given by statute, rule of court, or recognized local practice. But frequently the court in its discretion may relieve the bail from liability where surrender is made shortly after default and no harm has resulted from the default.¹

reason given being that the surrender must be to some officer who might commit the principal to jail or admit him to bail, while the deputy sheriff could do neither, having no authority *ex officio* to detain the prisoner and no specific warrant in his hands to justify the detention. The court said that "admitting that such a surrender to the high sheriff would be sufficient, which is by no means admitted, yet assuredly a surrender to a mere ministerial sub-officer is unauthorized."

But in *Carter v. State*, 43 Ark. 132, the validity of a surrender to a deputy sheriff was attacked solely upon the ground that the officer was not a deputy *de jure* but only *de facto*, there being a question as to whether his powers had terminated at the time the surrender to him was made.

Where surrender is made to the sheriff, the bail should require of him, for their protection, an acknowledgment of surrender in writing. *Moyers v. Center*, 2 Strobb. (S. Car.) 439.

It was said in *State v. Cunningham*, 10 La. Ann. 393, that the better opinion was that a warrant was unnecessary to protect the bail in arresting his principal; citing *Petersdorff on Bail* 405, 414; 1 Chitty's Crim. Law 104.

1. **Surrender After Default.**—*Brownell v. Forbes*, 2 Johns. (N. Y.) 101; *Beers v. Haughton*, 9 Pet. (U. S.) 329.

As to the practice under the *New York* statutes, where bail wishes to make the surrender after the commencement of an action on a bail bond, see *Cozine v. Walter*, 55 N. Y. 304.

In *People v. Johnson*, 4 N. Y. Supp. 705, on an application to discharge a judgment, Daly, J., said, for the court of common pleas: "As the principal was surrendered by his bail after the forfeiture, and was convicted and sentenced to imprisonment upon the charge against him, I am in favor of granting this application to discharge the judgment."

To the point that the surrender cannot be made after default in discharge of the liability of bail, see *State v. McGuire*, 16 R. I. 519; *Com. v. John-*

son, 3 Cush. (Mass.) 454; *People v. Bennett*, 136 N. Y. 482; *Hangsleben v. People*, 89 Ill. 164.

The *Kentucky Cr. Code*, § 98, provides that "if, before judgment is entered against the bail, the defendant is surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in the bail bond," and where a principal had gone into another state and there been confined in the penitentiary for another crime, it was held that the discretion of the court was not abused when judgment was entered against his bail for two-thirds of the amount specified, though the accused was surrendered by his bail when released from the penitentiary. *Yarbrough v. Com.*, 89 Ky. 151. There is a similar provision in the *Texas Code Crim. Proc.*, art. 455, and the surrender of the principal in a forfeited recognizance, after entry of a judgment *nisi* thereon, will not release the sureties from the penalty of such recognizance unless remitted by the court. *Lee v. State*, 25 Tex. App. 331.

Bail were allowed, on paying costs, to surrender at a term subsequent to that at which the *capias* against them was returnable, when the principal made no defense, and judgment was not docketed in seven years, and he, in the meantime, had been in jail and was deemed insolvent, and had removed into another state. *Livingston v. Bartles*, 4 Johns. (N. Y.) 478.

Where the principal and his bail reside at a great distance from the place where the court is held, and the *capias* was served on the bail only a few days before its return, the time for surrendering was enlarged upon an affidavit stating such facts. *Van Rensselaer v. Hopkins*, 3 Cai. (N. Y.) 136; but not so if the bail mistook the time of the return of the *capias* against him. *Rathbone v. Warren*, 4 Johns. (N. Y.) 310; though if the surrender is prevented by an omission to file the bail piece, time will be allowed for that purpose after judgment against them. *Nichols v. Sutfus*, 7 Cow. (N. Y.) 422.

The court only has power to enlarge

4. **When Surrender is Prevented by Operation of Law.**—When the surrender of the principal is prevented by operation of law, or when the law prohibits the principal from being imprisoned at all, the bail is entitled to an *exoneretur* without a surrender.¹

SURRENDER OF CRIMINAL.—See EXTRADITION, vol. 7, p. 598.

the time for surrendering, and not a judge acting as commissioner, and will do so whenever the bail have done all in their power to surrender seasonably. *Warner v. Haden*, 2 Wend. (N. Y.) 251. But no further time should be given if the bail have the means in their hands of indemnifying themselves in case recovery is had against them. *Bank of Geneva v. Reynolds*, 12 Abb. Pr. (N. Y.) 81; 20 How. Pr. (N. Y.) 18.

Sunday is to be reckoned one of the eight days allowed by statute within which bail may surrender their principal after the return of process against them. *Brown v. Smith*, 9 Johns. (N. Y.) 84.

Where a sheriff, by allowing a prisoner to escape, or otherwise, has become liable as his bail, and, after execution has been returned unsatisfied, plaintiff has brought action against him, he may, while such action is pending, surrender the prisoner and be entitled to the privilege usually accorded bail, of being exonerated on payment of costs of the proceedings. *Buckman v. Carnley*, 9 How. Pr. (N. Y.) 180; *Brady v. Brundage*, 2 Thomp. & C. (N. Y.) 621.

In *Connecticut*, *Vermont* and *South Carolina*, the liability of bail is fixed on the return of *non est* on the execution against the principal, unless the bail can show that such return was unfairly made. *Collins v. Cook*, 4 Day (Conn.) 1; *Fitch v. Loveland*, Kirby (Conn.) 384; *Saunders v. Bobo*, 2 Bailey (S. Car.) 492; *Howe v. Ransom*, 1 Vt. 276. But bail will be exonerated by an offer to surrender the principal within a time reasonably to be allowed for the return of the execution, though actually after the return. *Edwards v. Gunn*, 3 Conn. 316. In *Georgia*, bail may surrender their principal at any time before final judgment on *scire facias* against them, but not afterwards, and the death of the principal before such judgment discharges the bail. *Griffin v. Moore*, 2 Ga. 331; *Shannon v. Hyde*, 17 Ga. 88.

1. *Champion v. Noyes*, 2 Mass. 481; *Boggs v. Teackle*, 5 Binn. (Pa.) 332; *Newton v. Tibbatts*, 7 Ark. 150; *Beers v. Haughton*, 9 Pet. (U. S.) 329.

Where the district court, or the judge thereof, erroneously vacates the order of arrest, thus taking away the right of bail to surrender defendant, the bail will be exonerated without surrender. *Baker Mfg. Co. v. Fisher*, 35 Kan. 659. But it will not excuse the bail that the principal, after his arrest, has enlisted as a soldier in the army, or as a sailor in the navy, of the *United States*; *Harrington v. Dennie*, 13 Mass. 93; *Sayward v. Conant*, 11 Mass. 146; or has been convicted of a crime and confined in prison. *Parker v. Chandler*, 8 Mass. 264.

Surrender Suspended by District Attorney.—The governor alone has power to remit fines, and hence evidence tending to show that the surrender of the defendant, or the payment of his fine, was suspended upon the written request of the prosecuting attorney, is inadmissible to relieve his bondsmen. *State v. Stewart*, 74 Iowa 336.

Surrender Excused by Legislature.—When the bail are absolutely fixed and have no further time, the right of the judgment creditor to his debt from them is a vested right, arising *ex contractu*, of which no subsequent legislative act can divest him. Accordingly, an act authorizing the surrender of the principal in discharge of the bail at any time before judgment against them, can have no retrospective operation, but must be construed to apply only to cases arising subsequently to the statute. *Lewis v. Brackenridge*, 1 Blackf. (Ind.) 220; 12 Am. Dec. 228. In that case the court said, Justice Holman delivering the opinion: "It is never to be presumed that a legislative body would transcend its powers, or act contrary to the rules of universal justice. It is equally beyond the rules of a fair presumption, to suppose it would interfere with private rights, so as to do a manifest injury to one individual for the benefit of another. We have, therefore, just ground to presume that the legislature, in the passage of this act, did not intend to destroy any right that had arisen under preëxisting laws. They were aware of the constitutional provisions."

'SURROGATES' AND PROBATE COURTS.—(See also COURTS, vol. 4, p. 447; DOWER, vol. 5, p. 884; EXECUTORS AND ADMINISTRATORS, vol. 7, p. 165; FOREIGN EXECUTORS AND ADMINISTRATORS, vol. 8, p. 414; GUARDIAN AND WARD, vol. 9, p. 85; INSANITY, vol. 11, p. 105; JUDGE, vol. 12, p. 2; PARTITION, vol. 17, p. 677; PROBATE, vol. 19, p. 161; TRUSTS AND TRUSTEES; WILLS.)

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I. DEFINITION.—The word Surrogate, in its literal signification, means a substitute, or one who acts for another. In this sense it was applied in English law to the bishop's chancellor, an officer who usually presided in the bishop's diocesan court, and who, as the representative of the ordinary, performed the judicial duties of that official.¹ In the *United States*, a surrogate was formerly an officer whose powers and duties were ancillary to those of the tribunal which exercised general probate jurisdiction.² But by a process of legislative evolution the surrogate's court has become a tribunal of original probate jurisdiction;³ and, in this latter signification, is the subject here under consideration.⁴

II. JURISDICTION—1. *In England*.—Before the Norman Conquest it appears that jurisdiction over the probate of wills and the distribution of property thereunder, belonged to the county court or

1. Burrill's L. Dict., tit. *Surrogate*; Bouvier's L. Dict., tit. *Surrogate*.

2. See Brick's Estate, 15 Abb. Pr. (N. Y. Surr. Ct.) 12, which contains an interesting and instructive history of the surrogate's court in *New York*, from the earliest colonial period to the date of the opinion, by Daly, first judge of the court of common pleas and acting surrogate. See also 2 Kent's Com. 409; Daly's Historical Sketch of the Judicial Tribunals of *New York* from 1623 to 1846, printed in 1 E. D. Smith (N. Y.) XVII.

In *Wales v. Willard*, 2 Mass. 124, Parsons, C. J., said: "The county courts of probate were never established by any statute until the act of March 12, 1784. Before the revolution, the judges of probate were considered as surrogates of the governor and council, who derived from the royal charter the authority to prove

wills and to grant administrations." See also *In re Evans' Will*, 29 N. J. Eq. 571, where it is held that the orphans' court may review the surrogate's acts on appeal.

3. 2 Kent's Com. 409; Burrill's L. Dict., tit. *Surrogate*; Bouvier's L. Dict., tit. *Surrogate*; Brick's Estate, 15 Abb. Pr. (N. Y. Surr. Ct.) 27 *et seq.*; McClellan's Surrogate's Court, p. 1.

4. Courts of general probate jurisdiction are variously designated as surrogate's courts, orphans' courts, probate courts, parish courts, county courts, superior courts, courts of ordinary, etc. See PROBATE, vol. 19, p. 161.

In *North Carolina*, clerks of the superior court exercise the powers of probate judges; and, when so acting, their courts are independent tribunals of original jurisdiction. *Hunt v. Sneed*, 64 N. Car. 176; *Edwards v. Cobb*, 95 N. Car. 4.

the court baron in the manor where the testator died.¹ The earl or lord of the manor was originally the presiding judge, but it early became the custom for the bishop to sit with him.² About the eighteenth year of William the Conqueror, the ecclesiastical and lay jurisdictions were separated by royal charter, and the ecclesiastical court was thus established as a district and separate tribunal.³ After the separation of the ecclesiastical and lay tribunals, the spiritual courts assumed jurisdiction of the probate of wills, but at exactly what period does not seem to be certainly ascertainable.⁴

In case a man died intestate, the king, as *parens patriæ*, was entitled by the old law to seize upon his goods, and this prerogative, it seems, was exercised in the county court.⁵ Subsequently, the ecclesiastical courts acquired jurisdiction of the administration of such estates.⁶ And it is said that the clergy took for the use of the church the residue of the estate of the deceased, after deducting the two-thirds which were by law the reasonable parts of the widow and children, without even paying the lawful debts of the deceased.⁷ This abuse of power led to the enactment of a statute requiring the ordinary to pay the debts of the deceased;⁸ and, by a series of statutes, the powers of the ordinary were further diminished and regulated, and the law of distribution so modified that, in the time of James II., the whole estate was administered for the benefit of the family of the deceased, and nothing was left to the spiritual courts except the judicial cognizance of the administration.⁹

1. 3 Bl. Com. 95; introductory note to 1 Bradf. (N. Y.) VII *et seq.*, by Surrogate Bradford; 1 Woerner Am. Law of Administration, § 137; Croswell, Ex. & Adm., § 3; Schouler, Ex. & Adm., § 10.

2. Schouler, Ex. & Adm., § 10. Surrogate Bradford in the introductory note in 1 Bradf. (N. Y.), p. XIX, says: "The clergy, probably, first, for purposes of convenience and assistance in expounding the laws, and afterwards by custom and royal warrant, became presiding judges with the civil magistrate in the most important courts. In the county court the bishop sat with the earl; in the hundred court the rural dean or arch-deacon with the hundredary;" *citing* Selden's Janus, pp. 27, 97; Spellman's Reliq., pp. 13, 53, 130, 131; Sullivan's Lec. 26.

3. Introductory note to 1 Bradf. (N. Y.), p. XX, *citing* Spence Eq. Jur., pp. 1, 62; Sullivan's Lec. 29; Seld. Janus 97; Spellman's Reliq., p. 131. See also Croswell, Ex. & Adm., § 3; *citing* Swinb. pt. 6, § 11, p. 772, note; Fonb. Eq., bk. 4, pt. 1, ch. 1, § 1.

4. See Bl. Com., bk. 3, p. 97.

5. 2 Bl. Com. 494; Hensloe's Case, 9 Coke 38.

6. 2 Bl. Com. 494; Bracton, Lib. II. ch. 26, § 2; Fleta Lib. II., § 57.

7. 2 Bl. Com. 495.

8. Statute Westminster 2, 13 Edw. I, ch. 19.

9. By Stat., 31 Edw. III, ch. 2, it was provided that the ordinary should grant the administration to the next of kin; and, by Statute 21, Hen. VIII. ch. 5, the ordinary was given discretion to grant administration either to the widow or next of kin.

The Statutes of Distributions, 22 and 23 Car. II, ch. 10; 29 Car. II, ch. 30, abolished the old common-law right of reasonable parts and made the estate distributable among the widow and next of kin, still leaving, however, in the hands of the administrator for his own use the third formerly retained by the church. But by Stat., 1 James II, ch. 17, this third was made also subject to the Statute of Distributions, and the whole estate was administered for the benefit of the family of the deceased after the payment of his debts.

Thus probate jurisdiction of estates of deceased persons, testate and intestate, except in cases where such jurisdiction was granted by the crown as a franchise to lords of manors and others, or was exercised by lay tribunals by local custom,¹ was established in the ecclesiastical courts and so continued until the year 1857, when it was taken away by statute and vested in the queen, to be exercised in her name in a new tribunal known as the court of probate.²

2. In the United States—*a.* IN GENERAL.—Surrogates' courts, and other courts which exercise probate jurisdiction in the *United States*, derive none of their jurisdiction or power from the common law, but must find the warrant for all their doings in the constitutions and statutes of the states.³ Consequently they may exercise only such powers as are expressly conferred upon them and such incidental powers as are requisite to the execution of the powers expressly given.⁴ If the court oversteps the bounds of

1. In 2 Bl. Com. 494, it is said that it was granted as a franchise to many lords of manors and others who had a prescriptive right to grant administration to their intestates' tenants and suitors in their own courts baron and other courts, or to have their wills there proved in case they made any disposition.

In 1 Bradf. (N. Y.) XIX, Surrogate Bradford said: "London and Kent preserved the Saxon custom. The custom of London was that wills should be tried and proved in the court of Hustings. In Canterbury they were proved in the Burghmote. Probate jurisdiction is still exercised by lords of manors and other proprietors within certain districts, and some of the manorial courts are well known to have existed before the Conquest. To this day about eighty of the testamentary courts in *England* are lay courts; the franchise being attached to corporations, manors, forests, universities, and hospitals, and most of them are held by prescription and are of indefinite antiquity or of Saxon origin."

2. See the Probate Act, 20 & 21 Vict., ch. 77.

3. Grady v. Hughes, 64 Mich. 540; Grimes v. Norris, 6 Cal. 621; Brodess v. Thompson, 2 Har. & G. (Md.) 120; State v. Warren, 28 Md. 338; Caton v. Carter, 9 Gill. & J. (Md.) 476; Townshend v. Brooke, 9 Gill (Md.) 90; Lee's Case, 1 Minn. 60; *In re* Hawley, 104 N. Y. 250; Fairfield v. Gullifer, 49 Me. 360; Fowle v. Coe, 63 Me. 248; *In re* Marston, 79 Me. 34.

Unless expressly authorized by stat-

ute, they may take no cognizance of any matter which does not relate to probate alone. Schull v. Murray, 32 Md. 9; Eichelberger v. Hawthorne, 33 Md. 588; Larue v. Van Horn, 25 La. Ann. 445.

4. Erwin v. Lowry, 1 La. Ann. 276; Snyder's Appeal, 36 Pa. St. 166; 78 Am. Dec. 372.

In *Maryland*, the orphans' court is prohibited by statute from exercising any incidental powers not expressly conferred by law. Blumenthal v. Moltz, 76 Md. 564.

In Sipperly v. Baucus, 24 N. Y. 46, the court said: "Before the adoption of the Revised Statutes, the powers and jurisdiction of surrogates' courts were undefined, the laws respecting them and the subjects of their cognizance were defective, ambiguous, and irreconcilable, and the practice and decisions uncertain and contradictory. The revisers of our statutes undertook to provide a remedy for those evils by accurately and strictly defining the purposes and ends of the court, and the objects and extent of its authority. To that end, the first section of the Revised Statutes relative to surrogates' courts declared as follows: 'Which powers shall be exercised in the cases, and in the manner prescribed by the statutes of this state, and in no other; and no surrogate shall, under pretext of incidental power or constructive authority, exercise any jurisdiction whatever, not expressly given by some statute of this state.' 2 Rev. Sts. 221. A few years' experience demonstrated that the limited and

the authority thus belonging to it, its decrees are void;¹ and the rule is not changed by an attempt to confer jurisdiction by

precise terms of the above statute were incompatible with, and inadequate to, the business interests of the court. As was said by Chancellor Walworth in *Pew v. Hastings*, 1 Barb. Ch. (N. Y.) 454, 'It was found that the exercise of certain incidental powers by courts was absolutely essential to the due administration of justice; and that the revisers and the legislature had not, by their care and foresight, been able to take the case of these surrogates' courts out of the operation of the general rule.' Accordingly, the legislature, in 1837, repealed the restrictive part of the foregoing clause of the Revised Statutes. Laws of 1837, p. 531. Since that repeal, surrogates' courts have continually exercised powers not enumerated in the statutes, and there are several reported cases sustaining and commending such acts. In *Vreedburgh v. Calf*, 9 Paige (N. Y.) 128, decided since the repeal of the prohibitory provisions of the Revised Statutes, it was held that where an order had been entered which the surrogate had no power to enter, he not only had the right, but it was his duty, to set it aside as irregular. In *Skidmore v. Davies*, 10 Paige (N. Y.) 316, it was expressly stated that the remedy of a party aggrieved by an irregular *ex parte* order made by a surrogate was to apply to the surrogate to vacate or set it aside, and not by appeal. To the same effect is the case of *Proctor v. Wanmaker*, 1 Barb. Ch. (N. Y.) 302. *Pew v. Hastings*, 1 Barb. Ch. (N. Y.) 454, is still a stronger case. . . . In another case it was held that if an order was made at a particular time, which was then authorized, the surrogate had a right afterward to enter it *nunc pro tunc*. *Butler v. Emmett*, 8 Paige (N. Y.) 21. Except when restricted by the terms of the statute, surrogates' courts now possess substantially the same powers as before the Revised Statutes; the effect of the amendment of 1837 having been to restore to them the powers which were essential and necessary to the proper discharge of the duties conferred upon them. Although wherever the statute speaks, it must be followed and obeyed, yet, when a proper occasion arises to invoke the incidental power of the court, the surrogate should not

decline the exercise of the power because the statute is silent on the subject." This case is approved in *Stilwell v. Carpenter*, 59 N. Y. 414; *Bevan v. Cooper*, 72 N. Y. 317; *Riggs v. Cragg*, 89 N. Y. 489; *In re Verplanck*, 91 N. Y. 450; *In re Underhill*, 117 N. Y. 471.

In *North Carolina*, judges of probate are by the state constitution vested with the general jurisdiction and powers of the ordinary, together with such additional powers as are conferred by statute. *Taylor v. Bidle*, 71 N. Car. 1.

1. *Turner v. Malone*, 24 S. Car. 398; *Briggs v. Cragg*, 89 N. Y. 489; *In re Underhill*, 117 N. Y. 471; *Partridge v. Partridge*, 46 N. J. Eq. 434; *Wales v. Willard*, 2 Mass. 125; *Sumner v. Parker*, 7 Mass. 83; *Moore v. Philbrick*, 32 Me. 102; 52 Am. Dec. 642, citing *Holyoke v. Haskins*, 5 Pick. (Mass.) 20; 16 Am. Dec. 372; 9 Pick. (Mass.) 259; *Cutts v. Haskins*, 9 Mass. 543; *Sigourney v. Sibley*, 21 Pick. (Mass.) 101; 32 Am. Dec. 248. See also the cases cited in the two preceding notes.

In *Peters v. Peters*, 8 Cush. (Mass.) 543, Shaw, C. J., said: "If the probate court, even where it has jurisdiction over the general subject, exceeds its powers, or acts in a manner prohibited by law, its decrees are not regarded as merely irregular and voidable, but yet good and valid, unless reversed, like other erroneous or irregular judicial proceedings; but they are held entirely and absolutely void and of no effect, and may be set aside in any collateral proceeding by plea and proof. This would not be true if they could be drawn in question and vacated by a writ of *certiorari*. Thus, where original administration was granted after twenty years, contrary to the statute, it was held void in a collateral suit and for the reason mentioned. *Wales v. Willard*, 2 Mass. 120; *Hunt v. Hapgood*, 4 Mass. 117. The subject was more fully considered and developed in an opinion of Jackson, J., in *Smith v. Rice*, 11 Mass. 507, 512. He says: 'It is undoubtedly true that in cases where the probate court is acting within its jurisdiction, pursuing the course prescribed by law, if there is an indiscreet exercise of an authority, the only remedy of the party

consent of the parties interested.¹ These courts are, as a rule, courts of record;² and where they are not technically so it is required that they keep complete records of all their proceedings.³

They are, however, courts of limited and special jurisdiction,⁴ and it has been held that all jurisdictional facts should appear on the record.⁵ But in some jurisdictions where they have been

aggrieved is by appeal.' And he afterwards adds: 'The defect which renders the decree irregular and illegal is not confined to what may be considered strictly a want of jurisdiction of the cause, but if the inferior tribunal proceed in a manner prohibited or not authorized by law, the proceeding is void.' The same thing is declared in the close of an elaborate opinion of Parker, C. J., in *Chase v. Hathaway*, 14 Mass. 227. Speaking of the importance of preserving full records of notices and other proceedings in the probate office, he says: 'It is the more important, as any material defect will render the proceedings null at any period when they shall be brought in question, it having been determined that orders and decrees of these courts may be avoided by plea, they not being, like judgments of common law, reversible by writs of error.' These citations might be multiplied. The cases all assume that a decree which in other courts would be voidable shall be held wholly void because it cannot be re-examined and reversed in a common-law court, by a common-law process, but only in the supreme court of probate on appeal."

1. *Peterson's Estate*, 13 Phila. (Pa.) 265; *Gilliland v. Sellers*, 2 Ohio St. 223.

A testator cannot, by his will, authorize a probate court to exercise a power which is not conferred upon it by statute. *Leman v. Sherman*, 117 Ill. 657, *affirming* 18 Ill. App. 368. Neither can a testator, by an independent clause in his will, deprive the court of jurisdiction over his estate. *Prather v. McClelland*, 76 Tex. 574.

2. *Allen v. Clark*, 2 Blackf. (Ind.) 343; *Shroyer v. Richmond*, 16 Ohio St. 465; *State v. McElhaney*, 20 Mo. App. 584; *Rottmann v. Schmucker*, 94 Mo. 139; *Russell v. Lewis*, 3 Oregon 380; *People v. Marshall*, 7 Abb. N. Cas. (N. Y. Surr. Ct.) 380; *Matter of Harstrom*, 7 Abb. N. Cas. (N. Y. Surr. Ct.) 391; *Dozier v. Joyce*, 8 Port. (Ala.) 303; *Turner v. Malone*, 24 S. Car. 398; *Chase v. Whiting*, 30 Wis. 544.

3. *Chase v. Hathaway*, 14 Mass. 222.

4. *In re Marston*, 79 Me. 34; *Fair-*

field v. Gullifer, 49 Me. 360; *Levering v. Levering*, 64 Md. 399; *Grady v. Hughes*, 64 Mich. 540; *Wood v. Stone*, 39 N. H. 572; *In re Hawley*, 104 N. Y. 250; *In re Underhill*, 117 N. Y. 471; *People's Sav. Bank v. Wilcox*, 15 R. I. 258; 2 Am. St. Rep. 894; *Sayler v. Simpson*, 45 Ohio St. 141; *Davis v. Davis*, 11 Ohio St. 391; *Turner v. Malone*, 24 S. Car. 398; *Mayo v. Tudor*, 74 Tex. 471.

5. In *Fairfield v. Gullifer*, 49 Me. 360, the court said: "Courts of probate are created by statute, and have a special and limited jurisdiction only. The record of the proceedings of such courts must show their jurisdiction. To place a citizen under guardianship, the records of the court must show that he falls within that class of persons named in the statute for whom a guardian may be appointed, and these facts must appear affirmatively as distinct allegations, and not by way of inference from the facts."

In *Jenks v. Howland*, 3 Gray (Mass.) 536, the court said: "The suggestion is made that we are to presume that all things were rightly done and therefore that the money was paid or secured. This rule is not applicable to courts of limited jurisdiction, especially where the question itself is one as to the authority of the court. The record should show the facts which give the jurisdiction. In this case, it does not appear by the record that the money was paid or secured, and the fact is found to be otherwise."

In *Adams v. Jeffries*, 12 Ohio 272; 40 Am. Dec. 477, the court said: "Where the law confers upon courts an authority, not after the course of the common law, over property, whose owners are required to be before them as adversaries, they act as tribunals of special and limited jurisdiction. *Bend v. Susquehanna Bridge, etc., Co.*, 6 Har. & J. (Md.) 130; 14 Am. Dec. 261; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119; *Denning v. Corwin*, 11 Wend. (N. Y.) 647; *Smith v. Fowle*, 12 Wend. (N. Y.) 9. It is necessary that such tribunals show they act within the scope of their pow-

declared courts of record by statute, they are accorded the same presumptions of jurisdiction as arise in favor of the proceedings of other courts of record.¹

When it appears that the court has acted within its jurisdiction, its orders and decrees are not open to collateral attack,² but are

ers. But after jurisdiction is once acquired, however irregular or erroneous their proceedings may be, they cannot be collaterally impeached, and they conclude all persons, unless annulled by *certiorari* or appeal."

1. *People v. Gray*, 72 Ill. 343; *Dakin v. Hudson*, 6 Cow. (N. Y.) 221; *Irwin v. Scriber*, 18 Cal. 499; *Ratcliff v. Ratcliff*, 12 Smed. & M. (Miss.) 134.

In *Obert v. Hammel*, 18 N. J. L. 73, the court said: "The orphans' court is not organized for a single purpose. It has general jurisdiction as broad as the common pleas or circuit court, or perhaps the supreme court itself, exclusive of its appellate and superintending authority. Like them it has a permanent location, a public seal, established terms, records not ambulatory, but fixed in the custody of a distinct officer; it has organized process, executive officers, and its functions do not expire with the fulfillment of any particular duty. The statute of 16th of Dec., 1784, Pat. Rev. Laws 59, though made as far back as the revolution, did not create a court before unknown. It did no more than give a new dress to powers coeval with the province and which the ordinary and his surrogates had always exercised in the prerogative court; professing in its title only to ascertain, to regulate, and to establish. It confers no attribute of a special court for one purpose only, but a jurisdiction for the general administration of justice within certain great departments. The presumptions in favor of limited and general jurisdictions are the same. In *Turner v. Bank of N. A.*, 4 Dall. (U. S.) 8, the Supreme Court of the *United States* acknowledged their circuit court to have only a limited jurisdiction extending to citizens only of different states. It distinguishes jurisdictions into such as are general, such as are limited, and such as are special or inferior, and decides that the circuit court, though limited, is 'entitled to as liberal intendments or presumptions in favor of its regularity as any supreme court.' Therefore, if the orphans' court exercises a limited jurisdiction,

still it is not a special one and is entitled to the same liberal presumption as any supreme court; that what is done is rightly done until reversed. And this court recognized the same principle as far as it could do so in relation to a decree of the orphans' court which came before us on *certiorari* in the case of *State v. Conover*, 9 N. J. L. 338."

2. *Gamble v. Jordan*, 54 Ala. 432; *Roberts v. Flanagan*, 21 Neb. 503; *Shoemaker v. Brown*, 10 Kan. 383; *Bostwick v. Skinner*, 80 Ill. 147; *In re Hawley*, 100 N. Y. 206; *Matter of Harvey*, 3 Redf. (N. Y.) 214; *Bearns v. Gould*, 77 N. Y. 455; *Sims v. Gay*, 109 Ind. 501; *Adams v. Jeffries*, 12 Ohio 272; 40 Am. Dec. 477; *Shroyer v. Richmond*, 16 Ohio St. 455; *People's Sav. Bank v. Wilcox*, 15 R. I. 258; 2 Am. St. Rep. 894; *Com. v. Bunn*, 71 Pa. St. 405; *Pelham v. Murray*, 64 Tex. 477; *Gager v. Henry*, 5 Sawy. (U. S.) 237; *Simmons v. Leonard*, 89 Tenn. 626.

In *People's Sav. Bank v. Wilcox*, 15 R. I. 258; 2 Am. St. Rep. 894, the court said: "We have come to the conclusion, after much consideration, that the rule applicable to courts of limited jurisdiction, which is the better established on principle and authority, is this: That where the jurisdiction depends on some collateral fact which can be decided without deciding the case on its merits, then the jurisdiction may be questioned collaterally and disproved, even though the jurisdictional fact be averred of record and was actually found upon evidence by the court rendering the judgment. *Chew v. Holroyd*, 8 Exch. 249; *Bunbury v. Fuller*, 9 Exch. 111; *Wanzer v. Howland*, 10 Wis. 8; *Clark v. Holmes*, 1 Doug. 390; *Holyoke v. Haskins*, 5 Pick. (Mass.) 20; 16 Am. Dec. 372; *Jochumsen v. Suffolk Sav. Bank*, 3 Allen (Mass.) 87; *Sears v. Terry*, 26 Conn. 285; *Fowle v. Coe*, 63 Me. 245; *Salladay v. Bainhill*, 29 Iowa 555; *Wyatt v. Rambo*, 29 Ala. 520; 68 Am. Dec. 89; *Wilson v. Frazier*, 2 Humph. (Tenn.) 30; *Johnson v. Corpenning*, 4 Ired. Eq. (N. Car.) 216; 44 Am. Dec. 106; *Moore v. Smith*, 11 Rich. (S. Car.) 569; 73 Am. Dec. 122; *Burns v. Van*

binding on all parties until vacated by the court itself or reversed by appropriate appellate proceedings.¹

The decree of a probate court within the sphere of its jurisdiction is binding upon the courts of the several states and of the *United States*.²

b. TERRITORIAL LIMIT.—As a general rule, the probate court

Loan, 29 La. Ann. 560; *Miller v. Jones*, 26 Ala. 247; *Brown v. Foster*, 6 R. I. 564; 1 *Smith's Lead. Cas.* 820. But on the other hand, where the question of jurisdiction is involved in the question which is the gist of the suit so that it cannot be decided without going into the latter question, there the judgment is collaterally conclusive, because the question of jurisdiction cannot be retried without retrying the case on its merits, which is not permissible in a collateral proceeding. *Brittain v. Kinnaird*, 1 Bro. & B. 432; *Reg. v. Bolton*, 1 Q. B. 66; 41 E. C. L. 439; *Basten v. Carew*, 3 B. & C. 649; 10 E. C. L. 211; *Cave v. Mountain*, 1 M. & G. 257; *Staples v. Fairchild*, 3 N. Y. 41; *Angell v. Robbins*, 4 R. I. 493. The distinctions recognized in the rule seem to have been observed by this court in deciding the cases of *Brown v. Foster*, 6 R. I. 564, and *Angell v. Robbins*, 4 R. I. 493, above cited. We think the courts of probate of this state are technically courts of limited jurisdiction. Similar courts have been treated as, or decided to be such, in other *New England* states. *Wattles v. Hyde*, 9 Conn. 10; *Sears v. Terry*, 26 Conn. 273; *Fairfield v. Gullifer*, 49 Me. 360; *Fowle v. Coe*, 63 Me. 245; *Holden v. Scanlin*, 30 Vt. 177; *Hathaway v. Clark*, 5 Pick. (Mass.) 490; *Jochumsen v. Suffolk Sav. Bank*, 3 Allen (Mass.) 87."

In *Dakin v. Hudson*, 6 Cow. (N. Y.) 221, *Savage, C. J.*, said: "The rule is, that the pleading, relying on a proceeding of an inferior jurisdiction, must set forth the facts necessary to give jurisdiction, and it may then say *taliter processum fuit*, etc. Such summary proceedings are contrary to the course of the common law. The surrogate's court is entirely a creature of the statute. It should be shown to the court affirmatively, therefore, that the surrogate had power to make the decree; that the facts upon which he acted gave him jurisdiction of the subject-matter and of the persons before him."

But in *Van Deusen v. Sweet*, 51 N. Y. 378, it was held that it was not necessary that the record of proceedings

of a court of limited jurisdiction should show affirmatively that the court had jurisdiction, but that the necessary facts might be shown by extrinsic proof; and that where the introduction of the record in evidence was objected to only on the ground that the proceedings shown by the record were void, the question of jurisdiction might not be raised upon appeal.

After the fact of jurisdiction is established by the record, then all the presumptions arise in favor of the decree which inherently belong to the judgments of courts of original and general jurisdiction. *Scott v. Porter*, 44 Miss. 364.

1. *McKee v. Whitten*, 25 Miss. 31; *Steen v. Steen*, 25 Miss. 513; *Judge v. Robins*, 5 N. H. 246; *Tebbetts v. Tilton*, 24 N. H. 120; *Wilson v. Edmonds*, 24 N. H. 517; *Hulburt v. Wheeler*, 40 N. H. 73; *Litchfield v. Cudworth*, 15 Pick. (Mass.) 30; *Livingston v. Combs*, 1 N. J. L. 42; *Selin v. Snyder*, 7 S. & R. (Pa.) 172; *Kennedy v. Wachsmuth*, 12 S. & R. (Pa.) 171; 14 Am. Dec. 676; *Otterson v. Gallagher*, 88 Pa. St. 355; *West v. Waddill*, 33 Ark. 575; *Granbery v. Mhoon*, 1 Dev. (N. Car.) 456; *Brown v. Gibson*, 1 Nott & M. (S. Car.) 326; *Cooper v. Duncan*, 20 Mo. App. 355; *State v. Roberts*, 60 Mo. 402; *State v. Dennis*, 39 Kan. 509; *Abbott v. Traybor*, 11 Bush (Ky.) 335; *Sabrinus v. Chamberlain*, 76 Tex. 624; *Franks v. Chapman*, 60 Tex. 46; *Mercer v. Hogan*, 4 Mackay (D. C.) 520.

2. *Simmons v. Saul*, 138 U. S. 439, following *Hanley v. Donoghue*, 116 U. S. 1, 4, wherein the court said: "Judgments recovered in one state of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties;" citing *Buckner v. Finley*, 2 Pet. (U. S.) 592; *McElmoyle v. Cohen*, 13 Pet. (U. S.) 324; *D'Arcy v. Ketchum*, 11 How. (U. S.) 165, 176; *Christmas v. Russell*, 5 Wall. (U. S.) 305; *Thompson v. Whit-*

of the county wherein a deceased person had his last residence or domicile has exclusive jurisdiction over the administration of his estate.¹ But if the deceased left personal property in a state other than that of his residence, the probate court of the county wherein such property is situate may grant administration thereof.² And if such property is to be found in more than one county of the foreign state, the court which first grants administration within such state will have exclusive jurisdiction.³

It has been held that a statutory right of action for wrongfully causing the death of the intestate, is not, in the absence of other property, sufficient to warrant the appointment of an administrator in the county of the domicile in another state;⁴ but it is otherwise if the appointment of the administrator is sought in a county of the state in which the cause of action accrued;⁵ or if ancillary administration be sought in a county of such state.⁶

c. AS LIMITED BY THE SUBJECT-MATTER—(1) *Matters Within the Jurisdiction*.—Probate and surrogates' courts have jurisdiction

man, 18 Wall. (U. S.) 457. See Broderick's Will, 21 Wall. (U. S.) 503; Ellis v. Davis, 109 U. S. 485, where it was held that the decrees of probate courts might not be impeached for fraud in the courts of the *United States*. See also Parker v. Parker, 11 Cush. (Mass.) 519; Crippen v. Dexter, 13 Gray (Mass.) 330.

1. Moore v. Philbrick, 32 Me. 102; 52 Am. Dec. 642; Holt's Estate, 11 Phila. (Pa.) 14; Raborg v. Hammond, 2 Har. & G. (Md.) 42; Schultz v. Houck, 29 Md. 27; Cutts v. Haskins, 9 Mass. 543; Holyoke v. Haskins, 5 Pick. (Mass.) 20; 16 Am. Dec. 372; 9 Pick. (Mass.) 259; Matter of Buckley's Will, 41 Hun (N. Y.) 106. See also PROBATE, vol. 19, p. 164.

If a new county be erected after the death of the intestate, which new county includes his residence, the probate court of the old county, a part of which was erected into such new county, will not thereby be deprived of jurisdiction of the estate of the deceased. Bugbee v. Surrogate of Yates County, 2 Cow. (N. Y.) 471. But it is otherwise if the act of the legislature by which the new county is erected directs the transmission of all records of unfinished business of the residents of the new county to said county and invests its judicial tribunals with immediate jurisdiction of such matters. Grevemberg v. Bradford, 44 La. Ann. 400. And the rule laid down in Bugbee v. Surrogate of Yates County, 2 Cow. (N. Y.) 471, has been changed by § 2480, *New York Code Civ. Proc.*

Guardians.—The probate court cannot exercise jurisdiction over a guardian appointed by the probate court of another state. Bell v. Suddeth, 2 Smed. & M. (Miss.) 532.

In *Colorado*, probate courts may issue process to other counties within the state. Cody v. Raynaud, 1 Colo. 272; Phelps v. Spruance, 1 Colo. 414.

2. Emery v. Hildreth, 2 Gray (Mass.) 231; Pinney v. McGregory, 102 Mass. 186; Clark v. Blackington, 110 Mass. 369; Vaughn v. Barrett, 5 Vt. 333; 26 Am. Dec. 306; Goodlett v. Anderson, 7 Lea (Tenn.) 286; Murphy v. Creighton, 45 Iowa 179; Arnold v. Arnold, 62 Ga. 627; Fox v. Carr, 16 Hun (N. Y.) 434.

But *United States* bonds, deposited by a citizen of another state for safe keeping upon a special certificate of deposit transferable by indorsement with the approval of the company and upon the surrender of which the bonds are to be returned to the depositor, may be obtained by the executor in the foreign domicile of the depositor, and do not necessitate the granting of administration in the county where they are deposited. Shakespeare v. Fidelity Ins., etc., Co., 97 Pa. St. 173.

3. Arnold v. Arnold, 62 Ga. 627; Schouler, Ex. & Adm., § 24. See also FOREIGN EXECUTORS AND ADMINISTRATORS, vol. 8, p. 414.

4. Illinois Cent. R. Co. v. Cragin, 71 Ill. 177.

5. Hutchins v. St. Paul, etc., R. Co., 44 Minn. 5.

6. Hartford, etc., R. Co. v. Andrews, 36 Conn. 213.

over all matters of probate and such other matters as are indicated by the statutes of the various states.¹ But where the constitution or organic act confers upon such courts jurisdiction over matters of probate only, an act of the legislature attempting to extend their jurisdiction over matters properly cognizable only in courts of common law or equity is unconstitutional and void.²

Such courts have been given the power to construe wills, so far at least as is necessary to determine to whom distribution of property shall be made.³ And in some jurisdictions,

1. As a rule, their jurisdiction is exclusive in purely probate matters. *Hart v. Hoss*, 22 La. Ann. 517; *Labranche's Succession*, 23 La. Ann. 292; *Holbrook v. Campau*, 22 Mich. 287; *Simmons v. Saul*, 138 U. S. 439 (construing *Louisiana* statutes); *Steel v. Holladay*, 20 Oregon 70; *Morse v. Smith* (Supreme Ct.), 17 N. Y. Supp. 385; *Meredith v. Scallin*, 51 Ark. 361; *Turner v. Rogers*, 49 Ark. 51; *Goff v. Robinson*, 60 Vt. 633; *Chandler v. Dodson*, 52 Mo. 128; *Gray v. Cruise*, 36 Ala. 559; *Hall v. Hall*, 47 Ala. 295.

But in some states, other courts have concurrent jurisdiction in many matters of probate. *Deans v. Wilcoxon*, 25 Fla. 980; *Alexander v. Leakin*, 72 Md. 199; *Richardson v. Palmer*, 24 Mo. App. 480; *People v. Barton*, 16 Colo. 75.

Where jurisdiction of all matters testamentary and of administration is conferred, it is held to embrace only matters which concern the property which is the subject of administration and which vests in the personal representative. *Hanks v. Neal*, 44 Miss. 228; *Root v. McFerrin*, 37 Miss. 17; 75 Am. Dec. 49; *Hollman v. Bennett*, 44 Miss. 322; *Ferguson v. Hunter*, 70 Ill. 657; *Hayden v. Burch*, 9 Gill (Md.) 79; *Massey v. Massey*, 4 Har. & J. (Md.) 141; *Den v. Ayres*, 13 N. J. L. 153; *Fogelsonger v. Somerville*, 6 S. & R. (Pa.) 271. But it is otherwise if the statute expressly gives the court jurisdiction over the real estate of the deceased. *Dublin v. Chadbourn*, 16 Mass. 441; *Tompkins v. Tompkins*, 1 Story (U. S.) 547 (construing a *Massachusetts* statute).

2. *Perris v. Higley*, 20 Wall. (U. S.) 375; *Locknane v. Martin*, 1 McCah. (Kan.) 60; *Dewey v. Dyer*, 1 McCah. (Kan.) 77; *Mayberry v. Kelley*, 1 Kan. 116; *Bloomington v. DuRell*, 1 Idaho 33; *Moore v. Koubly*, 1 Idaho 55; *Garcia y Perea v. Barela* (N. Mex. 1891), 27 Pac. Rep. 507.

A special proceeding, before the decree of distribution, to determine the interests of all who claim ownership of an interest in an estate of a testator or intestate, either as heirs, devisees, or legatees, is a matter of probate. And an act authorizing such proceeding in a probate court is constitutional. *In re Barton*, 93 Cal. 459. So proceedings by guardians for the sale of the real estate of their wards, are "probate matters," and an act conferring jurisdiction over the same upon the probate court is constitutional. *Winch v. Tobin*, 107 Ill. 212.

Where the constitution provides that probate courts shall have jurisdiction in probate and testamentary matters, and such other jurisdiction as may be provided by law, an act authorizing the probate court to inquire into and determine the damages sustained by owners of abutting property caused by local improvements in a municipal corporation, is not obnoxious to the constitution. *Toledo v. Preston* (Ohio, 1893), 34 N. E. Rep. 353.

3. *In re Verplanck*, 91 N. Y. 439; *Curran v. Sears*, 2 Redf. (N. Y.) 526; *Danser v. Jeremiah*, 3 Redf. (N. Y.) 130; *Kelsey v. Van Camp*, 3 Dem. (N. Y.) 530; *Jones v. Hamersley*, 4 Dem. (N. Y.) 427; *Matter of Thompson*, 5 Dem. (N. Y.) 117; *In re Marcial's Estate* (Surr. Ct.), 15 N. Y. Supp. 89; *In re Kelemen's Will*, 126 N. Y. 73; *Nelson v. McDonald*, 61 Hun (N. Y.) 406; *Matter of Shrader's Will*, 63 Hun (N. Y.) 36; *In re Merriam's Will*, 136 N. Y. 58; *In re Walker's Will*, 136 N. Y. 20; *In re Ullmann's Estate*, 137 N. Y. 403; *Tudor v. James*, 53 Ga. 302; *State v. Ueland*, 30 Minn. 277; *Brook v. Chappell*, 34 Wis. 419; *Schaeffner's Appeal*, 41 Wis. 260; *Franks v. Chapman*, 61 Tex. 576; *Glover v. Reid*, 80 Mich. 228; *Patterson v. Stewart*, 38 Mich. 402; *Kelly v. Reynolds*, 39 Mich. 464; 33 Am. Rep. 418; *Langrick v.*

they may pass on the validity of dispositions of property made therein.¹

They have jurisdiction over the settlement of the accounts of executors and administrators.² And in many jurisdictions they have the appointment of guardians for infants,³ and persons of unsound mind,⁴ and have control over such guardians and the settlement of their accounts.⁵

They may revoke letters of administration for good cause

Gospel, 48 Mich. 185; *Byrne v. Hume*, 84 Mich. 185; *Byrne v. Hume*, 86 Mich. 546.

In *Schaeffner's Appeal*, 41 Wis. 260, the court said: "That the county court has jurisdiction to give construction to wills, when that is necessary to the due administration of the estates of deceased persons, and may exercise the same as fully as can a court of equity, is settled in *Brook v. Chappell*, 34 Wis. 419." See also *Harrison v. Harrison*, 9 Ala. 470; *Blasini v. Blasini*, 30 La. Ann. 388; *Covert v. Sebern*, 73 Iowa 564; *Matter of Brown*, 65 How. Pr. (N. Y. Surr. Ct.) 387; *Giles's Estate*, 11 Abb. N. Cas. (N. Y. Surr. Ct.) 57; *Du Bois v. Brown*, 1 Dem. (N. Y.) 317; *Greene v. Day*, 1 Dem. (N. Y.) 45; *In re York*, 3 Dem. (N. Y.) 187.

1. *Curran v. Sears*, 2 Redf. (N. Y.) 526; *Danser v. Jeremiah*, 3 Redf. (N. Y.) 130; *Jones v. Hamersley*, 4 Dem. (N. Y.) 427; *Matter of Walker's Will*, 136 N. Y. 20; *In re Merriam's Will*, 136 N. Y. 58; *Matter of Ullmann's Estate*, 137 N. Y. 403.

But under the provision of the statute giving the court this power, the surrogate has no authority to pass upon a question of title to property as between a claimant and a representative of the testator's estate. *Matter of Walker's Will*, 136 N. Y. 20.

In determining the validity of dispositions of property, the surrogate is limited in his inquiry to bequests of personal property. He has no jurisdiction as to devises of real estate. *Matter of Merriam's Will*, 136 N. Y. 58.

In *Alabama*, it has been held that the probate court has jurisdiction on the settlement of a testator's estate to decide whether a bequest to charitable uses which is vested in the executor as trustee is or is not valid, and whether it has lapsed. *Johnson v. Longmire*, 39 Ala. 143. See also *Hinckley's Estate*, Myr. Prob. (Cal.) 189; *Crook's Estate*, Myr. Prob. (Cal.) 247.

And the surrogate has no jurisdiction upon proceedings for probate to pass upon the validity, construction, or effect of a disposition of personal property contained in a will executed without the limits of the state. *Tiers v. Tiers*, 2 Dem. (N. Y.) 209. See also *Mackin's Estate*, 14 Phila. (Pa.) 328.

2. *In re Valentine's Estate* (Surr. Ct.), 23 N. Y. Supp. 289; *Matter of Miller*, 70 Hun (N. Y.) 61; *Haddow v. Lundy*, 59 N. Y. 320; *Van Sinderen v. Lawrence*, 50 Hun (N. Y.) 272; *In re Cox's Estate*, 2 Pa. Dist. Ct. Rep. 26; *Barber v. Ross*, 2 Pa. Dist. Ct. Rep. 263; *Judge v. Lane*, 51 N. H. 342; *Ballard v. Kilpatrick*, 71 N. Car. 281; *Williams v. Williams*, 26 La. Ann. 207; *Auguisola v. Arnaz*, 51 Cal. 435; *Search v. Search*, 27 N. J. Eq. 137; *Gulick v. Bruere*, 42 N. J. Eq. 639; *Peters v. Clendenin*, 12 Mo. App. 521; *Ex p. Pearce*, 44 Ark. 509; *Grady v. Hughes*, 64 Mich. 540; *Williams v. Herrick* (R. I. 1893), 25 Atl. Rep. 1099; *Arnold v. Smith*, 14 R. I. 217. See also EXECUTORS AND ADMINISTRATORS, vol. 7, p. 421.

3. *Kraft v. Wickey*, 4 Gill & J. (Md.) 332; 23 Am. Dec. 569; *Dequindre v. Williams*, 31 Ind. 444; *Dorr v. Davis*, 76 Me. 301. See also GUARDIAN AND WARD, vol. 9, p. 90.

4. *Thompson v. Hall*, 77 Me. 160; *State v. Wilcox*, 24 Minn. 143; *In re Marquis*, 85 Mo. 615; *Coleman v. Farrar*, 112 Mo. 54; *Wyman v. Felker*, 18 Colo. 382. See also INSANITY, vol. 11, p. 105.

5. *Com. v. Raser*, 62 Pa. St. 436; *Rowland v. Thompson*, 65 N. Car. 110; *Sudderth v. McCombs*, 65 N. Car. 186; *Jacobs v. Fouse*, 23 Minn. 51; *New England Trust Co. v. Eaton*, 140 Mass. 532; 54 Am. Rep. 493; *Salvant v. Salvant*, 24 La. Ann. 316; *Yeoman v. Younger*, 83 Mo. 424; *Coleman v. Farrar*, 112 Mo. 54; *In re Hawley*, 104 N. Y. 250; *Pyatt v. Pyatt*, 46 N. J. Eq. 285.

shown.¹ In many states they have jurisdiction over the assignment of dower,² over proceedings for the partition of real estate,³ and may order the sale of a portion or the whole of a decedent's real estate, when necessary for the payment of debts⁴ or legacies,⁵ and may order the sale of land by guardians, when necessary for the maintenance and education of their wards.⁶

The following matters have also been held to be within the jurisdiction of probate courts: the determination as to whether a parol trust has been created;⁷ examination into the fairness of an inventory of an estate;⁸ the determination of the question of heirship;⁹ the decreeing of the payment of owelty of partition;¹⁰ the granting of naturalization papers;¹¹ setting aside the sale of real estate under a testamentary power;¹² binding out orphans as apprentices;¹³ the assignment of homesteads;¹⁴ declaring an estate insolvent;¹⁵ the determination of the validity of an ante-nuptial agreement;¹⁶ the removal of obstructions from

1. *Marston v. Wilcox*, 2 Ill. 60; *Williams v. Williams*, 26 La. Ann. 207; *In re Brinson*, 73 N. Car. 278; *Edwards v. Cobb*, 95 N. Car. 64; *Taylor v. Biddle*, 71 N. Car. 1; *Ex p. Pearce*, 44 Ark. 509; *Stoefer v. Ludwig*, 4 S. & R. (Pa.) 201; *Levering v. Levering*, 64 Md. 399; *Hood v. Hood*, 2 Dem. (N. Y.) 583.

2. *Snodgrass v. Clark*, 44 Ala. 198; *Hause v. Hause*, 57 Ala. 262; *Hewitt's Appeal*, 53 Conn. 24; *Irwin v. Brooks*, 19 S. Car. 96; *Tatham v. Ramey*, 82 Pa. St. 130.

3. *Doe v. Smith*, 1 Ind. 451; *Wilkinson v. Stuart*, 74 Ala. 198; *Brinkman v. Huyghe*, 42 La. Ann. 109; *Pennisson v. Pennisson*, 22 La. Ann. 131; *Johnson v. Labatt*, 25 La. Ann. 143; *Freret v. Freret*, 31 La. Ann. 506; *Gillespie v. Twitchell*, 34 La. Ann. 288; *Brown's Appeal*, 84 Pa. St. 457; *Rankin's Appeal*, 95 Pa. St. 358; *Wahab v. Smith*, 82 N. Car. 229; *Davenport v. Caldwell*, 10 S. Car. 317.

4. *Brown v. Rose*, 6 Blackf. (Ind.) 69; *Shaw v. Barksdale*, 25 S. Car. 204; *McNamee v. Waterbury*, 4 S. Car. 156; *Chamberlain v. Chamberlain* (N. J. 1890), 20 Atl. Rep. 1085; *Hine v. Hussey*, 45 Ala. 496; *Collins v. Johnson*, 45 Ala. 548; *Doe v. Hardy*, 52 Ala. 291; *Pettus v. McClannahan*, 52 Ala. 55; *Wilkinson v. Stewart*, 74 Ala. 198; *Barnett v. Kincaid*, 2 Lans. (N. Y.) 320; *Mead v. Jenkins*, 4 Redf. (N. Y.) 369; *Bobb's Succession*, 27 La. Ann. 344; *Norment v. Brydon*, 44 Md. 112; *Connell v. Walker*, 6 Lea (Tenn.) 709; *Hollman v. Bennett*, 44 Miss. 322; *Miskimin's Appeal*, 114 Pa. St. 530; *Doan v. Biteley*, 49 Ohio St. 588.

In *Gregory v. Rhoden*, 24 S. Car. 90,

it was held that under a proceeding in the probate court by a creditor to sell land in aid of assets, the court had jurisdiction to determine in the first instance the validity of an alleged deed under which one of the defendants claimed to hold title from the intestate.

But in *Spoors v. Coen*, 44 Ohio St. 497, it was held that the probate court has no jurisdiction to determine the validity of such a deed; such jurisdiction not having been conferred by statute.

5. *Moore's Appeal*, 84 Mich. 474; *Norriss v. Farrell*, 11 Phila. (Pa.) 271.

6. *Thaw v. Ritchie*, 136 U. S. 519; *McVey v. McVey*, 51 Mo. 406; *Mohon v. Tatum*, 69 Ala. 466; *Thaw v. Ritchie*, 5 Mackey (D. C.) 200; *reversing* 4 Mackey (D. C.) 347; *Reid v. Hart*, 45 Ark. 41.

7. *Lowry's Appeal*, 114 Pa. St. 219.

8. *Pickel v. Alpaugh*, 42 N. J. Eq. 630.

9. *Davis's Estate*, 13 Phila. (Pa.) 407.

10. *Neel's Appeal*, 88 Pa. St. 94.

11. *Matter of Harstrom*, 7 Abb. N. Cas. (N. Y. Surr. Ct.) 391. See also *Dale v. Irwin*, 78 Ill. 170; *People v. McGowan*, 77 Ill. 644; 20 Am. Rep. 254; *State v. Webster*, 7 Neb. 469.

12. *Dundas's Appeal*, 64 Pa. St. 325; *Mussleman's Appeal*, 65 Pa. St. 480.

The court also has jurisdiction over proceedings to set aside an executor's sale ordered by the court itself. *Matter of Lynch*, 33 Hun (N. Y.) 309.

13. *Mitchell v. Mitchell*, 67 N. Car. 307.

14. *Gutham v. Gutham*, 18 Neb. 98.

15. *Hays v. Collier*, 47 Ala. 726.

16. *Matter of Jones' Estate*, 3 Misc. (N. Y. Surr. Ct.) 586.

roads;¹ the assessment of taxes to be paid under a collateral inheritance tax act;² control of the disposition of leasehold property.³

(2) *Matters not Within the Jurisdiction.*—In the absence of express statutory authority, surrogates' courts have no power to try and determine disputed claims.⁴ But in a number of jurisdictions, such power has been conferred upon them to a limited extent.⁵

1. Duggan v. Cox, 78 Ga. 158.

2. Matter of Wolfe's Estate, 137 N. Y. 205.

3. Williams v. Holmes, 9 Md. 281.

4. Giles v. De Talleyrand, 1 Dem. (N. Y.) 97; Greene v. Day, 1 Dem. (N. Y.) 45; Moyer v. Weil, 1 Dem. (N. Y.) 71; Welch v. Gallagher, 2 Dem. (N. Y.) 40; Rudd v. Rudd, 4 Dem. (N. Y.) 335; Matter of Woodworth, 5 Dem. (N. Y.) 156; Shaw's Estate, 1 Tuck. (N. Y.) 352; Tucker v. Tucker, 4 Abb. App. Dec. (N. Y.) 428; Leviness v. Cassebeer, 3 Redf. (N. Y.) 491; Van Sinderen v. Lawrence, 50 Hun (N. Y.) 272; Bowie v. Ghiselin, 30 Md. 553; Gibson v. Cook, 62 Md. 256; Farnham v. Thompson, 34 Minn. 330; Heilig v. Foard, 64 N. Car. 710; Smith v. Pipkin, 79 N. Car. 569; Wadsworth v. Chick, 55 Tex. 241; Wise v. O'Malley, 60 Tex. 588; Edwards v. Mounts, 61 Tex. 398; Cox v. Cox, 77 Tex. 587; Winton's Appeal, 111 Pa. St. 387; Appeal of Odd Fellows' Sav. Bank, 123 Pa. St. 356; Robinson's Estate, 12 Phila. (Pa.) 170; Ditsche's Estate, 13 Phila. (Pa.) 288; Partridge v. Partridge, 46 N. J. Eq. 434.

In Partridge v. Partridge, 46 N. J. Eq. 434, the court said: "Except in the case of insolvent estates, the orphans' court has not now, and never has had, authority to try disputed claims nor to determine who are and who are not creditors of a decedent's estate. The cases denying its jurisdiction in this respect are uniform and decisive. Miller v. Pettit, 16 N. J. L. 427; Vreeland v. Vreeland, 16 N. J. Eq. 527; Middleton v. Middleton, 35 N. J. Eq. 115. So absolute is its incapacity to pronounce judgment on the rights of creditors when the estate is solvent, that it has been held that it cannot, even at the instance of an heir at law, entertain a litigation respecting the validity of the claims on which an application for an order to sell land for the payment of debts is based. Smith v. Smith, 27 N. J. Eq. 446."

Until a court of law shall have definitely pronounced on the validity of

the claim of the creditor, the orphans' court has no power against the protestation of the administrator to decree its payment. Bowie v. Ghiselin, 30 Md. 553.

Where a will creates a trust and appoints the trustee, the court of probate in which the will was proved and the estate administered has not jurisdiction to determine conflicting claims to the income or trust fund and compel the trustee to execute the trust according to the intent of the will. Hayes v. Hayes, 48 N. H. 219.

The surrogate upon a final or litigated accounting of an executor or administrator, has no jurisdiction to try the validity and amount of a disputed demand against the estate. Tucker v. Tucker, 4 Abb. App. Dec. (N. Y.) 428.

Courts of probate have no power to provide for the payment of the debts of a lunatic contracted prior to the lunacy; and where the existence of the debt alleged to be due from a lunatic is denied, a court of probate has no jurisdiction to try the question of debt or no debt. Smith v. Pipkin, 79 N. Car. 569.

Claims against an executor or administrator in his individual capacity are not within the jurisdiction of the orphans' court. Robinson's Estate, 12 Phila. (Pa.) 170.

The orphans' court does not have jurisdiction in the distribution of the funds of an estate to entertain a claim for damages arising from the acts of the executors of that estate. Winton's Appeal, 111 Pa. St. 387.

The surrogate's court is devoid of jurisdiction to adjudicate finally upon the validity of an alleged creditor's disputed claim against a decedent's estate. Greene v. Day, 1 Dem. (N. Y.) 45.

Neither has the surrogate's court jurisdiction of an independent proceeding instituted to compel payment of a debt alleged to be owing to the executor from his decedent's estate. Moyer v. Weil, 1 Dem. (N. Y.) 71.

5. Mellor v. Gilmore, 33 La. Ann.

Such courts have no authority to try the title to real or personal property.¹ Neither may they take cognizance of partner-

1404; *Mercer v. Hogan*, 4 Mackey (D. C.) 520; *Kothman v. Markson*, 34 Kan. 542; *Tillman v. Bowman*, 68 Iowa 450; *McLaughlin v. McLaughlin*, 4 Ohio St. 508; 64 Am. Dec. 603; *Wernse v. McPike*, 76 Mo. 249; *Castlio v. Martin*, 11 Mo. App. 251.

In actions for money judgments against a succession, the probate courts of *Louisiana* have jurisdiction. *Mellor v. Gilmore*, 33 La. Ann. 1404.

The orphans' court of the *District of Columbia* has full power, authority, and jurisdiction to examine, order, and decree upon a credit claimed by an administrator in the settlement of his accounts for an individual claim of his against the deceased. And a decree or judgment of the orphans' court in a contested matter has the same force and effect as the decree of any other court in a contest *inter parties*. *Mercer v. Hogan*, 4 Mackey (D. C.) 520.

In *Iowa*, the adjudication of a claim against an estate is to be deemed a part of the settlement of the estate of which the circuit court as a court of probate has exclusive jurisdiction. *Tillman v. Bowman*, 68 Iowa 450.

In *Kansas*, the probate court has jurisdiction over proceedings to enforce the payment of a claim against the estate of an intestate, and the district court has no jurisdiction of the same, in the absence of special circumstances, requiring the aid of a court of equity. *Kothman v. Markson*, 34 Kan. 542, citing *Collamore v. Wilder*, 19 Kan. 67; *Stratton v. McCandless*, 27 Kan. 296.

By Act of 1853, the probate courts of *Ohio* are authorized to determine every disputed question of fact, or, in their discretion, to cause the same to be determined by the verdict of a jury, which may be necessary to ascertain the amount justly due from the administrator to the distributees of the estate. *McLaughlin v. McLaughlin*, 4 Ohio St. 508; 64 Am. Dec. 603.

In *Missouri*, the Act of March 19, 1866, establishing probate courts in certain counties, invested them with exclusive jurisdiction of suits against the estates of deceased persons commenced after their death. And the fact that a living person is jointly liable with a decedent, does not authorize the circuit court to take jurisdiction. *Wernse*

v. McPike, 76 Mo. 249. See also *Castlio v. Martin*, 11 Mo. App. 251.

But the probate court has no jurisdiction to try an action against a former executor for a debt due by him to the decedent before the latter's death. *McManus v. McDowel*, 11 Mo. App. 436.

In *Mulholland's Estate*, 154 Pa. St. 491, it appeared that a settlement was made between a guardian and his ward shortly after the ward came of age, but the guardian had cut timber from the ward's estate and paid one-third of the proceeds to the intestate's widow which was not included in the guardian's settlement, and it was held that the orphans' court had jurisdiction to compel the mother by citation either to pay over to the guardian the money which she had illegally received or to enter security for the payment of it at her own death to her daughter, the ward.

1. **Real Estate.**—The probate court has no jurisdiction to try the title to real estate as between the representative of an estate and the husband of the decedent, where the latter claims an interest adverse thereto. *Stewart v. Lohr*, 1 Wash. 341; 22 Am. St. Rep. 150.

A superior court sitting as a court of probate may examine into the title to parcels of real estate named in the inventory for the purpose of selecting a homestead, but has no jurisdiction to try and determine the title as between adverse claimants. *Burton's Estate*, 64 Cal. 428.

The orphans' court has no jurisdiction to pass on the title to land sold by trustees who are also executors under the will, after the final accounting by them as executors. *Blumenthal v. Moitz*, 76 Md. 564.

The probate court, on the application to sell lands for division between joint owners or tenants in common, has no jurisdiction to determine complicated questions of law and fact respecting the title; but may pass on the evidence as afforded by deeds of undisputed validity, when the applicant's title is simply denied. *Guilford v. Madden*, 45 Ala. 290.

A probate court cannot determine the title to real property between an heir or devisee and a third party claiming under such heir or devisee by reason of a transaction between them.

ship dealings, and compel an accounting between a surviving partner and the personal representative of a deceased partner.¹

The probate court has no jurisdiction of an action to recover the purchase price of an infant's land sold by his guardian;² nor of proceedings by a county to enforce a claim against the estate of a deceased county treasurer;³ nor of a bill to surcharge and falsify a guardian's settlement;⁴ nor of proceedings to enforce a vendor's lien against land belonging to a decedent's estate;⁵ nor over a complaint in a peace proceeding;⁶ nor of a suit on an administrator's or guardian's bond, unless such jurisdiction is conferred by statute;⁷ nor of an action against a guardian for the

Farnham v. Thompson, 34 Minn. 330; Dobberstein v. Murphy, 44 Minn. 526.

Personal Property.—Where a third person claims property in the hands of an administrator, the court of probate has no power to try the question of title and to make an order that the administrator deliver the property to the claimant. Homer's Appeal, 35 Conn. 113. See also Smith v. Gilmore, 13 Mo. App. 155.

Where, on the settlement of an executor, his accounts are objected to on the ground that he has personal property in his possession not accounted for, and the executor sets up that such property is held by him in trust for a minor whose property it is, the probate court has no power to try the title to such property. *In re Haas' Estate*, 97 Cal. 232.

1. *In re Miller's Estate*, 136 Pa. St. 349; Wiley's Appeal, 84 Pa. St. 270; Ainey's Appeal, 2 Penny. (Pa.) 192; King v. White, 63 Vt. 158; Choate v. O'Neal (Ark. 1893), 21 S. W. Rep. 470; Culley v. Edwards, 44 Ark. 423; 51 Am. Dec. 614; Altemus' Estate, 32 La. Ann. 364; Walmsley v. Mendelsohn, 31 La. Ann. 152.

The probate court has no jurisdiction to adjust the partnership accounts between a deceased and surviving partner. But when their accounts have been settled and a balance struck against a partner who afterwards dies, a probate court may render judgment for this balance against his estate. Culley v. Edwards, 44 Ark. 423; 51 Am. Dec. 614.

And where the adjustment of the decedent's estate involved at the same time the adjustment of the affairs of a partnership, of which the decedent and the accountant were both members, and this adjustment was acquiesced in by the surviving partners and nothing remained to be paid or collected, it is too late for the accountant, sixteen

years after he invoked the aid of the orphans' court in his own behalf, to allege that the court did not possess jurisdiction. Brown's Appeal, 89 Pa. St. 139. But the court afterwards said that there was nothing in this case that in any way qualified the rule that the probate court had no jurisdiction over such partnership affairs. *In re Miller's Estate*, 136 Pa. St. 349.

In *Oregon*, the county court, sitting as a probate court, has concurrent jurisdiction with the circuit court over such partnership matters. Gardner v. Gillihan (Oregon, 1891), 27 Pac. Rep. 220.

In *Missouri*, it is provided by statute that the final settlement of a partnership on the death of a co-partner must be made in the probate court, and until such final settlement the circuit court has no jurisdiction. Ensworth v. Curd, 68 Mo. 282; Caldwell v. Hawkins, 73 Mo. 450.

In some jurisdictions they have power to enforce accountings by executors, administrators, guardians, etc. Cass v. Cass, 61 Hun (N. Y.) 460; *In re Rogers' Estate* (Surr. Ct.), 16 N. Y. Supp. 197; Matter of Adams, 2 Redf. (N. Y.) 66; Jennings v. Jones, 2 Redf. (N. Y.) 95; Gibbs v. Lum, 29 La. Ann. 526.

But in *Michigan*, when a trustee receives money belonging to a trust fund created by will, a court of chancery, and not the probate court, has jurisdiction to enforce an accounting. McBride v. McIntyre, 91 Mich. 406.

2. Peterson v. Baillif (Minn. 1893), 54 N. W. Rep. 185.

3. Cole County v. Schmidt (Mo. 1889), 10 S. W. Rep. 888.

4. Roy v. Giles, 4 Lea (Tenn.) 535.

5. Ross v. Julian, 70 Mo. 209.

6. State v. Brazier, 37 Ohio St. 78.

7. Woods v. Legg, 91 Ala. 511; Timmins v. Bonner, 58 Tex. 554.

price of goods sold to his ward;¹ nor of an action to collect a debt due the intestate before his death.²

Unless expressly authorized by statute, probate courts have no power to issue writs of *habeas corpus*³ or *certiorari*,⁴ or to grant injunctions.⁵ Neither may they adjudicate upon a case stated;⁶ nor determine whether or not mutual wills constitute a binding contract;⁷ nor render judgment against an executor or administrator in favor of legatees;⁸ nor determine a trustee's right of set-off.⁹

d. JUDICIAL POWERS—(1) In General.—It has been held that a bill of review will not lie in a probate court.¹⁰ But while it is true that appeal is the proper remedy for errors of law,¹¹ yet, in some jurisdictions, decrees may be attacked by bill of review or similar proceedings, for fraud, newly discovered evidence, clerical error, or the like;¹² and in others, the courts possess the power

In *Missouri*, jurisdiction over actions on administrators' bonds is conferred upon the probate court by statute. *State v. Stafford*, 73 Mo. 658; *State v. Withrow*, 108 Mo. 1; *State v. Maulsby*, 53 Mo. 500; *State v. Waters*, 54 Mo. 112.

In *Brooke's Appeal*, 102 Pa. St. 150, it was held that the orphans' court had jurisdiction to compel the surety of a guardian to surrender to the guardian, property belonging to the minors' estate, which had been deposited by the guardian in the hands of his surety as security.

1. *Creswell v. Matthews*, 52 Ark. 87.

2. *Overbeck v. Cornwell*, 29 Ill. App. 595.

3. *Lee's Case*, 1 Minn. 60.

In *Georgia*, jurisdiction to issue writs of *habeas corpus* is, by the code, conferred upon the ordinary, and not upon the court of ordinary. *Moore v. Roberson*, 63 Ga. 506.

In *Missouri*, the judge of probate has power to take bail in case a prisoner is held to answer upon a charge of crime in his county. *State v. McElhaney*, 20 Mo. App. 584.

But after indictment, a judge of such court of a county other than that where the indictment is pending has no power to take a recognizance for the appearance of the prisoner, unless he is brought before such judge upon a writ of *habeas corpus*. *State v. Ferguson*, 50 Mo. 409.

4. *Barlow v. Esterling*, Walk. (Miss.) 302.

But in *Alabama*, the probate judge is authorized to award a *certiorari* returnable into the circuit court. This

power is derived from the statute and cannot be extended by construction. *Wilson v. Scott*, 42 Ala. 348.

5. *American Colonization Soc. v. Wade*, 8 Smed. & M. (Miss.) 610.

6. *Holt's Estate*, 11 Phila. (Pa.) 13.

7. *Lansing v. Haynes*, 95 Mich. 16.

8. *Piggott v. Ramey*, 2 Ill. 145; *McLaughlin v. McLaughlin*, 4 Ohio St. 508; 64 Am. Dec. 603.

9. *Abbott v. Foote*, 46 Mass. 333; 4 Am. Rep. 314; *Ball v. Hill*, 48 Tex. 634.

10. *Harris v. Fisher*, 5 Smed. & M. (Miss.) 74; *Farmers', etc., Bank v. Tappan*, 5 Smed. & M. (Miss.) 112; *Washburn v. Phillips*, 5 Smed. & M. (Miss.) 600.

11. *Offutt v. Gott*, 12 Gill & J. (Md.) 385; *Wales v. Willard*, 2 Mass. 120; *Sumner v. Parker*, 7 Mass. 83; *Ammidown v. Kinsey*, 144 Mass. 587; *Ex p. Sellers*, Walk. (Miss.) 414; *Lyles v. McClure*, 1 Bailey (S. Car.) 7; 19 Am. Dec. 648; *Crosland v. Murdock*, 4 McCord (S. Car.) 217; *Chadwick v. Chadwick*, 6 Mont. 566; *In re Gray*, 42 Hun (N. Y.) 411; *People v. Lott*, 42 Hun (N. Y.) 408; *Matter of Collins*, 41 Hun (N. Y.) 403; *Baldwin's Appeal*, 112 Pa. St. 2.

12. After the decision of *Harris v. Fisher*, 5 Smed. & M. (Miss.) 74, the legislature of the State of *Mississippi* passed an act authorizing the courts of probate in that state to entertain bills of review for the revision of their decrees. *Hooker v. Hooker*, 10 Smed. & M. (Miss.) 599; *Pendleton v. Prestridge*, 12 Smed. & M. (Miss.) 302; *Austin v. Lamar*, 23 Miss. 189.

A bill of review may be brought in

summarily to vacate and set aside their decrees and orders for such cause shown.¹

It has been held that a court of chancery may interfere to grant relief from a decree of the probate court obtained by fraud, or to correct manifest errors in a decree.² But, on the other hand, there is eminent authority to the effect that a court of chancery should not so interfere.³

the probate court in *Texas*. *Fortson v. Alford*, 62 Tex. 576.

In *Gale v. Nickerson*, 144 Mass. 415, it was held that a petition to revise a decree of the probate court allowing a will, which decree had been affirmed upon appeal, must be heard in the first instance in the probate court. The court said: "We think there is an inherent power in probate courts in cases where justice clearly requires it, to revise such a decree. Thus, if, after a will is proved, a later will or codicil is discovered, or, if there is newly discovered evidence proving that the will is forged, the court may reopen the case and revise the decree. This subject is fully discussed in *Waters v. Stickney*, 12 Allen (Mass.) 1; 90 Am. Dec. 122."

So the accounts of executors and administrators may be opened in the probate court for correction where mistake is shown. *Blake v. Pegram*, 101 Mass. 592; *Denholm v. McKay*, 148 Mass. 434.

1. *Wells v. Wallace*, 2 Redf. (N. Y.) 58; *Hart v. Duffy*, 2 Redf. (N. Y.) 151; *Matter of Tilden*, 67 How. Pr. (N. Y. Supreme Ct.) 447; *Singer v. Hawley*, 3 Dem. (N. Y.) 571; *Olmsted v. Long*, 4 Dem. (N. Y.) 44; 17 Abb. N. Cas. (N. Y.) 320; *Hoyt v. Hoyt*, 112 N. Y. 493; *Wiggin v. San Francisco County*, 68 Cal. 398; *In re Gragg*, 32 Minn. 142; *Jackson v. Reynolds*, 39 N. J. Eq. 313, *overruling Reynolds v. Jackson*, 36 N. J. Eq. 515; *Baldwin's Appeal*, 112 Pa. St. 2; *Montgomery v. Williamson*, 37 Md. 421; *In re Marquis*, 85 Mo. 615; *Rottman v. Schmucker*, 94 Mo. 139.

It has been held that the court may not set aside its decrees or orders after the term in which they were rendered. *Alexander v. Nelson*, 42 Ala. 462; *Bryant v. Horn*, 42 Ala. 496.

But in *Re Marquis*, 85 Mo. 615, it was held that a probate court could, at a subsequent term, set aside its judgment adjudging a person insane and appointing a guardian for him.

A surrogate's court possesses no power to open a decree and grant a hearing on the ground of an error of

law. *Singer v. Hawley*, 3 Dem. (N. Y.) 571.

The surrogate has power to open, vacate, modify, or set aside, or to enter as of a former time, a decree or order of his court, or to grant a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause. *Olmsted v. Long*, 4 Dem. (N. Y.) 44.

A probate court may vacate its order or judgment procured by fraud, misrepresentation, or through surprise or excusable inadvertance or neglect. *In re Gragg*, 32 Minn. 142.

But it was held in *State v. Sibley County Ct.*, 33 Minn. 94, that after a probate court has made an order for the sale of real property of an estate, and it has been accordingly sold, the sale confirmed by the court and a deed executed to the purchaser as directed by the order of confirmation, and the administrator has been discharged, the matter is out of the jurisdiction of the probate court, and it cannot entertain an application to review and set aside the sale proceedings. The court distinguished this case from *In re Gragg*, 32 Minn. 142, in that the subject-matter of the order had passed out of the jurisdiction of the court.

The probate court has power to correct manifest errors on the record. *Milne's Appeal*, 99 Pa. St. 483; *Hatrick's Estate*, 13 Phila. (Pa.) 275.

But a surrogate may not grant the reargument of matters disposed of by his predecessor. *Melcher v. Stevens*, 1 Dem. (N. Y.) 123.

And in *Johnson v. Johnson*, 26 Ohio St. 357, it is held that a probate court has no power to vacate or modify its own orders previously made in the settlement of accounts of executors and administrators.

2. *Brackenridge v. Holland*, 2 Blackf. (Ind.) 377; 20 Am. Dec. 123; *Allen v. Clark*, 2 Blackf. (Ind.) 343; *Reinhardt v. Gartrell*, 33 Ark. 727; *Liddicoat v. Treglown*, 6 Colo. 47; *In re Hudson's Estate*, 63 Cal. 454; *Dean v. Santa Barbara County Ct.*, 63 Cal. 473.

3. *Broderick's Will*, 21 Wall. (U. S.)

As a rule, a surrogate or probate judge has power to enforce his proper orders and decrees by attachment.¹

(2) *Equity Powers*.—As a rule, courts of probate proceed after the manner of courts of equity,² and, within the limits of their

503; wherein there is an elaborate and critical review of the English and American cases on the subject. Justices Clifford and Davis dissented, however, for the reason, among others, that the leading authorities, cited to support the majority opinion, admitted that the jurisdiction did exist in cases where there was no other remedy. Nevertheless, in *Ellis v. Davis*, 109 U. S. 485, the court approved the majority opinion in the case of *Broderick's Will*, 21 Wall. (U. S.) 503, saying: "It is contended, however, for the appellants, that the bill ought to have been maintained for the purpose of decreeing the invalidity of the will of Mrs. Dorsey and annulling the probate, so far at least as it gave effect to the will as a muniment of title. It is well settled that no such jurisdiction belongs to the circuit courts of the *United States* as courts of equity, for courts of equity, as such by virtue of their general authority to enforce equitable rights and remedies, do not administer relief in such cases. The question in this aspect was thoroughly considered and finally settled by the decision of this court in the case of *Broderick's Will*, 21 Wall. (U. S.) 503. It was elaborately considered and finally determined in *England* by the House of Lords in the case of *Allen v. McPherson*, 1 H. L. Cas. 191." This doctrine was again approved in *Simmons v. Saul*, 138 U. S. 459.

1. *Saltus v. Saltus*, 2 Lans. (N. Y.) 9; *Matter of Watson*, 3 Lans. (N. Y.) 408; 5 Lans. (N. Y.) 466; *People v. Marshall*, 7 Abb. N. Cas. (N. Y. Surr. Ct.) 38; *Sherry's Estate*, 7 Abb. N. Cas. (N. Y. Surr. Ct.) 390; *In re Brinson*, 73 N. Car. 278.

The surrogate, having made an order directing an executor to pay moneys in accordance with a decree entered upon his accounting, may, if he neglects to comply with the order, arrest the executor by attachment. *Saltus v. Saltus*, 2 Lans. (N. Y.) 9; *People v. Marshall*, 7 Abb. N. Cas. (N. Y. Surr. Ct.) 380.

But such attachment cannot be issued unless it be shown that he had the fund in his possession at the time of the decree. *Sherry's Estate*, 7 Abb. N. Cas. (N. Y. Surr. Ct.) 390.

The surrogate is not authorized to inflict a fine and then commit for non-payment of the fine. *Matter of Watson*, 3 Lans. (N. Y.) 408; 5 Lans. (N. Y.) 466.

A probate court has power to order the removal of the public administrator and at the same time order that he make immediate return and settlement of estates in his hands, and for refusal to obey such order the court may punish him for contempt. *In re Brinson*, 73 N. Car. 278.

But in *Gilliam v. McJunkin*, 2 S. Car. 442, it was held that a judge of probate had no jurisdiction to issue a warrant to arrest and imprison an administrator for a failure to comply with the terms of a money decree. And the probate judge having ordered such arrest, the administrator was discharged on *habeas corpus* by a circuit judge.

2. *Cowden v. Dobyms*, 5 Smed. & M. (Miss.) 82; *Satterwhite v. Littlefield*, 13 Smed. & M. (Miss.) 302; *McWillie v. Van Vacter*, 35 Miss. 428; 72 Am. Dec. 127.

"When it is said, as it has often been said, that the orphans' court is a court of equity, all that is meant is that, in the exercise of its limited jurisdiction, conferred entirely by statute, it applies the rules and principles of equity." Sharswood, J., in *Willard's Appeal*, 65 Pa. St. 267.

"The orphans' courts, in matters within their jurisdiction, proceed on the same principles as a court of chancery." Tilghman, C. J., in *Guier v. Kelly*, 2 Binn. (Pa.) 294.

"Although the orphans' court has been called a court of equity in respect to the few subjects within its jurisdiction, the ancillary powers of such a court have not been given to it. It is a special tribunal for special cases, and its resemblance to a court of equity consists in its practice of proceeding by a petition and answer containing the substance, but not the technical subtleties and nice distinctions of a bill in equity, by which, however, justice is obtained more conveniently and as certainly as in courts of equity, purely so called." Gibson, C. J., in *Brinker v. Brinker*, 7 Pa. St. 55.

jurisdiction, possess many of the powers usually exercised by courts of chancery.¹

Like courts of chancery, they are in some jurisdictions required to make up issues of fact to be tried by a jury or a court of law in cases where doubtful questions of fact are contested.² And in

1. *Powell v. North*, 3 Ind. 392; 56 Am. Dec. 513; *Dehart v. Dehart*, 15 Ind. 167; *Yorks' Appeal*, 110 Pa. St. 69; *Fidelity Ins., etc., Co. v. Gazzam*, 2 Pa. Dist. Ct. Rep. 569; *Stockton's Appeal*, 64 Pa. St. 58; *Willard's Appeal*, 65 Pa. St. 265; *Johnson's Appeal*, 114 Pa. St. 132; *Swasey v. Jaques*, 144 Mass. 135; 59 Am. Rep. 65; *Phillips v. Phillips* (N. J. 1889), 18 Atl. Rep. 579; *Sherman v. Lanier*, 39 N. J. Eq. 249; *Carter's Appeal*, 59 Conn. 576; *Donovan's Appeal*, 41 Conn. 551; *Sanders v. Soutter*, 126 N. Y. 193; *Dunn's Estate*, Myr. Prob. (Cal.) 122; *Catlin v. Wheeler*, 49 Wis. 507.

In *Swasey v. Jaques*, 144 Mass. 135; 59 Am. Rep. 65, the court said: "A bill in equity is the proper proceeding for obtaining the instructions of the court upon the construction to be given to a will. The jurisdiction in equity to hear and determine all matters relating to trusts created by will, was long ago conferred upon the probate courts. Rev. Stat., ch. 69, § 12, and commissioner's note; Gen. Stat., ch. 100, § 22. Pub. Stat., ch. 141, § 27. By the statutes of 1873, ch. 224, § 3, 'probate courts in the several counties may concurrently with the supreme judicial court hear and determine all matters arising under wills in the same manner as is now provided by law in relation to trusts created by will,' and by the statutes of 1879, ch. 183, § 1, 'the supreme judicial court and the probate courts in the several counties may, on petition, hear and determine all matters and questions arising under wills, provided, however, that any party aggrieved by the decision of the probate court thereupon may appeal therefrom to the supreme judicial court as now provided by law.'" See *Huntress v. Place*, 137 Mass. 409; *Wright v. White*, 136 Mass. 470.

In *Donovan's Appeal*, 41 Conn. 551, the court said: "The court of probate in this state as to all matters within its jurisdiction is a court of equity as well as a court of law, and commissioners on insolvent estates take cognizance of equitable as well as legal claims." And in *Carter's Appeal*, 59

Conn. 587, the court said: "It is true that courts of probate do not have any general equity jurisdiction, but where an estate is in settlement before a court of probate, and an equity arises between the persons interested in such estate incidental to and growing out of such interest, then that court not only may, but must, apply and enforce it in order to do justice to all parties and to settle the estate. To this extent courts of probate have the fullest equity powers;" citing *Beach v. Norton*, 9 Conn. 198; *American Bible Soc. v. Wetmore*, 17 Conn. 187; *Ashmead's Appeal*, 27 Conn. 241; *Mix's Appeal*, 35 Conn. 123; 95 Am. Dec. 222; *Vail's Appeal*, 37 Conn. 185; *Hewitt's Appeal*, 53 Conn. 24; *Chase's Appeal*, 57 Conn. 236.

In *Missouri*, it is said that courts of probate have no equity powers. *Butler v. Lawson*, 72 Mo. 227; *Burckhardt v. Helfrich*, 77 Mo. 376.

2. *Barroll v. Reading*, 5 Har. & J. (Md.) 175; *Miller v. Dorsey*, 9 Md. 317; *Sumwalt v. Sumwalt*, 52 Md. 338; *Keller v. De Franklin*, 5 Cal. 432; *Clendaniels' Estate*, 13 Phila. (Pa.) 248; *Boyer's Estate*, 13 Phila. (Pa.) 254; *Knauss' Appeal*, 49 Pa. St. 419; *Compton v. Compton*, 6 Smed. & M. (Mass.) 194; *Wood v. Skinner*, 79 N. Car. 92.

In *Maryland*, the finding of the jury is conclusive upon the orphans' court. Thus, in *Sumwalt v. Sumwalt*, 52 Md. 338, the court said: "The proceeding in this case is under article 93, section 250 of the code, which requires the orphans' court in all cases of controversy therein, if either party requires it, to direct an issue or issues to be made up and sent to any court of law convenient for trying the same. The obvious purpose of this provision, as said in *Cain v. Warford*, 3 Md. 462, and *Pegg v. Warford*, 4 Md. 393, is 'to enable the orphans' court to advertise itself of the real facts of the case.' These, when found by the jury, are conclusive upon the orphans' court which has no discretion but must enter the judgment in conformity to the finding of the jury. *Pegg v. Warford*, 4 Md. 394; *Browne v. Browne*, 22 Md. 110; *Waters v. Waters*, 28 Md. 24."

some jurisdictions, they have power to compel the specific performance of contracts for the sale of real estate, where such contracts affect estates which are under the control of the court.¹

c. WHEN JUDGE IS INTERESTED IN ESTATE—(See also JUDGE, vol. 12, p. 45).—A judge of probate who has an interest in an estate of a deceased person is disqualified from acting judicially with reference to the estate.² The same is true if he is nearly related to the parties interested,³ or has acted as attorney or

But in *Pennsylvania*, it seems that such findings are no more binding on a judge of the orphans' court than they would be on the chancellor in a court of equity. In *Bicking's Appeal*, 2 Brewst. (Pa. Supreme Ct.) 202, the court said: "Undoubtedly when, upon a consideration of the evidence, the mind of the judge rests in doubt, he ought to give conclusive effect to the determination of the tribunal, whether jury or auditor, to which it is referred in the first instance and which has much better opportunities of forming a right judgment upon the weight of evidence, and most especially the credit to be given to the witnesses. But if the judge has no doubt—if the case to his mind is plain, he is bound to follow the dictates of his own judgment and decree accordingly."

1. *Luchterhand v. Sears*, 108 Mass. 552; *Lynes v. Hayden*, 119 Mass. 482; *Servis v. Beatty*, 32 Miss. 52; *Houston v. Killough*, 80 Tex. 296; *Bell's Appeal*, 71 Pa. St. 465; *White v. Patterson*, 139 Pa. St. 429; *Rafferty's Estate*, 9 Phila. (Pa.) 336; *Boyle v. Moss*, 4 Blackf. (Ind.) 535; *Matter of Lynch*, 67 How. Pr. (N. Y. Surr. Ct.) 436; *Adams v. Lewis*, 5 Sawy. (U. S.) 229; *Aspley v. Murphy*, 50 Fed. Rep. 376.

2. The interest should be one that is visible, demonstrable, and capable of precise proof, and not a mere possible or contingent interest. It is not a mere bias or prejudice which would be sufficient to set aside a juror. It must be a pecuniary or proprietary interest; a relation by which, as a debtor or a creditor, an heir or a legatee, or otherwise, he will gain or lose something by the result of the proceedings. *Northampton v. Smith*, 11 Met. (Mass.) 390.

A judge of probate having a valid demand against the estate is interested within the rule and disqualified. *Ex p. Cottle*, 5 Pick. (Mass.) 483; *Coffin v. Cottle*, 9 Pick. (Mass.) 287.

And this is true though he determine in his own mind not to enforce his

claim. *Sigourney v. Sibley*, 21 Pick. (Mass.) 101; 32 Am. Dec. 248.

But a bequest of money in a will to trustees for the benefit of indigent persons in the town where the judge of probate resides, does not make him so much interested as to oust his jurisdiction. *Northampton v. Smith*, 11 Met. (Mass.) 390.

So a judge of probate who is a debtor to the testator on a promissory note secured by mortgage, is disqualified. *Gay v. Minot*, 3 Cush. (Mass.) 352.

But the placing of property belonging to the estate in the hands of the surrogate, pending a contest as to the probate of the will, does not disqualify him to act, as he is responsible for the property, in any event, to the executor if the will is proved, or to the administrator if intestacy is established. *In re Hancock's Will*, 91 N. Y. 284, *reversing* 27 Hun (N. Y.) 78.

3. A judge of probate is disqualified to appoint his wife's brother administrator of the estate of a deceased person of which her father is a principal creditor. *Hall v. Thayer*, 105 Mass. 219; 7 Am. Rep. 513.

But he is not disqualified by reason of the fact that one of the creditors of the estate is his father-in-law, if such creditor is not a party to the proceedings before him. *Ex p. Aldrich*, 110 Mass. 189.

And his jurisdiction is not affected by the fact that his aunt by marriage is a legatee. *In re Marston*, 79 Me. 25.

New York Code Civ. Proc., § 46, provides that the judge shall not sit in the trial of a cause if he is related by consanguinity or affinity to any party in the controversy within the sixth degree.

In *Hopkins v. Lane*, 6 Dem. (N. Y.) 12, it was held that the fact that the surrogate was related by affinity within the sixth degree to one designated a legatee in the will, the latter not being a party to the special proceedings for

counsel in a matter which would otherwise be cognizable in his court; in either case the judge is disqualified.¹

the probate of the same, did not operate as a disqualification.

1. *New York Code Civ. Proc.*, § 46.

In *Moses v. Julian*, 45 N. H. 52; 84 Am. Dec. 114, it was held that a judge of probate who had written a will, was disqualified to sit on the probate of it. In a learned discussion of the general subject of the disqualification of judges, Bell, C. J., said: "The judge, who is satisfied that he is legally disqualified to act in a case, ought not to wait until the parties object to him, but should refuse to hear the cause, by an entry on the docket that he does not sit in the case. *Edwards v. Russell*, 21 Wend. (N. Y.) 64; *Paddock v. Wells*, 2 Barb. Ch. (N. Y.) 333; *North River Steamboat Co. v. Livingston*, 3 Cow. (N. Y.) 724; *Ten Eyck v. Simpson*, 11 Paige (N. Y.) 179; *Great Charte v. Kensington*, 2 Stra. 1173; *Bouvier L. Dict.*, art., "Judge;" *Pothier Pro. Civ.*, ch. 2, § 5. This is the immemorial practice of the courts, and of constant occurrence. *Reg. v. Justices*, 14 Eng. L. & Eq. 93; 16 Jur. 612. As the judge is not supposed to know anything of the cases to be tried until the trial is commenced, unless by accident, it may often happen that he knows nothing of any cause of disqualification. It is, therefore, the right and duty of the party who desires to object to, or recuse a judge, as he has a right to do (2 Dom. 559), to make his objection by a petition to the court, setting forth the facts on which he relies as a disqualification, and requesting that the judge would not sit on the trial of the case. *Just. Code L.* 1, tit. 1, 16; *Voet ad Pand. L.* 5, tit. 1, 43. The facts being unquestioned, the judge may cause the entry to be made that he does not sit. If the facts alleged are not admitted by the judge, or are denied by the adverse party, it is the duty of the party objecting to lay before the court the proof of their truth, upon which the other judges, if others are present, will decide, or the judge, or justice, if alone, will decide. *Pothier Pro. Civ.*, ch. 2, § 5. A judge ought not to withdraw upon a mere suggestion, unless the cause of recusation is true in fact, and sufficient in law; because the office of judge is one necessary for the administration of justice, and from which a judge should not be

permitted to withdraw without sufficient grounds. *Pothier Pro. Civ.*, ch. 2, § 5. The judge recused for good cause should leave the bench when the case is tried or heard, if other qualified judges are present to conduct the trial, or hear the case; *Reg. v. Justices*, 14 Eng. L. & Eq. 93; though it is usual for him to take a seat by his counsel, where he has an interest in the cause. If the judge recused is the sole judge present at the term, he may make all such orders as are merely formal, or as are necessary for the continuance of the cause to a future term, at which a qualified judge may be present. *Ten Eyck v. Simpson*, 11 Paige (N. Y.) 179; *People v. Spalding*, 2 Paige (N. Y.) 326; *Buckingham v. Davis*, 9 Md. 324; *Haydenfeldt v. Towns*, 27 Ala. 243; *State v. Collins*, 3 Wis. 330. If the sole judge is satisfied that the ground of recusation is well founded, he should decline to act in the case, and dismiss it. *Edwards v. Russell*, 21 Wend. (N. Y.) 64. If the facts are known to the party recusing, he is bound to make his objection before issue joined, and before the trial is commenced, otherwise he will be deemed to have waived the objection in cases where a statute does not make the proceedings void. *Adams v. State*, 11 Ark. 466; *Shropshire v. State*, 12 Ark. 190. After a trial has been commenced no attempt to recuse a judge will be listened to, unless it is shown affirmatively that the party was not aware of the objection, and was in no fault for not knowing it. *Voet ad Pand. L.* 5, tit. 2, 48; *Peebles v. Rand*, 43 N. H. 342. Except in cases where a statute forbids it (*Oakley v. Aspinwall*, 3 N. Y. 547), the parties, by a joint application to the judge, suggesting the ground of recusation, expressly waiving all objection on that account, and requesting him to proceed with the trial or hearing, signed by them, or their attorneys, may give full power to the judge to proceed, as if no objection existed. *Paddock v. Wells*, 2 Barb. Ch. (N. Y.) 333; *Pothier Pro. Civ.*, ch. 2, § 5; see *Walker v. Rogan*, 1 Wis. 597. This is denominated in civil and Scotch law prorogated jurisdiction, *Ersk. Inst.*, tit. 2, § 27; *Dig. Nov.*, 11; 1 *Hein. ad Pand. L.* II, tit. 1, § 252; and a tacit prorogation is inferred

against a plaintiff who brings his cause before a judge who is known to him to be disqualified to try it, and against a defendant, who, knowing the existence of just grounds of recusation, appears and, without objecting, offers defenses in the cause, either dilatory or peremptory. 1 Hein. ad Pand. L. II, tit. 1, § 255; Ersk. Inst., tit. 2, § 27; Platt v. New York, etc., R. Co., 26 Conn. 544; Groton v. Hurlburt, 22 Conn. 178; Walsh v. Collinger, Cro. Eliz. 320; Ellsworth v. Moore, 5 Iowa 486; Reg. v. Cheltenham Com'rs, 1 Q. B. 467; Baldwin v. Calkins, 10 Wend. (N. Y.) 167.

"But a party, who has once properly declined the jurisdiction of a judge, will not be deemed to have waived it by any subsequent defense. Ersk. Inst. tit. 2, 27. At common law, the recusation of a judge does not affect the jurisdiction, but is merely ground to set aside the judgment on error or appeal. Dimes v. Grand Junction Canal, 17 Jur. 73; 16 Eng. L. & Eq. 63; Gorrill v. Whittier, 3 N. H. 268; Hesketh v. Braddock, 3 Burr. 147; Jenk. 90, pl. 74; 14 Vin. Ab. 573, pl. 28, except in cases of inferior tribunals, where no writ of error or appeal lies. The language of statutes may be such as to render the proceedings void. Higbie v. Leonard, 1 Den. (N. Y.) 186; Davis v. Alden, 11 Pick. (Mass.) 466; 22 Am. Dec. 386; Coffin v. Cottle, 9 Pick. (Mass.) 287; Sigourney v. Sibley, 21 Pick. (Mass.) 101; 32 Am. Dec. 248; Gay v. Minot, 3 Cush. (Mass.) 352; Foot v. Morgan, 1 Hill. (N. Y.) 654; Bacon, Appellant, 7 Gray (Mass.) 391; otherwise in courts of common-law jurisdiction they are generally voidable only. Cottle, Appellant, 5 Pick. (Mass.) 483; Edwards v. Russell, 21 Wend. (N. Y.) 63; Haydenfeldt v. Towns, 27 Ala. 423. The 35th article of the Bill of Rights of *New Hampshire* declares that 'it is essential to the rights of every individual, his life, liberty, property and character, that there should be an impartial interpretation of the laws and administration of justice.' And 'it is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit.' This is but the expression of a well-known rule of universal justice everywhere recognized, which the people of this state were anxious to secure as far as possible from all doubts, or possibility of legislative interference. It is one of the great principles of the common law, for which

the people of *England* had struggled for ages, and which they ultimately succeeded in establishing against the strenuous efforts of a tyrannical government. We can have no higher authority than this for denouncing as illegal everything which interferes with the entire impartiality of every legal tribunal. I. No man ought to be judge in his own cause, is a maxim aimed at the most dangerous source of partiality in a judge. Peck v. Freeholders, 21 N. J. L. 656; Hawley v. Baldwin, 19 Conn. 585; Russell v. Perry, 14 N. H. 152; Allen v. Bruce, 12 N. H. 418; Dig. I. 1, *de jurisdictione*; 1 Broke Ab. 177, Conusans 27; Broom's Max. 84; Co. Litt. 141, a; Litt., § 212; Derby's case, 12 Rep. 114; Dig. L. 5, tit. 1, 17. It is not necessary that a judge should be a party to the cause to create this disqualification. If he is interested in a suit brought in another's name, he is equally disqualified. Foot v. Morgan, 1 Hill (N. Y.) 654; Wright v. Crump, 2 Ld. Raym. 766. Any, the slightest pecuniary interest in the result, not merely possible and contingent, North River Steamboat Co. v. Livingston, 3 Cow. (N. Y.) 713; Hawes v. Humphrey, 9 Pick. (Mass.) 350; 20 Am. Dec. 481; Wilbraham v. Hampden County, 11 Pick. (Mass.) 322; Danvers v. Essex County, 2 Met. (Mass.) 185; Peck v. Essex, 20 N. J. L. 457; Northampton v. Smith, 11 Met. (Mass.) 390; though merely as trustee, or executor, Knight v. Hardeman, 17 Ga. 253; and though indemnified, Oakley v. Aspinwall, 3 N. Y. 547; even the interest which would in former times have disqualified a party to be a witness, will be quite sufficient; Smith v. Boston, etc., R. Co., 36 N. H. 492; Derby's Case, 12 Co. 114; 1 Rolls Ab. 491; Day v. Savadge, Hob. 87; Ranger v. Great Western R. Co., 27 Eng. L. & Eq. 35; Baldwin v. McArthur, 17 Barb. (N. Y.) 414. The members of partnerships and corporations, Voet ad Pand. L. 5, tit. 2, 45; Washington Ins. Co. v. Pierce, 1 Hop. 1; Place v. Butternuts Woolen, etc., Mfg. Co., 28 Barb. (N. Y.) 503; Dig. 49, 4, 11; Poth. Pro. Civ., ch. 2, 55; though their interest may be very trifling, Gregory v. Cleveland, etc., R. Co., 4 Ohio St. 675, are nevertheless disqualified, Northampton v. Smith, 11 Met. (Mass.) 390; Nashua Tp. Petition, 12 N. H. 425; except in cases where a party is a mere inhabitant of a public municipal corporation, as a town or

county, entitled to receive the fines and costs imposed on offenders. In such cases the members of such corporations are not disqualified, either as judges or jurors, *London v. Wood*, 12 Mod. 686; *Northampton v. Smith*, 11 Met. (Mass.) 390; *Hill v. Wells*, 6 Pick. (Mass.) 104; *Justices v. Fennimore*, 1 N. J. L. 190; *Com. v. Emery*, 11 Cush. (Mass.) 406; *Com. v. Burding*, 12 Cush. (Mass.) 506; *Com. v. Tuttle*, 12 Cush. (Mass.) 506; *Corwein v. Hames*, 11 Johns. (N. Y.) 76; *Wood v. Rice*, 6 Hill (N. Y.) 58. Generally an interest in the question, as distinct from a pecuniary interest in the result of the cause, is no valid ground of recusation, *Northampton v. Smith*, 11 Met. (Mass.) 390; *Poth. Pro. Civ.*, ch. 2, § 5; *People v. Edmonds*, 15 Barb. (N. Y.) 529. To this, however, there is an exception; where the judge has a law suit pending or impending with another person, which rests upon a like state of facts, or upon the same points of law, as that pending before him; this is a valid disqualification. *Davis v. Allen*, 11 Pick. (Mass.) 466; 22 Am. Dec. 386; *Ersk. Inst.*, tit. 2, 26; *Poth. Pro. Civ.*, ch. 2, § 5; *Voet ad Pand. L.* 5, tit. 1, 44. II. Relationship or affinity to either party in interest, though only a stockholder in a corporation, *Place v. Butternuts Woolen, etc., Mfg. Co.*, 28 Barb. (N. Y.) 503; or not a party to the suit, *Foot v. Morgan*, 1 Hill (N. Y.) 654; is a cause of recusation by either, *North River Steamboat Co. v. Livingston*, 3 Cow. (N. Y.) 724; *Kelly v. Hockett*, 10 Ind. 299; *Poth. Pro. Civ.*, ch. 2, § 5; *Dig.* 47, 10, 5; *Code du Pro. Civ.* 378; *Ersk. Inst.* tit. 2, 33; *Durand's Spec. Juris.* 19, in civil matters to the fourth degree at least, that is, to cousins german inclusive; *Sanborn v. Fellows*, 22 N. H. 473; *Bean v. Quimby*, 5 N. H. 98; *Gear v. Smith*, 9 N. H. 63; *Voet ad Pand. L.* 5, tit. 1, 45. In many jurisdictions the exclusion extends much further, *Oakley v. Aspinwall*, 3 N. Y. 547; *Voet ad Pand. L.* 5, tit. 1, 45; *People v. Cline*, 23 Barb. (N. Y.) 200; *Post v. Black*, 5 Den. (N. Y.) 66. The judge, whose wife is related, by blood or affinity, to a party, is recusable, as if he were of the same relationship himself, and, *vice versa*, the judge related, by blood or affinity, to the wife of a party, is disqualified as he would be if related in the same degree to the party himself, *Paddock v. Wells*, 2 Barb. Ch. (N. Y.) 333; *Carman v. Newell*, 1 Den. (N. Y.) 25; *Cod. Civ. Pro.* 378; *Poth.*

Pro. Civ., ch. 2, § 50; but the *consanguinei* of the husband are not at all related to the *consanguinei* of the wife, as where the justice's brother married the plaintiff's sister, the justice was held related to the plaintiff's sister, but not at all to the plaintiff, *Higbie v. Leonard*, 1 Den. (N. Y.) 186. The affinity, and the recusation which results from it, is extinguished when the marriage which forms it is dissolved, and there remains no issue of the marriage. *Cain v. Ingham*, 7 Cow. (N. Y.) 478, and note; *Foot v. Morgan*, 1 Hill (N. Y.) 654. See *Winchester v. Hinsdale*, 12 Conn. 88; *Eggleston v. Smiley*, 17 Johns. (N. Y.) 133. The judge is none the less recusable, though related by blood, or marriage, in the same degree to both parties. *Ersk. Inst.* tit. 2, 26; *Poth. Pro. Civ.*, ch. 2, p. 5. The disability resulting from relationship is held by the civil law to extend much further, where from the absence of nearer relatives, the judge and party stand in the relation of heirs presumptive to each other, and this rule seems to us founded in good reason. *Voet ad Pand. L.* 5, tit. 2, 45. III. The friendly or hostile relations existing between a judge and one of the parties, may be good ground of recusation. *Voet ad Pand. L.* 5, tit. 2, 45. Of the first class, there are various circumstances referred to as examples indicating a state of feeling inconsistent with impartiality, as where the judge has received himself, or his near relative, important benefits or donations from one of the parties, *Poth. Pro. Civ.*, ch. 2, § 5; where the relation of master and servant exists between the judge and a party, *Poth. Pro. Civ.*, ch. 2, § 5; *Smith v. Boston, etc., R. Co.*, 36 N. H. 492; or where the relation of protection and subjection exists between the judge and a party, as in the case of a guardian and ward, *Poth. Pro. Civ.*, ch. 2, § 5, *Qui jurisdictioni preest neque sibi jus dicere debet, neque uxori vel liberis suis, neque libertis vel caeteris quos secum habet*; *Dig.* 2, 1, 10; *Ersk. Inst.*, tit. 2, § 26; 1 *Rolls Ab.* 492; 6 *Vin. Ab.* 1, *Connusance*, O. It is a good cause to remove a plea, that the bailiff, who is the judge, is of the robes of the plaintiff, 12 H. 4, 13; *Br. cause de remover*, pl. 13. But a creditor, lessee, or debtor, may be judge in the case of his debtor, landlord, or creditor, except in cases where the amount of the party's property involved in the suit is so great that his ability to meet his engagements with

SURVEYS.—(See also BOUNDARIES, vol. 2, p. 495; INSURANCE, vol. 11, p. 278; PUBLIC LANDS, vol. 19, p. 306; REVENUE LAWS, vol. 21, p. 301.)

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I. DEFINITIONS.—Ordinarily, a survey means the act of making an official examination to determine extent, dimension, form, situation, topographical features, quantity, condition, or value. The

the judge may depend upon the success of his suit. Poth. Pro. Civ., ch. 2, § 5. Enmity, indicated by threats verbal or written, pending, or shortly preceding the suit, Voet ad Pand. L. 5, tit. 2, 45; Poth. Pro. Civ., ch. 2, § 5; or otherwise, *Turner v. Com.*, 2 Metc. (Ky.) 619; and a lawsuit pending between a judge and a party, are good causes for recusation. Generally, such a lawsuit between a party and the nearest relative of the judge is not sufficient cause of recusation, though this may depend upon the state of feeling between the judge and the party, to which the lawsuit has given rise. The bitterness of feeling resulting from a lawsuit is supposed to subside when the lawsuit has terminated. A party cannot disqualify a judge to sit in his case by bringing an action against him after the principal suit is commenced. Under this head falls the class of cases where a judge has a bias, or prejudice in favor of, or against, one of the parties. Such bias caused by hearing an *ex parte* statement of the facts of a case would be a disqualification to try it. A judge, anxiously on his guard to hear nothing

of the cases which may come before him, except what is said in court and in presence of the adverse party, may yet find that he has been imposed upon by artful statements designed to create a prejudice in his mind relative to the case. In such a case he may well decline to sit in the case. *Williams v. Robinson*, 6 Cush. (Mass.) 334; Rev. Stat., ch. 176, § 22; Stat. 1855, ch. 1659, § 23. Among this class of disabilities is that chiefly in question in this case, the fact that the judge, as is alleged, has acted as counsel for the party in the same cause; which has always been held everywhere to justify the suspicion and belief that, however upright he may be, he cannot avoid favoring the cause of his late client. It is consequently everywhere a just cause for the judge to withdraw, or for the party to recuse him. *Ten Eyck v. Simpson*, 11 Paige (N. Y.) 179; *McLaren v. Charrier*, 5 Paige (N. Y.) 532; Poth. Pro. Civ., ch. 2, § 5; Voet ad Pand. L. 5, tit. 2, 45; *Louisiana Code of Practice* 159; *New York Code of Civil Procedure* 178; *Wente v. Houser*, 28 Mo. 233; Dig. 47, 10, 5.

word is used also to denote an exhibit, diagram, or report, setting forth the result of such examination.¹

In fire insurance, the word "survey" sometimes has been restricted to the plan of the premises which accompanies the application for insurance; but it oftener includes also the regular application, consisting of questions and answers, etc.²

In army, naval, and revenue proceedings, the word is applied to an official inspection made under statutory or departmental prescription.³

In marine policies, as in other maritime transactions, the word signifies the examination of a vessel or cargo by a board therefor appointed.⁴

1. Abb. L. Dict.; Black. L. Dict.; Bouv. L. Dict.

Survey of Land.—The actual measurement of land, ascertaining the contents by running lines and angles, making the same, and fixing corners and boundaries. *Winter v. U. S., Hempst. (U. S.) 371.*

A **chamber survey** is one that has never been made upon the ground; but where a survey has been returned and accepted without a caveat, the presumption after twenty-one years is *juris et de jure* that it was made on the ground. *Packer v. Schrader Min. Co., 97 Pa. St. 383.*

2. **In Fire Insurance.**—In *Albion Lead Works v. Williamsburg City F. Ins. Co., 2 Fed. Rep. 479*, the court, by Lowell, J., said: "A careful study of the cases will show, what was likewise testified by experts on the stand, that 'plan,' 'application,' and 'survey' are often used in the contract as meaning the same thing. 'Survey' is the word employed most commonly, and it is not difficult to discover how it came to be used instead of 'application.' When a person wrote to a company for insurance upon his house or mill, his letter was an application, but not often a full and satisfactory one, and the company would send back a form for a more full application. This paper usually had a caption, stating that it was to be the basis for the insurance, and contained printed questions with directions how they should be answered. This paper was filled out and signed by the assured, or by his agent, or by the agent of the company, and was the final application; but to avoid misunderstanding, it came to be called a survey, as in many cases the original letter might be called an application."

In an insurance policy the company agree "That it 'will be responsible for

the accuracy of surveys and valuations made by its agents.' Its counsel claim that the word 'survey' as here used means only that which was merely matter of measurement or description. But we think, whatever may be its strict meaning, it has acquired in insurance cases a general meaning, which includes what is commonly called the application, which contains the questions propounded on behalf of the company and the answers of the assured. It was evidently used in this general sense in this policy." *May v. Buckeye Mut. Ins. Co., 25 Wis. 307.*

In *Denny v. Conway Stock & Mut. F. Ins. Co., 13 Gray (Mass.) 497*, where the policy recited that it was "made and accepted in reference to the survey on file at this office," the court, by Bigelow, J., said: "The word 'survey,' in its strict signification, as well as in the broader meaning which it may be supposed to have as applied to the subject matter, can be taken to import only a plan and description of the present existing state, condition, and mode of use of the property. It cannot, by any reasonable construction, be held to signify that any statements or representations of a promissory or executory nature are embraced within it, relating to any contemplated alteration or improvement in the property, or to the mode in which the premises were to be occupied during the continuance of the policy. In this sense, the word appears to be used in the conditions of insurance attached to the policy and forming a part of the contract. The terms 'survey, plan, and description' are there used as being nearly synonymous."

3. See *infra*, this title, *In Maritime Affairs; In Army Regulations; In Revenue Proceedings.*

4. See *infra*, this title, *In Marine Insurance.*

The word is also used to indicate the determination of the route of a canal, railway, or turnpike.¹

Statutes provide sometimes for geological surveys.²

II. IN MENSURATION—1. Of Public Domains—(See also PUBLIC LANDS, vol. 19, p. 306)—*a.* NECESSITY AS TO TITLE.—In the earliest stages of the public land system, no right or interest could be secured by the individual in any public land until it had been surveyed into legal subdivisions. Nor after this had been done was it subject to sale, until, by a proclamation of the president fixing the time and place for the auction, it was brought into market. It often occurred that a settler's improvements placed the land beyond his reach, and it fell into the hands of speculators. To remedy this state of things, the preëmption system was established. This, at first, was only applicable to lands which had been surveyed. But gradually this was changed, until, in 1862, preëmptions were allowed, under proper restrictions, on unsurveyed lands as well as on those surveyed.³

1. See *infra*, this title, *In Expropriations*.

In *New Jersey*, an injunction asked for on the alleged ground that no "survey" of a railroad had been made, within the charter's requirement that "a survey of such route shall be deposited in the office of the Secretary of State," was refused; the word "survey" not necessarily meaning a map or profile, and a description having been filed therein, setting forth in words and figures the commencement and terminus, the stations, and their distance apart. *Atty. Gen'l v. Stevens*, 1 N. J. Eq. 369; 22 Am. Dec. 526.

2. As in *Michigan*, *Minnesota*, and *Missouri*, for example. See *infra*, this title, *Geological Boards*.

3. **Public Lands.**—12 U. S. Stat. 418. *Atherton v. Fowler*, 96 U. S. 517.

The object of the act of 1866 (14 U. S. Stat. 218), "to quiet titles in *California*," was to withdraw from the general operation of the preëmption laws, lands continuously possessed and improved by a purchaser under a Mexican grant, which was subsequently excluded from a final survey, or limited to a less quantity than that embraced in the boundaries designated. *Hosmer v. Wallace*, 97 U. S. 575.

Under the *Oregon Donation Act* of 1850, the right of the claimant to a patent became perfected when the certificate of the surveyor-general and accompanying proofs were received and

approved by the Commissioner of the General Land Office. *Stark v. Starrs*, 6 Wall. (U. S.) 402.

As against the government, one who, before survey, settles on public land, is a mere tenant at sufferance; he can transfer possession, but not convey title. *Missionary Soc. v. Dalles City*, 107 U. S. 336.

As to the effect of a decision of a register and receiver upon a claim filed before survey, see *Lytle v. Arkansas*, 9 How. (U. S.) 314.

A preëmption intervening between an erroneous and a correct survey was held to be valid; the selection attaching on return and approval of the latter. *Barnard v. Ashley*, 18 How. (U. S.) 43.

A mistake in a survey does not render it void; an existing survey, although irregular or defective, is within the *United States Law* of 1807, protecting surveys of lands held under certain military warrants. *Harlan v. Thatcher*, 18 Ohio 48.

A survey in pursuance of an entry will not appropriate land, without the calls of that entry, in opposition to a subsequent location, in cases occurring before the statute prohibiting such locations. *Hastings v. Stevenson*, 2 Ohio 8.

The title of one holding a survey by assignment, will be preferred to that of one who, deriving title under a forced assignment of an entry of the same land, afterwards obtains a legal

title thereto from the commonwealth. *Morrison v. Campbell*, 2 Rand. (Va.) 206.

The rule that a land warrant be so located and surveyed that the overplus shall be in one piece, was held to be inapplicable where the survey was compact, purse-shaped, and embraced two houses inhabited by the claimants. *U. S. v. Vallejo*, 1 Wall. (U. S.) 658.

Whether the survey shall be compact may depend on the surface, relation to other grants, etc. *U. S. v. Armijo*, 5 Wall. (U. S.) 444.

A grant is not defeated by mere want of a survey, if the description is definite enough to allow a survey to be made. *U. S. v. Arredondo*, 13 Pet. (U. S.) 133. *Compare* *Fremont v. U. S.*, 17 How. (U. S.) 542; *U. S. v. Vaca*, 18 How. (U. S.) 556.

A description in a grant from the Spanish Governor of *East Florida*, in 1802: "lands at Musquito, 50,000 acres, south and north of that place," was held to be too indefinite. *Buyck v. U. S.*, 15 Pet. (U. S.) 215.

The survey by the surveyor-general must be in reasonable conformity with such Spanish grant. *Villalobos v. U. S.*, 10 How. (U. S.) 541.

A title under a Spanish concession was held to be defeated by want of a survey and by long delay to take possession, except by the trifling act of placing a slave on the land. *U. S. v. Boisdoré*, 11 How. (U. S.) 63.

A Spanish grant specifying no certain boundaries must be surveyed, and the survey approved before the grantee can be entitled to a patent. *Stanford v. Taylor*, 18 How. (U. S.) 409; *Snyder v. Sickles*, 98 U. S. 203; *Maguire v. Tyler*, 8 Wall. (U. S.) 650; *Tyler v. Maguire*, 17 Wall. (U. S.) 253.

As to how the validity of the survey of a Spanish grant in *Florida* may depend on the power of the officer making it—*e. g.*, correcting, etc.—see *Chaires v. U. S.*, 3 How. (U. S.) 611; *U. S. v. Forbes*, 15 Pet. (U. S.) 173; or, *e. g.*, to change a location, see *Villalobos v. U. S.*, 10 How. (U. S.) 541.

The Secretary of the Interior has power to set aside a survey of a grant in the upper *Louisiana* country. *Maguire v. Tyler*, 1 Black (U. S.) 195. The validity of an order of survey was held to depend on the authority of the governor of *Louisiana* making it. *Chouteau v. U. S.*, 9 Pet. (U. S.) 139.

A survey exceeding the exterior boundaries of the plat was held to be

fatal to a confirmation of the grant. *U. S. v. Richard*, 8 Pet. (U. S.) 130.

In case of a Spanish concession in *Florida*, the survey must comply with the absolute conditions thereof. *U. S. v. Boisdoré*, 11 How. (U. S.) 97. *Compare* *U. S. v. Clarke*, 9 Pet. (U. S.) 168. Otherwise, as to implied conditions. *U. S. v. Rodman*, 15 Pet. (U. S.) 130. And see further, as to the necessity that the survey conform to a Spanish concession (in *Florida*), *U. S. v. Levi*, 8 Pet. (U. S.) 309; *U. S. v. Huertas*, 8 Pet. (U. S.) 475; *U. S. v. Huertas*, 8 Pet. (U. S.) 488; *U. S. v. Hernandez*, 8 Pet. (U. S.) 485; *U. S. v. Sibbald*, 10 Pet. (U. S.) 313; *U. S. v. Seton*, 10 Pet. (U. S.) 309.

Delay of survey until 1811, when the grant was made before the cession of the *Louisiana* territory in 1803, was held to be fatal. *Smith v. U. S.*, 10 Pet. (U. S.) 326.

As to the title of towns to commons in the *Louisiana* territory not vesting under the act of 1812, until surveyed, see *Carondelet v. St. Louis*, 1 Black (U. S.) 179; *Jourdan v. Barrett*, 4 How. (U. S.) 169; *Mackay v. Dillon*, 4 How. (U. S.) 421; *Les Bois v. Bramell*, 4 How. (U. S.) 449; *West v. Cochran*, 17 How. (U. S.) 403.

As to the deposit of the plat by the surveyor-general, see *U. S. v. Hanson*, 16 Pet. (U. S.) 196.

A survey in *Kentucky* not founded on an entry, is a void act. *Wilson v. Mason*, 1 Cranch (U. S.) 45. As to the rights of infants (in *Kentucky*) to further time for completing surveys, see *Miller v. McIntire*, 11 Wheat. (U. S.) 441.

A prior grantee is not concluded by a survey made after confirmation of an imperfect Spanish title; otherwise, as to the *United States* and its confirmee. *Menard v. Massey*, 8 How. (U. S.) 293. *Compare* *Cousin v. Labatut*, 19 How. (U. S.) 202.

A patent issued on a second survey of a Mexican grant, ordered by the Commissioner of the General Land Office, was held not to be invalid merely because, in addition to lands not covered by the prior patent, it purported to convey those which were so covered. *Adam v. Norris*, 103 U. S. 591.

As to limitations upon a second enterer's obtrusion upon an existing survey, see *Niswanger v. Saunders*, 1 Wall. (U. S.) 424.

In the common-law practice, defects in an entry or survey cannot be taken advantage of in an action at law.

b. STATUTORY SYSTEM.—The *United States* statute of 1796 required that public surveys be governed by the true meridian, that townships be six miles square, and that sections of a mile square contain 640 acres, “as nearly as may be;” this qualifying clause being necessitated by the convergency of meridians. The statute of 1800 provided that “in all cases where the exterior lines of the townships, thus to be divided into sections or half sections, shall exceed or shall not extend six miles, the excess or deficiency shall be specially noted, and added to or deducted from the western or northern ranges of sections or half sections in such townships, according as the error may be in running the lines from east to west, or from south to north; the sections and half sections bounded on the northern and western lines of such townships shall be sold as containing only the quantity expressed in the returns and plats, respectively, and all others as containing the complete legal quantity.”

Standard parallels or “correction lines,” are established at stated intervals to counteract the error from convergency of meridians and from inaccuracies in measuring on meridian lines. It has been customary to have these twenty-four miles north of each principal base line, and thirty miles south thereof.

The sections are numbered beginning at the northeast angle of the township, thence proceeding west to number six, thence east to number twelve, thence west, etc.¹

c. GENERAL PROCEDURE.—It has been the policy of Congress, well settled in the acts of 1796, 1800, and 1820, not only to survey the public lands in square figures, running the lines north and south, and east and west, but also to extend the subdivisions authorized by law, as far as practicable, in square figures to the lowest denomination. Accordingly, it is the duty of the surveyor-general to lay out a fractional section in such manner that an entire quarter-section may be had if the fraction will admit of it.²

Boardman v. Reed, 6 Pet. (U. S.) 328; *Spencer v. Lapsley*, 20 How. (U. S.) 264.

1. For the eight rules of survey, see U. S. Rev. Stat., § 2395; three rules for ascertaining boundaries and contents, § 2396; rule for running lines of division of half quarter-sections, § 2397. The General Land-Office manual of instructions of 1855, is part of every government contract for surveying. § 2399. Procedure on application by settlers in a township for a survey thereof by the surveyor-general. § 2401. Compare the *Minnesota* statutory procedure given *infra*, this title, *Of Private Domains*, note.

The court cannot exercise any appellate jurisdiction over the rulings of the officers of the land department, or of their superior, upon mixed questions

of law and fact, concerning surveys, conflicting claims, preëmption rights, etc. *Quinby v. Conlan*, 104 U. S. 425.

The regulations of the land department require that “quarter-section corners, both upon north and south, and east and west lines, be established at a point equidistant from the corresponding section corners, except upon the lines closing on the north and west boundaries of the township.”

2. *Procedure.*—It was once held that he had no right to divide a fractional section by arbitrary lines, so as to prevent a regular quarter-section from being taken up. *Brown v. Clements*, 3 How. (U. S.) 650. But it is now held that, under the act of 1820 and the instructions of the Land Office, he has some discretion in subdividing frac-

In *Oregon* and *California*, surveys may be made after the geodetic method, wherein allowance is made for the curvature of the earth.¹ In *California*, the rectangular mode may be departed from, for the sake of adaptation to mountain chains, mineral deposits, water privileges, etc.² By Act of Congress, the field-notes and plats of the original surveyor of the public lands are declared the best evidence of a boundary.³

d. MERIDIONAL VARIATION.—In governmental surveys, north and south lines are to be “run according to the true meridian.”⁴ By some of the state statutes, the surveyor is required to resurvey by the magnetic meridian, and in his return certify the degree of the needle’s variation at the time, and also, when prac-

tional sections containing more than 160 acres. He is not obliged, absolutely and under all circumstances, to lay off a full quarter or half quarter-section, though the fraction is capable of such a subdivision. *Gazzam v. Phillips*, 20 How. (U. S.) 372. Compare *Downes v. Scott*, 4 How. (U. S.) 500.

For an excellent diagram of an official topographical survey of a township, see *Lester’s Land Laws & Reg.* (1860), map facing p. 723.

The surveyor-general has no right to give to a surveyor special instructions conflicting with the manual of the Land Office. *White v. U. S.*, 15 Ct. of Cl. 305.

See as to surveys in *Kentucky*, *Cornett v. Dixon* (Ky. 1889), 11 S. W. Rep. 660; *Adams v. Frazier* (Ky. 1892), 20 S. W. Rep. 268; *Rains v. King* (Ky. 1892), 19 S. W. Rep. 329; in *Tennessee*, *Walker v. Phillips* (Tenn. 1893), 22 S. W. Rep. 338; in *Illinois*, *Hunt v. Rowley*, 87 Ill. 491; in *Iowa*, *Glenn v. Jeffrey*, 75 Iowa 20; in *Kansas*, *Spawr v. Johnson*, 49 Kan. 788; in *Michigan*, *Wilson v. Hoffman*, 70 Mich. 552; *Sanborn v. Vance*, 69 Mich. 224; *Webber v. Peremarquette Boom Co.*, 62 Mich. 626; *Palmer v. Giddings*, 59 Mich. 338; in *Minnesota*, *Quinn v. Champagne*, 38 Minn. 322; in *Missouri*, *Campbell v. Wood* (Mo. 1893), 22 S. W. Rep. 796; *Van Amburgh v. Hitt* (Mo. Sup. 1893), 22 S. W. Rep. 636; *Goltermann v. Schiermeyer*, 111 Mo. 404; in *Wisconsin*, *Whitney v. Detroit Lumber Co.*, 78 Wis. 240; *Chandos v. Mack*, 77 Wis. 573; in *Texas*, *Garza v. Cassin*, 72 Tex. 440; *Gresham v. Chambers*, 80 Tex. 544; *Minor v. Kirkland* (Tex. Civ. App. 1892), 20 S. W. Rep. 932; *Bacon v. State*, 2 Tex. Civ. App. 92; in *Penn-*

sylvania, *Clement v. Packer*, 125 U. S. 309.

1. “The Secretary of the Interior, if he deems it advisable, is authorized to continue the surveys in *Oregon* and *California*, to be made after what is known as the geodetic method, under such regulations and upon such terms as have been, or may hereafter be, prescribed by the Commissioner of the General Land Office; but none other than township lines shall be run where the land is unfit for cultivation.” U. S. Rev. Stat., § 2409.

2. “Whenever, in the opinion of the Secretary of the Interior, a departure from the rectangular mode of surveying and subdividing the public lands in *California* would promote the public interests, he may direct such change to be made of surveying and designating such lands as he deems proper, with reference to the existence of mountains, mineral deposits, and the advantages derived from timber and water privileges; but such lands shall not be surveyed into less than 160 acres, or subdivided into less than 40 acres.” U. S. Rev. Stat., § 2410.

3. “The boundary lines actually run and marked in the surveys returned by the surveyor-general shall be established as the proper boundary lines of the sections or subdivisions for which they were intended.” U. S. Rev. Stat., § 2396.

See as to surveys in *California*, *Heath v. Wallace*, 71 Cal. 50; *Harkins v. Nelson*, 53 Cal. 316; *Carr v. Quigley* (Cal. 1887), 16 Pac. Rep. 9; *Murphy v. Sumner*, 74 Cal. 316; *Shanklin v. McNamara* (Cal. 1891), 26 Pac. Rep. 345; *Heath v. Wallace*, 138 U. S. 573.

4. *Meridian Line.*—U. S. Stat., § 2395. By some state statutes, surveys must

ticable, the variation at the time of the original survey.¹ Some state statutes require a meridian line to be established in each county.²

c. RIPARIAN MEANDERINGS.³—In surveying fractional portions of the public lands, bordering upon navigable rivers, meander lines are run, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction, and which is to be paid for by the purchaser. The water is the real boundary.⁴ A grant from the government, without reservation of lands on the bank of a navigable stream, passes the title to unsurveyed islands lying between the main land and the center

be by the magnetic meridian, and the plat show the variation from the true one; *e. g.*, *Kentucky Gen. Stat.* 1887, p. 1226, § 3.

1. *E. g.*, *West Virginia Code* 1891, p. 624, § 2. In some states he is specifically required to locate the meridian line, and record the deflection of the compass. *Virginia Code* 1887, § 922. In *Tennessee*, he must test his instruments by the meridian every six months. *Tennessee Code* 1884, § 506.

2. *E. g.*, *Virginia*: "A true meridian line . . . shall be located at some central and accessible place in each county, and where the compass needle is not affected by iron ore or other minerals; and shall be not less than 300 yards in length, and marked and defined at each extremity by a meridian line upon a substantial stone monument planted in the earth;" the cost not to exceed \$30 each. *Va. Code* 1887, §§ 920-1.

In *North Carolina*, in 1825, as to the boundary of the royal grant made to Earl Granville in 1768, the latitude whereof had been given, astronomical observation was held to be a more certain mode of ascertaining the location than an actual running of the line from a certain point designated on the seashore as its beginning. *Taylor v. Shufford*, 4 Hawks (N. Car.) 116; 15 Am. Dec. 512.

The fact that a deed calls for a line to run "due north," is not a sufficient indication that it is to run by the side-real, and not by the magnetic, meridian. *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235; 90 Am. Dec. 575.

Where the government surveyor's lines are obvious, they must be followed, though made on an assumed or wrong magnetic variation. *Bonney v. McLeod*, 38 Miss. 393.

The corners, as fixed by the surveyor-general, cannot be disregarded. *Throop v. Cheeseman*, 16 Johns. (N. Y.) 264; *Herbert v. Wise*, 3 Call (Va.) 238. Parol evidence is inadmissible to contradict the original survey. *May v. Baskin*, 12 Smed. & M. (Miss.) 428.

3. As to triangulation of the coast survey, compare U. S. Rev. Stat., § 4690, and *Connecticut Gen. Stat.* 1888, ch. 117. See also *infra*, this title, *Charting of Coasts*.

4. See BOUNDARIES, vol. 2, p. 504; 3 Kent's Com. (13th ed.) 427; *St. Paul, etc., R. Co. v. Schurmeier*, 7 Wall. (U. S.) 272. (See diagram, 7 Wall. (U. S.) 275.) Compare *Hardin v. Jordan*, 140 U. S. 371, wherein four of the justices disapprove the *dictum* in *Trustees of Schools v. Schroll*, 120 Ill. 509, concerning the common law affecting riparian rights in *Illinois*.

According to all the laws and usages of the *United States*, the line of ordinary high tide is the boundary dividing land and water, and the limit to which surveys may lawfully extend. *Mann v. Tacoma Land Co.*, 44 Fed. Rep. 27. Compare *Warren v. Chambers*, 25 Ark. 120; 91 Am. Dec. 538; *U. S. v. Pacheco*, 2 Wall. (U. S.) 587; *Howard v. Ingersoll*, 13 How. (U. S.) 381; *Mather v. Chapman*, 40 Conn. 382; *Stevens v. Paterson, etc., R. Co.*, 34 N. J. L. 532; *Bailey v. Burges*, 11 R. I. 330.

In *Wisconsin*, the actual water line is the true line of a lot bounded in terms by the meandered line, in case the two differ. *Boorman v. Sunnuchs*, 42 Wis. 233.

In an accretion controversy from *Illinois* (reviewing the decision therein, *Lovington v. St. Clair County*, 64 Ill. 56), it was held, that a survey "beginning on the bank of the Mississippi

of the stream.¹ The riparian owner takes alluvial and derelict land, gained by imperceptible degrees, as a reciprocal considera-

river, opposite St. Louis, from which the lower window of the *United States* storehouse in St. Louis bears N. $70\frac{3}{4}$ W.; thence S. 5 W. 160 poles to a point in the river from which a sycamore 20 inches in diameter bears S. 85 E. 250 links; thence S. 85 E. 130 poles (at 30 poles a slash) to a point . . . " was bounded by the river; the river bank being straight and running according to this line. *St. Clair Co. v. Lovington*, 23 Wall. (U. S.) 46.

In *Hardin v. Jordan*, 140 U. S. 371, 382, the court, by Bradley, J., said: "The right of the states to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the crown in *England*. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and in *Pennsylvania* to all the permanent rivers of the state; but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised. In the case of *Barney v. Keokuk*, 94 U. S. 324, we held that it is for the several states themselves to determine this question, and that if they choose to resign to the riparian proprietor rights which properly belong to them, in their sovereign capacity, it is not for others to raise objections. That was a case which arose in the State of *Iowa* with regard to land on the banks of the Mississippi in the city of Keokuk, and it appearing to be the settled law of that state that the title of riparian proprietors on the banks of the Mississippi extends only to ordinary high-water mark, and that the shore between high and low-water mark, as well as the bed of the river, belongs to the state, this court accepted the local law as that which was to govern the case. The same view was taken in quite a recent case with regard to titles on the Sacramento river under the law of *California*. *Packer v. Bird*, 137 U. S. 661. On the east side of the Mississippi, in the States of *Illinois* and *Mississippi*, a different doctrine prevails, and in those States it is held that the title of the riparian proprietor extends to the middle of the current, in

conformity to the rule of the common law, that the beds of all streams above the flow of the tide, whether actually navigable or not, belong to the proprietors of the adjoining lands. *Middleton v. Pritchard*, 4 Ill. 510; 38 Am. Dec. 112; *Morgan v. Reading*, 3 Smed. & M. (Miss.) 366; *St. Louis v. Rutz*, 138 U. S. 226." But the dissenting opinion of justices Brewer, Brown, and Gray, says: "If we turn to the decisions of the supreme court of *Illinois*, we find one rule laid down for running water and another for lakes and ponds. In the former case, the riparian owner owns to the thread of the current; in the latter, to the water line. No distinction is made on account of the size of either stream or pond."

Where a boundary upon the Chicago river was in dispute in 1861, and at the time of the survey in 1821 the river had found a new channel, it was held that the field-notes must nevertheless govern. *Bates v. Illinois Cent. R. Co.*, 1 Black (U. S.) 204.

A state, by virtue of its admission into the Union, becomes the owner of the soil under its navigable waters. *Pollard v. Hagan*, 3 How. (U. S.) 212; *Weber v. Board of State Harbor Com'rs*, 18 Wall. (U. S.) 57.

As to the consequent title to water lots in San Francisco for 99 years, see *Mumford v. Wardwell*, 6 Wall. (U. S.) 423.

A deed describing a lot by its number, and making a water line—*e. g.*, the Missouri river, a boundary, carries all the land up to the water line, no matter how it shifts. *Jefferis v. East Omaha Land Co.*, 134 U. S. 178.

Navigability in law is based upon navigability in fact. *McManus v. Carmichael*, 3 Iowa 1.

In the *United States*, the English definition, restricting navigability to tide water, is no longer tenable. *The Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 443.

The title to the land under all navigable waters, whether tidal or not, is in the state. *Barney v. Keokuk*, 94 U. S. 324. Compare *Tomlin v. Dubuque*, etc., R. Co., 32 Iowa 106; *Philadelphia v. Scott*, 81 Pa. St. 80; *Ross v. Faust*, 54 Ind. 471.

1. *Chandos v. Mack*, 77 Wis. 573; *Middleton v. Pritchard*, 4 Ill. 510; 38

tion for possible loss from the water's breaking in.¹ In general, in absence of contrary reservation, where a deed is bounded upon a

Am. Dec. 112; *Compare* St. Paul, etc., R. Co. v. First Div., etc., R. Co., 26 Minn. 31; *Greenleaf v. Kilton*, 11 N. H. 530; *Nichols v. Suncook Mfg. Co.*, 34 N. H. 349.

1. 2 Bl. Com. 262. See BOUNDARIES, vol. 2, p. 504; ACCRETION, vol. 1, p. 137.

In *North Carolina*, if the recession of the water be sudden and sensible, the derelict land belongs to the state, and is the subject of entry. *Murry v. Sermon*, 1 Hawks (N. Car.) 56.

In *Michigan*, the riparian owner of a fractional lot bounded by a non-navigable lake only takes so much of the lake bottom as is required to fill out the section or quarter-section of which he owns the fraction; in other words, his common-law right is limited by the section lines of the survey. *Clute v. Fisher*, 65 Mich. 48.

In *Indiana*, so also. *Stoner v. Rice*, 121 Ind. 51.

In *Louisiana*, the right to future alluvial formation or batture is a vested right, and so recognized in resurveys. *Municipality, No. 2 v. Orleans Cotton Press*, 18 La. 122; 36 Am. Dec. 624. As to the effect, on right under a survey, of accumulation of batture upon a bar in the Mississippi, see *Stephenson v. Goff*, 10 Rob. (La.) 99; *Saulet v. Shepherd*, 4 Wall. (U. S.) 502 (diagram at p. 503).

The decision of the surveyor under the Act of Congress of 1811, in allotting vacant land on Louisiana rivers, is final. *Haydel v. Dufresne*, 17 How. (U. S.) 23.

In *Virginia*, where, under *Virginia* Code, § 1339, riparian owners have land privileges down to low tide, a boundary on Elizabeth river was held to be coincident with the high-water line. *French v. Bankhead*, 11 Gratt. (Va.) 136; followed in 1891, in *McDonald v. Whitehurst*, 47 Fed. Rep. 757.

In *Vermont*, as to alluvion on the Otter Creek, see *Newton v. Eddy*, 23 Vt. 319 (diagram at p. 321). In a case between conterminous owners on the Winooski, the rule for distribution of accretions was held to be, to extend the side lines of each owner to the nearest bank, giving to each the deposits in front of his own land. *Hubbard v. Manwell*, 60 Vt. 235 (diagram at p. 239).

In *Illinois*, a general average was

made in distributing the alluvion. *Kehr v. Snyder*, 114 Ill. 313.

In *Texas*, as to the effect of alluvion on a survey depending on contiguity, see *Fulton v. Frandolig*, 63 Tex. 330.

In *Arkansas*, a riparian grantee of the *United States* takes not *ad medium filum aquæ*, but to high-water mark. *St. Louis, etc., R. Co. v. Ramsey*, 53 Ark. 314. And the same rule governs as to the boundaries of incorporated territories. *Fort Smith Bridge Co. v. Hawkins*, 54 Ark. 509. As to recession, see *Warren v. Chambers*, 25 Ark. 120.

In *Missouri*, in 1867, in a case affected by an extraordinary accretion from the *Mississippi* flood of 1844, it was held that, in private deeds of lots in St. Louis, calls for that river do not create riparian rights in the grantee. *St. Louis Public Schools v. Risley*, 40 Mo. 356; 10 Wall. (U. S.) 91 (diagram at p. 93). *Compare* as to the Missouri's alluvion, *Benson v. Morrow*, 61 Mo. 395. The eastern limit of St. Louis is the middle thread of the Mississippi. *Jones v. Soulard*, 24 How. (Miss.) 41.

In *South Carolina*, so also, as to a boundary of Columbia on the Congaree. *State v. Columbia*, 27 S. Car. 127.

In *Maryland*, as to the Patapsco, see *Linthicum v. Coan*, 64 Md. 439.

In *Pennsylvania*, where a dam caused the channel between an island in the Alleghany to become filled and susceptible of cultivation, it was held to be still a part of the river bed so as to be incapable of appropriation by warrant and survey in the ordinary forms of the Land Office. *Poor v. McClure*, 77 Pa. St. 214.

In *Pennsylvania*, the limit of a municipality bounded by a navigable river, is the low-water mark, unless the act of incorporation expressly provides otherwise. So held as to the Susquehanna. *Gilchrist's Appeal*, 109 Pa. St. 600. As to the Juniata, so also. *Johns v. Davidson*, 16 Pa. St. 512.

In *New York*, as to a statutory boundary of Albany on the Hudson, see *Hart v. Albany*, 9 Wend. (N. Y.) 571, 602. Elsewhere on the Hudson, see *The E. G. Blakslee Mfg. Co. v. The E. G. Blakslee's Sons Iron Co. Works*, 59 Hun (N. Y.) 209; 129 N. Y. 155. As to New York City, see *Stryker v. New*

river not navigable, the boundary extends to the center of the stream.¹

York, 19 Johns. (N. Y.) 179. As to Brooklyn, see *Udall v. Trustees of Brooklyn*, 19 Johns. (N. Y.) 175; *In re Furman Street*, 17 Wend. (N. Y.) 649; *Wetmore v. Atlantic White Lead Co.*, 37 Barb. (N. Y.) 70.

In *New York*, a boundary "beginning at a stake near the high-water mark" of a mill pond, running thence "along the high-water mark," etc., was held to be unchanged by accretion and recession. *Cook v. McClure*, 58 N. Y. 437.

In *Vermont*, a boundary by the edge of a mill pond remains the same, regardless of contiguous accretions. *Eddy v. St. Mars*, 53 Vt. 462; *Holden v. Chandler*, 61 Vt. 291.

In *New Jersey*, as to the Hudson, see *State v. Jersey City*, 25 N. J. L. 525. As to the Raritan, see *Martin v. Waddell*, 16 Pet. (U. S.) 367.

In *West Virginia*, as to the Ohio, see *Brown Oil Co. v. Caldwell*, 35 W. Va. 95.

In *Ohio*, as to Chippewa Lake, see *Limbeck v. Nye*, 47 Ohio St. 336.

In *Georgia*, a change in a water-course boundary must be certified by the processioners. *Georgia Code* 1882, § 2393.

As to an embanked wharf between high and low water, see *Clemont v. Burns*, 43 N. H. 609; *Hastings v. Grimshaw*, 153 Mass. 497; *Rumsey v. New York, etc., R. Co.*, 133 N. Y. 79; *Albert v. State*, 66 Md. 325.

A call from a fixed point a specified distance "to a point on the shore" of Long Island Sound, was held to mean a point anywhere between the high and low-water mark, to be determined by the distance given. *Oakes v. De Lancy*, 133 N. Y. 227. But compare *Storer v. Freeman*, 6 Mass. 435.

In *New Jersey*, a call "along storm-tide of the Atlantic ocean," carries that space of the beach which lies between the ordinary high-water mark and the fast land, and which is rendered waste by the frequent wash of unusual tides. *Camden, etc., Land Co. v. Lippincott*, 45 N. J. L. 405.

In *New Jersey*, subject to the rights of the state under the act of 1851 (N. J. Rev., p. 1240), the owner upon tide waters can, by filling, extend his title to the actual high-water mark. *Gough v. Bell*, 22 N. J. L. 440; *Bell v. Gough*, 23 N. J. L. 624.

In *England*, in the absence of evidence of usage to the contrary, the crown's right to the seashore landwards is limited by the line of the medium high tide between the springs and the neaps. *Atty. Gen'l v. Chambers*, 4 De G. M. & G. 206.

1. *Kimball v. Schoff*, 40 N. H. 190; *Norway Plains Co. v. Bradley*, 52 N. H. 86. Twenty years' possession on such river gives title to the thread, etc. *Nichols v. Suncook Mfg. Co.*, 34 N. H. 345.

In *Massachusetts*, as to a boundary of Tolland on the Farmington, see *Cold Spring Iron Works v. Tolland*, 9 Cush. (Mass.) 492. As to the Ipswich, see *In re Ipswich Petition*, 13 Pick. (Mass.) 431. As to the Neponset, see *Macdonald v. Morrill*, 154 Mass. 270. As to the Acushnet, see *Hastings v. Grimshaw*, 153 Mass. 497.

In *Maine*, as to the Schoodiac, see *Granger v. Avery*, 64 Me. 292. As to circumstances rendering a brook that was crossed by a boundary three times, the *terminus a quo*, and not the *terminus ad quem*, see *Haight v. Hamor*, 83 Me. 453 (diagram at p. 456).

In *New Hampshire*, as to the Connecticut, see *Daniels v. Cheshire R. Co.*, 20 N. H. 85. As to the Merrimac, see *State v. Canterbury*, 28 N. H. 195. As to the Winnipiseogee, see *State v. Gilmanton*, 14 N. H. 467. Such boundary carries an island situated nearest the bank where the premises lie. *Greenleaf v. Kilton*, 11 N. H. 530; *Nichols v. Suncook Mfg. Co.*, 34 N. H. 349. But the quantity of water on each side of the island may be shown to be such as to be called by the river's name, and in case of such latent ambiguity, parol evidence may show which bank was intended. *Claremont v. Carlton*, 2 N. H. 369. A description, "to a tree on the bank of Newfound river, thence up said river," was held to carry to the central thread, regardless of call for distance and quantity. *Kent v. Taylor*, 64 N. H. 489. So also a description, "northwesterly to the river, thence northeasterly by the river shore." *Sleeper v. Laconia*, 60 N. H. 201.

In *Connecticut*, as to the Connecticut, see *Pratt v. State*, 5 Conn. 388. As to the Thames, see *Chapman v. Kimball*, 9 Conn. 38. In construing a deed, the words, "line of the canal,"

f. PROCESSIONING.—In order to reestablish boundaries, the statutes of some states provide for the appointment of processioners, who shall make a return of their survey with a description, etc.¹

g. PERAMBULATING.—In some of the *New England* States, statutory provision is made for the appointment of perambulators, who shall periodically renew town boundaries, etc.² In some states, the duty of establishing town boundaries devolves on the boards of supervisors or commissioners, along with the county surveyor, while in others the courts may, on petition of an interested party, appoint a commission to perpetuate monuments or settle disputed boundaries.³

2. Of Private Domains—*a.* LOCAL PROCEDURE.—In the newer states, the statutory provisions for appointment of surveyor-general or county surveyors, and for returns, records, etc., are, in some respects, analogous to those of the general government system.⁴ In the older states, not only the statutes, but also the common

were held to refer not to the water line, but to the top of the canal bank. *Bishop v. Seeley*, 18 Conn. 393.

In *New York*, a call from a post on the north bank of a creek, "thence down the same, and along the several meanderings thereof to the place of beginning," which was also on the bank, was held to include the bed of the stream to the center; and this, although the boundaries of the tract, after crossing the stream several times, recrossed it to reach the commencement of the boundary in question. *Seneca Nation v. Knight*, 23 N. Y. 498.

In *Wisconsin*, where lands bordering on streams which are meandered, are surveyed and sold by the *United States*, the purchaser takes to the thread of the stream; if the stream be navigable, he takes subject to the public easement. *Jones v. Pettibone*, 2 Wis. 308.

1. See the statutes of *Virginia*, *Kentucky*, *North Carolina*, *Tennessee*, and *Georgia*.

Processioners cannot be resorted to to settle a disputed line between a town lot and rural tract. *Christian v. Weaver*, 79 Ga. 406.

In processioning, both the surveyor's plat and the processioner's return are necessary parts of the proceeding. Neither is complete without the other. *Rattaree v. Morrow*, 71 Ga. 528.

Where it is sought to procession lands under *Georgia Code*, §§ 2384-2386, it is necessary to survey and mark the entire tract of land belonging to

and possessed by the owner; and it is not sufficient to survey and mark one lot alone, held by grant from the state, it being the lot where the line is uncertain or disputed. *Martin v. Cauthen*, 77 Ga. 491.

If the ten days' notice of the time fixed for making the line is given to the adjoining proprietor, the marking may be postponed for good cause, as, for example, bad weather, upon notice to such proprietor, verbal or written. *Phillips v. Chapman*, 78 Ga. 163.

See, as to processioning in *Texas*, *Tucker v. Smith*, 68 Tex. 473.

2. See the statutes of the *New England States*.

3. See *infra*, this title, *Private Domains—Local Procedure*.

In *California*, "all common boundaries, and common corners of counties not adequately marked by natural objects or lines, or by surveys lawfully made, must be definitely established by surveys jointly made by the surveyors of all the counties affected thereby, and approved by the boards of supervisors of such counties, or by a survey made by the surveyor-general, on application of the board," etc. *California Pol. Code* 1885, § 3969.

4. See *Colorado Ann. Stat.* 1891, § 4311 *et seq.*; *Dakota Comp. Laws* 1887, § 691; *Kansas Gen. Stat.* 1889, § 1882; *Wisconsin Ann. Stat.* 1889, § 770.

The state statutes regulating surveys, are subordinate to the Acts of Congress for subdividing sections. *Chan v. Brandt*, 45 Minn. 93; *Neff v. Paddock*, 26 Wis. 546.

law thereon, differ almost as much as the dissimilarity in condition of their first settlement.¹

1. See *supra*, this title, *Processioning*; *Perambulating*.

A survey by the "commissioners to manage the Yosemite valley and the Mariposa big-tree grove," would necessitate a different procedure from that practicable upon a prairie in the Mississippi valley. See *California Pol. Code* 1885, § 3584 *et seq.*; U. S. Rev. Stat. 1878, § 241.

In *New Hampshire*, in 1866, in *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235; 90 Am. Dec. 575, a case involving boundaries of certain White-Mountain grants, the court, by Bartlett, J., said: "The present method of surveying the public lands of the *United States*, can have no bearing on the question here, as it was specially adopted at a comparatively recent date, and long after the system of surveying private boundaries in this state had been established by ancient and long continued usage, if not originally fixed by the common law."

In *Alabama*, the county surveyor's official plat is presumptive evidence, if the opposite party had noticed that the survey was to be made. *Clements v. Pearce*, 63 Ala. 284. A deed designating the section and township may give color of title, though not stating the county, district, or state. *Black v. Tennessee Coal, etc., Co.*, 93 Ala. 109.

A person employed at a salary by a county surveyor, is not entitled to make copies of the field-notes of the government survey, from the books kept in the Secretary of State's office. *Phelan v. State*, 76 Ala. 49.

In *Arkansas*, where land is laid out in compact town lots, quantity is important, and the rule, in irregular and large surveys, that quantity yield to course and distance, must be relaxed. *Phelps v. Henry*, 15 Ark. 297. Where a public survey was regularly made, returned and approved, a sale by the federal executive is valid, notwithstanding an error, provided the defect does not render the tract uncertain as to locality or quantity. *Rector v. Gaines*, 19 Ark. 70. The county surveyor's record is only *prima facie* evidence of the correctness of the survey. *Smith v. Leach*, 44 Ark. 287.

In *California*, the surveyor-general is registered *ex officio*, and must keep

separate accounts and records in relation to each class of lands to which the state is entitled. He is also state agent for locating, in the *United States* Land Offices, the unsold portion of 500,000 acres granted to the state for school purposes, and the 16th and 36th sections granted in lieu thereof. To him, the county surveyors must report monthly. *California Pol. Code* 1885, § 3395 *et seq.*

As to the power of the *United States* district courts to confirm *California* surveys under the act of 1851, see *U. S. v. Fossatt*, 21 How. (U. S.) 445.

As to the power of the Commissioner of the General Land Office thereunder to refuse a patent upon an erroneous survey, see *Castro v. Hendricks*, 23 How. (U. S.) 438.

The act of 1860 did not affect the surveyor-general's power; the survey and location are still under control of the court rendering the decree. The *Fossat Case*, 2 Wall. (U. S.) 649.

If the survey does not conform to the decree of the board, the remedy must be sought from the general land commissioner. *U. S. v. Sepulveda*, 1 Wall. (U. S.) 104.

Under the act of 1860, the district court could order into court for adjudication, surveys of claims confirmed by the board. *Higuera v. U. S.*, 5 Wall. (U. S.) 827.

The *United States* circuit court has no original jurisdiction to reform such surveys. *U. S. v. Throckmorton*, 98 U. S. 61.

As to what parties are, under the act of 1860, entitled to a resurvey by the surveyor-general, see *U. S. v. Sutter*, 21 How. (U. S.) 170; *U. S. v. Coville*, 1 Black (U. S.) 339; *U. S. v. Estudillo*, 1 Wall. (U. S.) 710; *Dehon v. Bernal*, 3 Wall. (U. S.) 774.

A survey by the surveyor-general of *California* must reasonably conform to the decree of the commission created under the *United States* Law of 1851, for settling *California* land claims. *U. S. v. Halleck*, 1 Wall. (U. S.) 439 (diagram at p. 440).

A patent issued on a Mexican grant of land in *California* is conclusive only as between the parties; the court's approval of the survey was simply to insure conformity with the confirmation, and not to settle any question of title

against other claimants. *Mill v. Dale*, 92 U. S. 473; *Adam v. Norris*, 103 U. S. 591.

The Act of Congress of 1853—exempting from operation of the preëemption law certain school sections granted to *California*—protects a settlement, if the surveys, when made, ascertain its location to be on a school section. Congress had in view the rapid settlement of the country, and the long time that might elapse before actual survey. *Sherman v. Buick*, 93 U. S. 209.

In the act of 1853, the word “preëemptor” is almost synonymous with “settler.” *Ivanhoe Min. Co. v. Keystone Cons. Min. Co.*, 102 U. S. 167. Compare *Lansdale v. Daniels*, 100 U. S. 113.

Under the act of 1866, “to quiet land titles in *California*,” a survey need not be approved by the Commissioner of the General Land Office before approval by the *United States* surveyor-general for the state. *Fraser v. O'Connor*, 115 U. S. 102. Compare *Wright v. Roseberry*, 121 U. S. 488; *Tubbs v. Wilhoit*, 138 U. S. 134.

As to requisites of a survey of swamp lands under Cal. Pol. Code, § 3445, see *People v. Conwell*, 60 Cal. 400; *Madux v. Brown*, 91 Cal. 523.

In *Connecticut*, mention of a highway in a deed as a boundary, means the traveled highway, and not the highway in the record of the selectmen's survey. *Falls Village Water Power Co. v. Tibbetts*, 31 Conn. 167. The terms “south half” and “north half” are not always intended to be used with mathematical accuracy. *Becket v. Clark*, 40 Conn. 485.

In *Delaware*, as to procedure in exercise of the right of eminent domain in diversion of a private water-course, see *Murphy v. Wilmington*, 6 Houst. (Del.) 108.

In *Florida*, the commissioner of lands and immigration acts as register and surveyor-general. *Florida Dig. Laws* 1881, p. 190, § 15.

A grant by the Spanish governor of *East Florida*, meant merely an incipient right, which, when surveyed, required confirmation by the governor. The courts of the *United States*, as did the Spanish government, must accord to the plats and certificates of the surveyor-general the force of a deposition. *U. S. v. Hanson*, 16 Pet. (U. S.) 196.

Where courses and distances do not cover the area called for, the lines will be extended to adjoining tracts

referred to in the deed, if certain. *Hogans v. Carruth*, 19 Fla. 84.

In *Georgia*, a jury, in determining a boundary, may be governed by points fixed by tradition, rather than recent surveys. *Roberts v. Ivey*, 63 Ga. 622.

In *Illinois*, the board of supervisors establishes township boundaries, etc. *Illinois Rev. Stat.* 1891, p. 369, § 57.

A too indefinite description—*e. g.*, “lying outside of the town,”—may be rendered certain by reference to the name of a town in the description of another parcel in the same deed. *Smiley v. Fries*, 104 Ill. 416.

As to the *Illinois* distinction between lake and river boundaries, see *supra*, this title, *Riparian Meanderings*; dissenting opinion in *Hardin v. Jordan*, 140 U. S. 402.

The record of surveys of Peoria claims made under the act of Congress of 1820, bound the conferee and the *United States*. *Byran v. Forsyth*, 19 How. (U. S.) 202; *Ballance v. Papin*, 19 How. (U. S.) 342.

In *Indiana*, for a description fatally vitiated by the vague expression, “southeast part of,” etc., see *Shoemaker v. Monigle*, 86 Ind. 421. As to excess in fractional quarter-sections, and conclusiveness of the county surveyor's survey, see *Grover v. Paddock*, 84 Ind. 244.

In *Iowa*, the true corner of a government subdivision is where the *United States* surveyor in fact established it, whether rightly or wrongly, as shown by a subsequent survey. *Nesselrode v. Parish*, 59 Iowa 570. As to the procedure in fixing a disputed corner under the *Iowa* Act of 1874, see *Yocum v. Haskins*, 81 Iowa 436.

In *Kansas*, see, as to what constitutes an incomplete survey, *Reinhart v. Brunt*, 42 Kan. 43.

As to fees and keeping open office under *Kansas* Laws 1891, ch. 89, § 13, see *Sumner County v. Simmons* (Kan.), 33 Pac. Rep. 318.

The *Kentucky* Statute of 1797, allowing infant married women three years after removal of disability to complete surveys, is a saving of forfeiture, and should be strictly construed against the state. *Shipp v. Miller*, 2 Wheat. (U. S.) 316.

Under the *Virginia* Act of 1799, a survey in *Kentucky* without the entry could be no legal or equitable foundation for a title. *Wilson v. Mason*, 1 Cranch. (U. S.) 45.

Five per cent. is the customary allow-

ance for chain-carriers' deviations. *Eubank v. Hampton*, 1 Dana (Ky.) 343. The survey, being of record, may be used in supplying omissions or in correcting mistakes in land patents. *Bruce v. Taylor*, 2 J. J. Marsh. (Ky.) 160. The recorded survey is of equal dignity with the patent itself. *Steele v. Taylor*, 3 A. K. Marsh. (Ky.) 225; 13 Am. Dec. 151.

In *Louisiana*, the accuracy of surveys confirming Spanish surveys in *Upper Louisiana*, might be adjudged by the commissioner of the *United States* General Land Office before issuance of a patent. *Maguire v. Tyler*, 1 Black. (U. S.) 195.

Congress recognized, without reference to any particular surveys, complete grants made in *Louisiana* before its cession to the *United States*. *McDonough v. Millendon*, 3 How. (U. S.) 693.

The courts cannot control an allotment of vacant land on a river or creek in *Louisiana* territory, if honestly made by the surveyor under the Act of Congress of 1811. *Haydell v. Dufresne*, 17 How. (U. S.) 23.

In *Maine*, in case of a town survey, locations actually made control the proprietors' plan. *Brown v. Gay*, 3 Me. 126. Every call in a description must be answered if it can be done. *Herrick v. Hopkins*, 23 Me. 217. As to admissibility of parol evidence to explain a latent ambiguity, and as to control of course and distance to identify the monuments, see construction of a deed calling for a lumberman's road ("the Odlin road extended"), and diagram, in *Tyler v. Fickett*, 73 Me. 410.

In *Maryland*, any reversioner, etc., may, on petition to the circuit court, have a commission appointed to mark and bound the land, two months' notice to be given. The commissioners meet the county surveyor on the land, set up bounds, and return a plat and certificate. *Maryland* Code 1888, p. 121 *et seq.*

Where an ambiguity appears on the face of the certificate, parol evidence is not admissible in contradiction. *Dorsey v. Hammond*, 1 Har. & J. (Md.) 190.

In *Massachusetts*, a survey to which direct reference is made in the deed, will control. *Lunt v. Holland*, 14 Mass. 149. And see *infra*, this title, *Evidential Effect*.

In *Minnesota*, where, owing to a lake, no monument could be fixed at a

quarter-section corner, a stake may be placed on the margin on the section line, and the plat and field-notes indicate the distance. The government surveyor's measurement cannot be contradicted. *Chan v. Brandt*, 45 Minn. 93. As to parol evidence of lost corners, see *Borer v. Lange*, 44 Minn. 281.

In *Mississippi*, where the government map shows all the township's sections to be full, but all monuments between the two northern tiers are lost, and surveys based on established monuments show a shortage in the measurement north and south of those two tiers, it should be apportioned equally between the two, even though the original survey began at the southeast corner of the township. *James v. Drew*, 68 Miss. 518.

Establishment of a boundary between two properties different from that indicated by the government survey, must be upon record evidence. *May v. Baskin*, 12 Smed. & M. (Miss.) 428. But omission of township and range in a deed may be remedied by parol. *Foute v. Fairman*, 48 Miss. 536. If no division lines have been run as marked on the ground by the original survey, the line can only be ascertained as prescribed in the Act of Congress of 1805, viz: by running and marking to make the survey a closed one. *Newman v. Foster*, 3 How. (Miss.) 383.

In *New Mexico*, as to Mexican grants, effect of acts of public officers in issuing orders of survey, etc., as evidence of inceptive and nascent titles, see *Pino v. Hatch*, 1 N. Mex. 125.

In *North Carolina*, in absence of evidence that an anterior line of a grant is erroneous or is less specific, its terminus will not be reversed by a posterior one. *Harry v. Graham*, 1 Dev. & B. (N. Car.) 76; 27 Am. Dec. 226.

A line calling for an identifiable line of another tract must run thereto, controlling distance. *Gilchrist v. McLaughlin*, 7 Ired. (N. Car.) 310; *Corn v. M'Crary*, 3 Jones (N. Car.) 496. Otherwise, in absence of sufficient identifying evidence. *Spruill v. Davenport*, Busb. (N. Car.) 134.

In *Ohio*, a mistake in a survey does not render it void; an existing survey, although irregular or defective, is within the *United States* Law of 1807, protecting surveys of lands held under certain military warrants. *Harlan v. Thatcher*, 18 Ohio 48.

In case of discrepancy in the calls,

recourse must be had to the fixed and natural objects called for. *Wyckoff v. Stephenson*, 14 Ohio 13. See, as to the right of a county surveyor to make a charge against the county for recording a survey, *Strawn v. Columbia County (Ohio)*, 26 N. E. Rep. 635.

As to the rights of locators of warrants in the *Virginia* Military District in *Ohio*, the survey, etc., see *Niswanger v. Saunders*, 1 Wall. (U. S.) 424; *Tussell v. Gregg*, 113 U. S. 550.

In *Pennsylvania*, the return of a survey into the surveyor-general's office, is *prima facie* evidence that it was made; and an actual survey may be established by proof that any part of it was made on the ground. *Lambourn v. Hartswick*, 13 S. & R. (Pa.) 113; *Caul v. Spring*, 2 Watts (Pa.) 390; *Miller v. Keene*, 5 Watts (Pa.) 348; *Raush v. Miller*, 24 Pa. St. 277. But a survey is not evidence without showing that there was authority to make it. *Wilson v. Stoner*, 9 S. & R. (Pa.) 39; 11 Am. Dec. 664; *Schuykill, etc., Imp. Co. v. Munson*, 14 Wall. (U. S.) 442. A survey, although unaccompanied by a patent and payment of the consideration, gave a legal right of entry which supports an ejectment. *Sims v. Irvine*, 3 Dall. (U. S.) 425. As to settlers' rights under a *Pennsylvania* certificate of survey, see *Huidekoper v. Douglass*, 3 Cranch. (U. S.) 1; *Marlatt v. Silk*, 11 Pet. (U. S.) 1. The nonreturn of a survey to the land office for 130 years is proof of abandonment. *Paxton v. Griswold*, 122 U. S. 441.

In *South Carolina*, in 1845, it was held to be no objection to a grant made in 1837, that it stated the area at less than one-fourth the quantity ascertained, or that the lines were prolonged greatly beyond the distances, or that the course was sometimes disregarded. The general order of precedence is: First, natural boundaries; second, artificial marks; third, adjacent boundaries; fourth, course; fifth, distance. No one of these, however, occupies an inflexible position; for, in case of an evident mistake, an inferior means may control a higher. *Fulwood v. Graham*, 1 Rich. (S. Car.) 491, 497.

In *Tennessee*, calls for mere distance are surveyed by horizontal measurement. *Bleidorn v. Pilot Mountain Coal, etc., Co.*, 89 Tenn. 166 (diagram opposite p. 168). A survey of a town by commissioners appointed by law, is in the nature of a judicial act, and

binds all proprietors of lots as to the boundaries. *M'Kean v. Tate, Overt.* (Tenn.) 199.

See, as to recovering back from a surveyor fees paid to him, he having made a mistake in surveying, *State v. Keller*, 11 Lea (Tenn.) 399.

In *Texas*, an unauthorized survey may be rendered valid by the county surveyor's approval. *Doswell v. Dela Lanzo*, 20 How. (U. S.) 29; *Howard v. Perry*, 7 Tex. 259; *Horton v. Pace*, 9 Tex. 81.

In 1866, it was there held that the condition in 1835 required a liberal construction to be given to grants and locations then made. In absence of any showing of fraud, an excess of 300 acres in a survey made under a grant for a league, was adjudged not to affect the validity of the title. *Elliot v. Mitchell*, 28 Tex. 105.

In 1877, in a suit begun in 1862, it was held that a marked line found on the ground in 1838, recognized as the divisional line by the original claimants of the adjacent tracts, and their successors, although in a part of its course varying ten degrees from the course called for in the deed, could not be regarded as established in error. *Browning v. Atkinson*, 46 Tex. 605.

The rule requiring the location of a survey to be determined by the lines actually run, if practicable, is not varied by the fact that this would give the locator less land than he was entitled to by his certificate; nor by the fact that a call was made to run to the line of an old survey, if the surveyor never reached that line, but stopped at another line which was mistaken for it. *Burnett v. Burriss*, 39 Tex. 501.

Under the laws of the *Texas* republic, a junior locator of a land warrant was deemed an innocent purchaser, where a map showing a prior survey was deposited in the General Land Office. *Cook v. Burnley*, 11 Wall. (U. S.) 659.

The fact that a survey contained much more land than the contract or grant justified, can be taken advantage of by the State of *Texas* alone, and not by an individual adverse claimant. *White v. Burnley*, 20 How. (U. S.) 235.

Further, as to Spanish grants in *Texas*, see *supra*, this title, *Of Public Domains*.

As to the requisites of description, see *Blackburn v. McDonald*, 1 Tex. Unrep. Cas. 355; *Lenon v. Walker*, 2 Tex. Unrep. Cas. 568.

b. EVIDENTIAL EFFECT—(1) Judicial Notice; Usages.—Courts will take judicial notice of divisions of lands by public surveys of Congress.¹

(2) *Monuments.*—Known and fixed monuments control courses and distances. Consequently, the certainty of metes and bounds will include and pass all the lands within them, though they vary from the quantity expressed in the patent or other deed.²

Natural monuments control both artificial ones and distance; and if called for in a deed referring also to township, section, and fraction, will govern, although plats and field-notes indicate a different location.³

Ascertainable artificial monuments control courses and dis-

See, as to the jurisdiction for surveying purposes of county surveyors, *Cox v. Houston*, etc., Cent. R. Co., 68 Tex. 226; *Kimmarle v. Houston*, etc., R. Co., 76 Tex. 686; as to fees, *Bates v. Thompson*, 61 Tex. 335; as to description of land surveyed, *Catlett v. Starr* (Tex.), 7 S. W. Rep. 844; *Nye v. Moody* (Tex.), 8 S. W. Rep. 606.

The *Virginia* statute requiring the surveyor to record the survey is merely directory, and his omission thereof will not invalidate the title. *Stringer v. Young*, 3 Pet. (U. S.) 320.

In *Wisconsin*, the provision of *Wisconsin Ann. Stat.* 1889, § 770, as to the survey and subdivision of sections and quarter-sections, does not apply to establishment of lost corners of sections or lesser subdivisions of government lands. *Gerhardt v. Swaty*, 57 Wis. 24. Compare, however, U. S. Stat. 1878, §§ 2396-7; and *Westphal v. Schultz*, 48 Wis. 75.

As to a fractional lot crossed by a quarter-section line, see *Sheppard v. Wilmot*, 79 Wis. 15 (diagram at p. 16); *Shufeldt v. Spaulding*, 37 Wis. 662; *Martin v. Carlin*, 19 Wis. 454.

Survey and Surveyor.—See generally, as to the weight given to the survey and the acts of the surveyor, *Chapman v. Polack*, 70 Cal. 487; *Markley v. Rudy* (Ind.), 18 N. E. Rep. 50; *Ashe v. Lanham*, 5 Ind. 435; *Waltman v. Rund*, 109 Ind. 366; *Harris v. Burcham*, 1 Wash. 191; *Jewell v. Porche*, 2 La. Ann. 148; *Wilder v. St. Paul*, 12 Minn. 192; *Trotter v. President*, etc., St. Louis Public Schools, 9 Mo. 69; *Keller v. Over* (Pa.), 20 Atl. Rep. 25; 26 W. N. C. (Pa.) 247; *Schunior v. Russell* (Tex. Supp.), 18 S. W. Rep. 484; *Ross v. Reed*, 1 Wheat. (U. S.) 482; *Kimmarle v. Houston*, etc., R. Co., 76 Tex. 686.

1. *Gardner v. Eberhart*, 82 Ill. 316; *Murphy v. Hendricks*, 57 Ind. 593; *Lewis v. Harris*, 31 Ala. 689.

The correctness of a survey made in good faith and unchallenged for over fifteen years—presumed. *U. S. v. Hancock*, 133 U. S. 193.

2. "The least certain and material parts of the description must yield to those which are the most certain and material, if they cannot be reconciled; though in construing deeds, the courts will give effect to every part of the description, if practicable." 4 Kent's Com. (13th ed.) 466.

In *Opdyke v. Stephens*, 28 N. J. L. 86, the court, by Green, C. J., said: "The principle is so familiar as scarcely to require citation of an authority in its support, though the cases are very numerous." In another *New Jersey* case, it is even held that where monumental calls are identifiable and sufficient to show the boundaries, the given courses and distances may be entirely disregarded. *McCullough v. Absecon Beach Land, etc., Co.*, 48 N. J. Eq. 170.

In *Kentucky*, conversely, where two objects are found which answer to the call in an entry, and it cannot be determined which was intended, the call will be disregarded. *Frye v. Essry*, *Hughes* (Ky.) 103 (diagram at p. 104).

3. Besides the cases cited in BOUNDARIES, vol. 2, p. 502, see *Higuera v. U. S.*, 5 Wall. (U. S.) 836; *King v. Brigham*, 19 Oregon 560; *Adair v. White*, 85 Cal. 313; *Johnson v. Archibald*, 78 Tex. 96 (with elaborate diagrams); *McCullough v. Absecon Beach Land, etc., Co.* (N. J. 1891), 21 Atl. Rep. 481. In this last case the rule was applied, although it resulted in an excess of 150 acres; the excess being mostly covered by water.

tances.¹ Sometimes another and well-known parcel of land may serve as a monument.²

(3) *Course and Distance*.—Where both the natural and the artificial monuments are lost and unascertainable, courses and distances determine the location.³ In general, a line called for as between two points, will be presumed to be a straight one.⁴ But a reference to a survey may control to the contrary.⁵ A specific course will control a general one.⁶ In general, of two descriptions, one by name and the other by metes and bounds, that will prevail which is the most beneficial to the grantee.⁷

See also *Norfolk Trust Co. v. Foster*, 78 Va. 413; *Muhler v. Ruppert*, 55 N. Y. Super. Ct. 359; 124 N. Y. 627.

In *New York*, the rule is not very inflexible. *Danziger v. Boyd*, 53 N. Y. Super. Ct. 398 (diagram at p. 398); *Baldwin v. Brown*, 16 N. Y. 359; *Drew v. Swift*, 46 N. Y. 204; *Townsend v. Hayat*, 51 N. Y. 656; *Buffalo, etc., R. Co. v. Stigeler*, 61 N. Y. 348; *Mott v. Mott*, 68 N. Y. 246; *Robinson v. Kime*, 70 N. Y. 147; *Hussner v. Brooklyn City R. Co.*, 96 N. Y. 18; *Higginbotham v. Stoddard*, 9 Hun (N. Y.) 1; *Higginbotham v. Stoddard*, 72 N. Y. 94.

For a special application of the rule to mining claims, see *Pollard v. Shively*, 5 Colo. 309 (diagram at p. 311).

The rule is not affected by the fact of a standard of length established by the government. *Kalbfleisch v. Standard Oil Co.*, 43 N. J. L. 259.

1. *Whitehead v. Ragan*, 106 Mo. 231.

2. See *BOUNDARIES*, vol. 2, p. 500.

A well-known tract in an old patent, long referred to in the *New Hampshire* statutes, and containing settlements subject to census and tax laws, was (when called for in a subsequent grant made by the state as the boundary of a new grant), adjudged to be such a monument as would draw to it the limits of the latter grant, although its exterior lines were never actually run and located on the ground; and the state was held to be precluded from injecting a later grant between the two prior ones. *Bartlett Land, etc., Co. v. Saunders*, 103 U. S. 316.

3. See *BOUNDARIES*, vol. 2, p. 503; also *supra*, this title, *Local Procedure*.

Two leading cases, as to resort therein to evidence of acts of parties, etc., are *Clark v. Wethey*, 19 Wend. (N. Y.) 320 (decided in 1838), and *Wyckoff v. Stephenson*, 14 Ohio 13 (decided in 1846).

Where a survey and patent called for the line to run down the Shenandoah,

thence up the Potomac, it was held that the rivers must be taken as the boundary, and courses be disregarded. *Brown v. Huger*, 21 How. (U. S.) 305. So also as to a vacant strip, lying between the Porlier tract on the north and the Grignon tract on the south, commencing at low-water mark, and west 80 arpents, and in width three arpents on Fox river, etc.; distances and quantities must yield to the two well-known tracts as metes and bounds. *Morrow v. Whitney*, 95 U. S. 551.

4. *Marsh v. Marshall*, 19 N. H. 301. See *Campbell v. Branch*, 4 Jones (N. Car.) 313; and other cases *infra*, this title, *Termini*.

5. *Seneca Nation v. Hugaboom*, 132 N. Y. 432.

6. *Grand County v. Larimer County*, 9 Colo. 268. A street number will not prevail as against measurement. *Fitzpatrick v. Sweeny*, 56 Hun (N. Y.) 159.

7. *Hall v. Gittings*, 2 Har. & J. (Md.) 112. So held, as to a deed of "the farm," referring to an old survey. *Winter v. White*, 70 Md. 305.

In *Illinois*, in 1849, in a case involving the construction of a *United States* land patent, *M'Clintock v. Rogers*, 11 Ill. 297, the court, by Caton, J., said: "The law cannot satisfactorily determine, in all cases, whether the courses or distances shall govern, when they do not correspond, but this must be determined by concurring testimony, and the circumstances of each particular case. The one that most convinces the judgment must be selected. [See diagram, 11 Ill. 281.] . . . The monuments found at the two extremes of the line, were entitled to no more controlling influence, in determining the actual location of the intermediate line than two intermediate monuments, had they been found and these had been missing. . . . Quantity, although the least reliable, and the last to be resorted to, of all the descriptions

The rule that monuments, natural or artificial, rather than courses and distances, control, will not be enforced, when the deed would thereby be defeated, and when rejection of a call for a monument would reconcile other parts of the description, and leave enough to identify the land.¹

in a deed, in determining the boundaries of the premises conveyed, may sometimes be considered, in corroboration of other proof. . . .” And after commenting on certain coincidences discovered by the surveyor appointed by the court, the court held, that where a township line is lost, the monuments of the adjacent sections may be resorted to for the purpose of ascertaining where the lost line was actually run by the original surveyor. Also that a township line may be a deflected line, if established by satisfactory evidence. Followed in *Sawyer v. Cox*, 63 Ill. 137; *Bauer v. Gottmanhausen*, 65 Ill. 503; *Lull v. Chicago*, 68 Ill. 523; *McCor-mick v. Huse*, 78 Ill. 363.

In *Missouri*, in 1881, in *Major v. Watson*, 73 Mo. 661, the court, by Norton, J., cited the foregoing case (*M’Clintock v. Rogers*, 11 Ill. 279), and held, that the fact that a corner was established by a government surveyor in running a random line, makes it none the less to be regarded in locating other corners lost or destroyed; and that if no fixed monuments are called for in his field-notes, the calls therein for courses and distances must prevail.

In *Cox v. Griggs*, 79 Mo. 35, a like rule was applied, even though the statutory method had not been pursued: Mo. Rev. Stat. 1889, § 8333. And in 1883, the rule for establishing a lost quarter-section corner of an interior section, was stated to be to ascertain the corners of the section on that side, and locate the lost corner at a point on the line connecting them and equidistant from them. *Lemmon v. Hartsook*, 80 Mo. 13.

In *Knight v. Elliot*, 57 Mo. 325, this is declared to be the method of the *United States* land department. In *Frazier v. Bryant*, 59 Mo. 121, it is declared not to conflict with the procedure prescribed in the *Missouri* statute “to ascertain the medium point.” § 8333.

Further, as to the use of random lines in the *Missouri* statutory method, see *supra*, this title, *Local Procedure*, note.

1. In *White v. Luning*, 93 U. S. 526, a complicated case from *California*,

in 1876, in deciding that a call, “the north boundary of the rancho Sal Si Puestas on the mountains,” was mistakenly inserted, the court, by Davis, J., said: “It is rare, where so many field-notes of the survey of an irregularly shaped tract of land are incorporated in a deed, that there are so few mistakes. The courses and distances in this deed are numerous, and are all correct except the last; and there the only error is in the course, which is easily corrected, as the call is for the post where the survey begins.” (See diagram, 93 U. S. 521.)

In *Massachusetts*, the exception has been even more broadly extended, thus: Where a boundary is inadvertently inserted or cannot be found, or an adherence to it would defeat the evident intent of the parties, the boundary may be rejected, and the extent of the grant be determined by measurement, or by other portions of the grant. *Davis v. Rainsford*, 17 Mass. 207; *Morse v. Rogers*, 118 Mass. 573.

Where a call was to begin “on the north line” of a tract, “at a yellow birch,” the birch tree marked in the original survey, but not on the stated line, was, instead of that line, held to designate the boundary. *Cleaveland v. Smith*, 2 Story (U. S.) 278.

Similarly was rejected an inconsistent call of a numbered city lot as extending to the Monongahela river. *Barclay v. Howell*, 6 Pet. (U. S.) 498.

So also, the inconsistent words, “six miles,” where the grantor had cut off two, leaving four. *Jackson v. Wilkinson*, 17 Johns. (N. Y.) 146; *Jackson v. Sprague*, 1 Paine (U. S.) 496.

So also, as to the words “12th” general allotment, consistently construed to be the “21st.” *Jackson v. Clark*, 7 Johns. (N. Y.) 217.

So also, the inconsistent words, “being lot 17.” *Worthington v. Hyl-ler*, 4 Mass. 196.

So also, “northwest,” consistently construed to be “southwest.” *Vose v. Handy*, 2 Me. 322.

So also, “southeasterly,” consistently substituted for “southwesterly.” *Brookman v. Kurzman*, 94 N. Y. 272.

Where the lines are so short as to admit of entire accuracy, they are to be regarded with great confidence, as a means of ascertaining the intention of the parties.¹

Where no monuments are referred to in a grant, and none are intended to be afterwards designated as evidence of the extent, the distance stated therein must govern the location.²

Where the given courses and distances would include less land than is found within two known corners, the surplus must be divided between the two contiguous tracts in proportion to their respective lines in the plats.³

So also, rejecting an inconsistent call, "beginning at a large clump of rocks on the west bank of the Scaroon Lake." *Wendell v. People*, 8 Wend. (N. Y.) 183.

1. 3 Washb. Real Prop. (15th ed.) 631. See *Higinbotham v. Stoddard*, 72 N. Y. 94; *Buffalo, etc., R. Co. v. Stigeler*, 61 N. Y. 348; *Townsend v. Hayt*, 51 N. Y. 656; *Baldwin v. Brown*, 16 N. Y. 359.

In *Burkholder v. Markley*, 98 Pa. St. 40, the court, by Trunkey, J., said: "Lines run and marked on the ground are the true survey, and when they can be found, will control the calls for a natural or other fixed boundary; and also constitute the boundaries in the grant, where they differ from those produced by the courses and distances stated in the patent." Compare the *Fossat Case*, 2 Wall. (U. S.) 649 (and its diagrams at pp. 651 and 656).

2. *Wilson v. Hildreth*, 118 Mass. 578. But measurements must yield to any boundary capable of being made certain. *Morse v. Rogers*, 118 Mass. 572.

In *Chinoweth v. Haskell*, 3 Pet. (U. S.) 96, the court, by Marshall, C. J., said: "If the land be described by course and distance only, or by natural objects not distinguishable from others of the same kind, course and distance, though not safe guides, are the only guides given us, and must be used."

In *New Jersey* so held, as to a call, without monument, for the depth of a city lot, "eighty feet, or a fraction more or less." *Negbaur v. Smith*, 44 N. J. L. 672. Compare *Smith v. Negbaur*, 42 N. J. L. 307.

In *Maryland*, so held, where a deed called for "a stake upon the shore of the Patuxent river, near a water fence, three perches from a stake at the beginning of the 28th course in" an older survey, and such shore stake

could not be determined with certainty. *Wood v. Ramsey*, 71 Md. 9.

In *Tennessee*, calls for course and distance, without more, control in locating unsurveyed lines. *Bleidorn v. Pilot Mountain Coal, etc., Co.*, 89 Tenn. 166 (diagram opposite p. 168).

3. In *Iowa*, in 1855, in *Moreland v. Page*, 2 Iowa 153, a case called by Judge Grier, in *Moreland v. Page*, 20 How. (U. S.) 522, a "mere question of boundary between neighbors," but a leaning one on reestablishment of lost intermediate monuments—the court, by Isbell, J., said: "The first principle is, that course and distance must yield to fixed monuments. The surveyor employed to subdivide a township, commences to practice upon it the second time he runs, and continues to do so every second or closing section line through the whole township. To illustrate: [See diagram, 2 Iowa 141.]

. . . The second principle is, that all ascertained surrounding monuments shall have their due weight in determining the locality of the unascertained ones, under the system by which the survey was originally made. Thirdly, that where on a line of the same survey, between remote corners, the whole length of which line is found to be variant from the length called for, in reestablishing lost intermediate monuments, as marking subdivisinal tracts, we are not permitted to *presume* merely, that a variance arose from the defective survey of any *part*; but we must conclude, in absence of circumstances showing the contrary, that it arose from the imperfect measurement of the *whole* line, and distribute such variance between the several subdivisions of such line, in proportion to their respective lengths. . . We cannot conclude that there has never been a survey, though it should have been merely imaginary, so far as these two

(4) *Termini*.—Where natural and ascertained objects are wanting, and course and distance cannot be reconciled, the one or the other may be preferred according to circumstances.¹ Ordinarily, a grant from one terminus to another means a direct line; but if this will not reach the terminus, "it must be pursued so far as it conducts towards the terminus and then relinquished for a direct line to the terminus."²

As to highways, the presumption is, that owners of land on each side go to the center.³ Calls for a way or street are there-

ranges of sections are concerned. For, although imaginary, it has been platted and numbered, and incorporated into several grants. The purchasers of all the subdivisions numbered on that plat have purchased with relation not only to the monuments, but to the township, range, sections, and subdivisions, *as shown by the plat*. And now, as between these purchasers, it would be an enormity to entirely disregard it." This decision has been followed in *McNamee v. Moreland*, 26 Iowa 96; *Newcomb v. Lewis*, 31 Iowa 488; *Ufford v. Wilkins*, 33 Iowa 110; and *Jones v. Kimble*, 19 Wis. 429.

1. "If there be nothing to control the course and distance, the line is run by the needle." See *supra*, this title, *Procedure*, collation in note. It is a question of fact for the jury. *Opdyke v. Stephens*, 28 N. J. L. 83.

When practicable, it is a proper method of correcting mistakes or ascertaining lost corners by reversing the courses. *Fuller v. Carr*, 33 N. J. L. 157; *Curtis v. Aaronson*, 49 N. J. L. 68.

2. Where a grant called for a run "south with A's line 310 poles to B's old corner," and A's line did not reach B's corner nor run in that direction, but at expiration of 310 poles on A's line the run must be nearly at a right angle to reach B's corner, it was held that from that point there must be a straight line to B's corner, though this necessitate two lines instead of the one called for. *Shultz v. Young*, 3 Ired. (N. Car.) 385; 40 Am. Dec. 413. Compare *Haynes v. Young*, 36 Me. 557, and diagram facing p. 559.

If the call be along a river from one terminus to another, it must follow the river however sinuous. Where a patent began "at the mouth of Dividing Run, thence north, thence east, thence south to a white oak, thence along the river to the beginning," and the oak stood half a mile from the river, the river was held to be the bound-

ary. *Sandifer v. Foster*, 1 Hayw. (N. Car.) 237.

A description, "beginning at a servisberry corner, thence north to a white oak, thence east to a white oak, thence south to a limestone quarry, thence to a white oak; all these trees are marked," was held to be too vague for notice to an innocent purchaser at a judicial sale. *Banks v. Ammon*, 27 Pa. St. 172.

Where the patent of Springfield, N. Y., called for the third course line to run from a stated point "south, 30 degrees, west 450 chains to the aforesaid lake" (Otsego), but that course ran wide of the lake, it was held that the line must be run to strike the lake at the nearest point, at 450 chains without regard to course, and so as to preserve the fourth course. *Jackson v. Carey*, 2 Johns. Cas. (N. Y.) 350.

Where a call was for "McNeil's land," which the distance and course would not touch, it was held that a straight line must be run thereto, disregarding the erroneous description. *Campbell v. Branch*, 4 Jones (N. Car.) 313.

Where a deed conveyed "the north half of a certain lot of land, with the store standing on said north half," which was described as "bounded south on the grantor's own land," and a corner of the store, which was a permanent structure, projected a little beyond a line drawn straight from the middle of the front of the lot to the middle of the rear, it was held that the maxim, *falsa demonstratio non nocet*, applied, and the line must zig-zag to include the store. *Dikeman v. Taylor*, 24 Conn. 219.

A deed of a lot as "commonly called and distinguished as the Schermerhorn brickyard," was held sufficient to designate the premises, in absence of the monument (stake and stones) called for, and of possibility exactly to apply the courses and distances. *Seaman v. Hogeboom*, 21 Barb. (N. Y.) 398.

3. 3 Kent's Com. (13th ed.) 432.

fore generally construed accordingly.¹ So also as to a railroad.² In general, so also as to boundaries of lots in blocks.³

(5) *Calls "Descriptive" or "Locative."*—The foregoing modifications of the principal rule have sometimes been combined into a single formulation, thus: The general description, confirmed by clear recitals and references in the deed, must control courses and

1. *Silvey v. McCool*, 86 Ga. 1; *Morrow v. Willard*, 30 Vt. 118.

A grant of land "to a street one rod and a half wide, thence northerly by said street," passes the land to the center of the street. *Phillips v. Bowers*, 7 Gray (Mass.) 21. *Compare Bissell v. New York Cent. R. Co.*, 23 N. Y. 61.

As to boundary of lands in New York city by an old road, see *Haberman v. Baker*, 129 N. Y. 253; and *compare Re Department of Public Parks*, 53 Hun (N. Y.) 556.

In *Michigan*, an unqualified call for a highway is presumed to refer to its existence on the ground at the time, and not to the line as shown by the record of its survey in the proper office. *Atwood v. Canrike*, 86 Mich. 99.

In *New Jersey*, one's conveyance of land as abutting on a proposed street, extending over his other land, passes to the grantee a right to use the street for ingress and egress until it becomes a public highway. *Dodge v. Pennsylvania R. Co.*, 43 N. J. Eq. 351.

In *New York*, similarly. *New York v. Law*, 125 N. Y. 380.

In *Florida*, a call for a street as the western boundary, means the eastern line of the street as actually laid out and surveyed. *Andreu v. Watkins*, 26 Fla. 390.

In *Maryland*, where a tract had been divided and roads made for convenience of purchasers, a call beginning at a stone planted in presence of three persons named, "on the southwest side of" a specified road, thence "running along and with said road" to another stone planted on the southeast side of another road, then "with the last mentioned road," etc., was held not to include the road bed. *Peabody Heights Co. v. Sadtler*, 63 Md. 533. But *compare Moale v. Baltimore*, 5 Md. 314 (diagram at p. 315).

In *Massachusetts*, a reference to a plat of a tract divided into lots does not import a right of way, or preclude the closing of streets thereon shown, leaving open certain private ways to

the highways. *Regan v. Boston Gas Light Co.*, 137 Mass. 37 (diagram at p. 38); *Pearson v. Allen*, 151 Mass. 79 (diagram at p. 80). *Compare Greene v. Canny*, 137 Mass. 64 (diagram at p. 65).

2. *Maynard v. Weeks*, 41 Vt. 617; *Church v. Stiles*, 59 Vt. 642.

3. Where one's deeds of lots to different grantees bounded them on streets and passage ways in a plan therein referred to, but excluded by the distances stated, and conveyed a right to use the passageways in common, it was held that each abutter took to center of the street or way. *Gould v. Eastern R. Co.*, 142 Mass. 85.

A deed purporting in the general description to convey "Lot No. 8," a portion of which had been laid out as an alley for the use of the lot in common with others, but in the particular description making the alley the eastern boundary of the lot, was held to carry the bed of the alley. *Abert v. Thomas*, 73 Md. 181. *Compare Buchanan v. Steuart*, 3 Har. & J. (Md.) 128 (diagram opposite p. 238).

As to a case turning on whether grantors of lots intended that lines of certain lots should not be parallel, or mistook their length, see *Casey v. Dunn*, 57 N. Y. Super. Ct. 381 (diagram at p. 382).

As to apportionment of excess among lots in a block, see *Pereles v. Magoon*, 78 Wis. 27.

In *Kansas*, where there had been a partition of a tract among several allottees, with monuments only set theoretically on paper, it was held that their proper location should be determined by prorating the distances given, according to the frontage. *McAlpine v. Reicheneker*, 27 Kan. 257.

In *New Jersey*, where a tract was platted as containing fifty lots, forty-eight of which appeared twenty-five feet wide, it was held that the remaining two must be diminished below their assigned size. *Baldwin v. Shannon*, 43 N. J. L. 596.

distances.¹ This has led to a convenient distinguishment of calls as "descriptive" and "locative."²

(6) *Quantity; "More or Less."*—Ordinarily, mention of quantity of acres is mere matter of description; and where qualifying words, as "more or less," or as "containing by estimation," indicate that the quantity is not of the essence of the contract, the

1. *E. g.*, in *West Virginia*. *Adams v. Alkire*, 20 W. Va. 480.

In *Massachusetts*, it has been stated thus: A deed must be so construed, if possible, that no part shall be rejected; if this cannot be done, the courts reject what is repugnant to the general intention of the deed, or to any obvious particular intention of the grantor. *Bent v. Rogers*, 137 Mass. 192.

In *Maine*, so also. *Herrick v. Hopkins*, 23 Me. 217.

2. *E. g.*, in *Texas*. *Phillips v. Ayres*, 45 Tex. 602. The *United States Supreme Court* has also occasionally adopted this expression in considering cases from *Virginia* and *Kentucky*, *e. g.*, thus: A locative call for an unmarked tree may be disregarded. *Johnson v. Pannel*, 2 Wheat. (U. S.) 206. *Compare Shipp v. Miller*, 2 Wheat. (U. S.) 316; *Holmes v. Trout*, 7 Pet. (U. S.) 171; *Brown v. Huger*, 21 How. (U. S.) 305.

In *Thomas v. Godfrey*, 3 Gill & J. (Md.) 142, where there was a call, "beginning at a bound hickory on the side of a hill, on the S. side of the main falls of Patapsco, and respective to the W. Chew's Resolution Manor, and running with the said Manor south 53 degrees west 200 perches to a bound hickory," the court, in holding that the words "running with said Manor" did not constitute a peremptory call, but like the course and distance were directory only to the principal call, the tree, said: "The call to the tree is the imperative call, and must be gratified if it can be established, no matter where it stands with regard to the line, which is to be taken as intended only as a *designatio loci*, where the tree was supposed to stand."

Where a bounded tree called for "at the beginning of the Bold Venture patent," was lost, it was held to be determinable by reversing the course and distance of the first line of that patent. *Compare Friend v. Friend*, 64 Md. 321; *Wilson v. Inloes*, 6 Gill (Md.) 121.

As to rejection of calls which are inconsistent with the general descrip-

tion, see *supra*, this title, *Course and Distance*.

Some of the earlier southern cases seem to have been decided in view of the circumstances—*e. g.*, in *Kentucky*, in the surveyor's certificate, the order of mention of corners or lines is immaterial. *Beckley v. Bryan*, Sneed. (Ky.) 91; 16 Am. Dec. 125; *Thornberry v. Churchill*, 4 T. B. Mon. (Ky.) 29. Although the courses called for will not close, yet, if the corners are marked, the grantor is presumed to have held by marked boundaries. *Terrill v. Herron*, 4 J. J. Marsh. (Ky.) 519. In general distance yields to course. *Bryan v. Beckley*, Litt. Sel. Cas. (Ky.) 91; 12 Am. Dec. 276.

In *North Carolina* and *Tennessee*, in absence of anything in the patent to the contrary, the courses and distances therein given according to the magnetic meridian control. *M'Iver v. Walker*, 4 Wheat. (U. S.) 444. As to locative calls, see *Bleidorn v. Pilot Mountain Coal, etc., Co.*, 89 Tenn. 166 (diagram opposite p. 168). And see other state, common-law or statutory provisions collated *supra*, this title, *Local Procedure*.

In *Texas*, calls of a survey identified are of equal dignity. *Scott v. Pettigrew*, 72 Tex. 321; *Rand v. Cartwright*, 82 Tex. 399 (diagram at p. 401).

See generally, as to the comparative weight given to locative calls, conflicting calls, lines, courses, and distances, *Case v. Trapp*, 49 Mich. 59; *Beeman v. Black*, 49 Mich. 598; *Dugger v. McKesson*, 100 N. Car. 1; *Disney v. Coal Creek Min., etc., Co.*, 11 Lea (Tenn.) 607; *Fordtran v. Ellis*, 58 Tex. 245; *Oliver v. Mahoney*, 61 Tex. 610; *Schaeffer v. Berry*, 62 Tex. 705; *Ayers v. Harris*, 64 Tex. 296; *Ayers v. Lancaster*, 64 Tex. 305; *Gerald v. Freeman*, 68 Tex. 201; *Duff v. Moore*, 68 Tex. 270; *Davidson v. Killen*, 68 Tex. 406; *Koepsel v. Allen*, 68 Tex. 446; *Moore v. Reiley*, 68 Tex. 668; *Blassingame v. Davis*, 68 Tex. 595; *Bigham v. McDowell*, 69 Tex. 100; *McAninch v. Freeman*, 69 Tex. 445; *Bowers v.*

buyer, in absence of fraud, takes the risk of deficiency.¹ But when the boundaries are doubtful in themselves, quantity often becomes the controlling fact.²

(7) *Ancient Plats; Traditionary Repute*.—Upon variance between calls for monuments, and for courses and distances,

Dickinson, 30 W. Va. 709; Ayers v. Watson, 113 U. S. 594; Com'r of Highways v. Beebe, 61 Mich. 1.

1. In Cottingham v. Parr, 93 Ill. 233, the court, by Dickey, J., said: "Quantity is perhaps the least reliable of all the *indicia*."

Sometimes descriptive clauses may be reconciled by construing "links" to mean hundredths of a rod. Sanders v. Godding, 45 Iowa 463.

In *New Hampshire*, the words, "to contain 200 acres by measure," were held to be mere description, and not to amount to a covenant. Perkins v. Webster, 2 N. H. 287.

As to words restricting the quantity meant by the words, "homestead farm," see Barnard v. Martin, 5 N. H. 536; also Woodman v. Lane, 7 N. H. 241, wherein at p. 247, referring to the description in Lodge v. Lee, 6 Cranch (U. S.) 237, the court, by Richardson, C. J., said: "An island has certain natural boundaries which cannot be mistaken, and which, when the whole island is granted, cannot be controlled by length of chain and point of compass."

In *Maine*, a deed of "my homestead farm, being lot No. 13," was held to pass only that lot, although the grantor also occupied land adjoining it. Allen v. Allen, 14 Me. 387.

A deed conveying "all that tract known as Beauchamp Neck," was restricted to certain well-known bounds specified therein, although the neck might extend farther. Thorndike v. Richards, 13 Me. 430. Compare Brown v. Saltonstall, 3 Met. (Mass.) 423.

In *Maine*, a deed made soon after location of the tract by the parties by monuments, and containing a precise description, was held to embrace the tract described, without regard to the quantity, notwithstanding the added words, "shall contain exactly one acre and a half." Emery v. Fowler, 38 Me. 99.

In *New York*, where a lot was described in a deed as "containing 600 acres, be the same more or less," and on actual survey, there was found to be a deficiency of 125 acres, it was

held that there was a failure of title to that extent. Mann v. Pearson, 2 Johns. (N. Y.) 37. So also as to a deficiency of seven acres in a lot described as containing 56 acres, "more or less." Wilson v. Randall, 67 N. Y. 338. Otherwise, as to a deficiency of five feet in a lot described as "seventy-five feet" (in depth on Walnut street) "more or less." Morris Canal Co. v. Emmett, 9 Paige (N. Y.) 168; 37 Am. Dec. 388. A deed calling for "160 acres" was held to pass an actual quantity of 185 acres. Hathaway v. Power, 6 Hill (N. Y.) 453.

2. In Winans v. Cheney, 55 Cal. 567, the court, by Thornton, J., said: "Quantity often makes the metes and bounds certain. The quantity, taking the eastern ridge as the boundary, approximates the quantity mentioned in the deed, being eleven acres more than the deed calls for. Taking the western ridge as the boundary, it adds 680 acres—nearly two-thirds as much more—to the deed. Such a discrepancy should not be disregarded."

In Shelby v. Smith, 2 A. K. Marsh. (Ky.) 513, the court, by Mills, J., said: "Where the parties have both believed that there were 200 acres in the tract, and owing to a hidden mistake long ago made, it is deficient in that quantity to so large an amount as the present survey (30 acres), and the contract is executory, . . . this ought to be rectified by the chancellor as other losses and defects."

Where a land contract designated a tract as containing 400 acres, and such was the family tradition as to its area; but in fact, it contained 490 acres, a decree for specific performance by conveyance of 490 acres was reversed. Harrison v. Talbot, 2 Dana (Ky.) 258.

The rule that quantity must yield to metes, etc., does not always apply to Mexican grants. Tobin v. Walkinshaw, McAllister (U. S.) 151. For many additional cases, see MORE OR LESS, vol. 15, pp. 717, 722; also Joseph v. Seward, 91 Ala. 597; Webb v. Brown, 2 Tex. Unrep. Cas. 36; Doyle v. Mellen, 15 R. I. 523; Britt v. Marks, 20 Oregon 223.

ancient documents and also traditionary repute may be resorted to.¹

Owing perhaps to the different circumstances of the two countries as to preservation of surveys and other records of estates, the English rule against hearsay evidence of boundaries is not

1. See BOUNDARIES, vol. 2, p. 503; EVIDENCE, vol. 7, pp. 70, 75.

An ancient survey of a manor, coming from the proper custody, and evincing competent knowledge in the maker, is admissible to prove a right of common in all the inhabitants of the manor. *Smith v. Brownlow*, L. R., 9 Eq. 241 (distinguishable from *Daniel v. Wilkin*, 7 Exch. 429).

An ancient plan or survey of adjacent lands is admissible to prove the location of a creek or arm of the sea, filled up since the deeds were executed and the plan made, and shown to be a dividing boundary. *Drury v. Midland, R. Co.*, 127 Mass. 571.

In *Boardman v. Reed*, 6 Pet. (U. S.) 341, in holding that traditionary evidence is admissible in ascertaining the boundaries of premises that were part of a large connection of surveys made together, the court, by McLean, J., said: "Landmarks are frequently formed of perishable materials, which pass away with the generation in which they were made. By the improvement of the country, and from other causes, they are frequently destroyed. It is therefore important in many cases, that hearsay or reputation should be received to establish ancient boundaries, . . . but it must be material to the issue."

In *Opdyke v. Stephens*, 28 N. J. L. 91, the court, by Green, C. J., said: "Evidence *aliunde* is admissible in all cases where there is a doubt as to the true location of the survey, or a question as to the application of the grant to its proper subject-matter. It must be constantly borne in mind that it is not a question of construction, but of location. A question of construction is a pure question of law, to be decided by the court upon the instrument itself, to the exclusion of evidence *aliunde*, where no latent ambiguity exists. A question of location, or the application of the grant to its proper subject-matter, is a question of fact to be determined by the jury by the aid of extrinsic evidence."

"The courses and distances laid down in a survey, especially if it be ancient,

are never, in practice, considered as conclusive." *Conn v. Penn*, Pet. (C. C.) 511; *Rockwell v. Adams*, 6 Wend. (N. Y.) 467; *Makepeace v. Bancroft*, 12 Mass. 469; *Owen v. Bartholomew*, 9 Pick. (Mass.) 520; *Andrews v. Rue*, 34 N. J. L. 402; *Curtis v. Aaronson*, 49 N. J. L. 68.

See generally, as to the weight to be given to the surveyor's notes, plats, and testimony, *Ellicott v. Pearl*, 1 McLean 206; *Crocket v. Greenup*, 4 Bibb (Ky.) 158; *Trabue v. North*, 2 A. K. Marsh. (Ky.) 361; *Ijanis v. Hoffman*, 1 Md. 423; *Ross v. Rhoads*, 15 Pa. St. 163; *Union Canal Co. v. Loyd*, 4 Watts & S. (Pa.) 393; *Poor v. Boyce*, 12 Tex. 440; *Lee v. Tapscott*, 2 Wash. (Va.) 276; *Richardson v. Carey*, 2 Rand. (Va.) 87; *Nolin v. Parmer*, 21 Ala. 66; *Free v. James*, 27 Conn. 77; *Burgin v. Chevauld*, 9 B. Mon. (Ky.) 285; *Bladen v. Cockney*, 1 Har. & M. (Md.) 230; *Gratz v. Beates*, 45 Pa. St. 495; *Meehan v. Williams*, 48 Pa. St. 238; *Harrison v. Middleton*, 11 Gratt. (Va.) 527; *Vines v. Whitten*, 4 Cal. 230; *Rose v. Davis*, 11 Cal. 133; *Redd v. Bohannon*, 3 A. K. Marsh. (Ky.) 602; *Ridgeley v. Johnson*, 11 Barb. (N. Y.) 527; *Holliday v. Maddox*, 39 Kan. 359; *Hume v. Hernstadt* (Tex.), 12 S. W. Rep. 285; *McMullin v. Lewis*, 5 W. Va. 144; *Atkinson v. Patterson*, 46 Vt. 750; *Funk v. Hughes*, 5 Gill (Md.) 315.

Maps, Plats, etc.—Maps, unless made by public authority, are not admissible in evidence, unless their correctness is shown by preliminary evidence, or has been admitted or acted upon by the parties. *Johnson v. Jones*, 1 Black. 209; *Stein v. Ashby*, 24 Ala. 521; *Thrall v. Smiley*, 9 Cal. 529; *Dunn v. Hays*, 21 Me. 76; *Wilder v. St. Paul*, 12 Minn. 192; *Jackson v. Vandyke*, 1 N. J. L. 28; *Jackson v. Frost*, 5 Cow. (N. Y.) 346; *Burnett v. Thompson*, 13 Ired. (N. Car.) 379. And see generally, as to the effect of maps as evidence: *Hedrick v. Hughes*, 15 Wall. (U. S.) 123; *People v. Klumpke*, 41 Cal. 263; *Williamson v. Fischer*, 50 Mo. 198; *Kingsland v. Chittenden*, 6 Lans. (N. Y.) 15; *Schools v. Risley*, 10 Wall.

rigorously adhered to in the *United States*; and here, under certain restrictions, declarations of a deceased owner or surveyor, made while pointing out a line, are admissible.¹

(U. S.) 91; *Missouri v. Kentucky*, 11 Wall. (U. S.) 395; *Harris v. Com.*, 20 Gratt. (Va.) 833; *Gates v. Kieff*, 7 Cal. 124; *Smith v. Strong*, 14 Pick. (Mass.) 128; *Surget v. Doe*, 24 Miss. 118; *Crawford v. Loper*, 25 Barb. (N. Y.) 449; *Com. v. Alburger*, 1 Whart. (Pa.) 469; *Penny Pot Landing v. Philadelphia*, 16 Pa. St. 79; *Wood v. Willard*, 36 Vt. 82; *Pfotzer v. Mullaney*, 30 Iowa 197; *St. Louis v. Missouri Pac. R. Co.*, 114 Mo. 13; *Sanborn v. Mueller*, 38 Minn. 27; *Cleveland v. Choate*, 77 Cal. 73.

1. In *Hunnicutt v. Peyton*, 102 U. S. 364, a case involving the boundary of a Mexican grant on the Brazos river, in summing up the preponderance of "the vast number of decisions of state courts upon this subject," the court, by Strong, J., said: "In questions of private boundary, declarations of particular facts, as distinguished from reputation, made by deceased persons, are not admissible, unless they were made by persons who, it is shown, had knowledge of that whereof they spoke, and who were on the land, in possession of it when the declarations were made. To be evidence, they must have been made when the declarant was pointing out or marking boundaries, or discharging some duties relating thereto. A declaration which is a mere recital of something past is not an exception to the rule that excludes hearsay evidence."

In *Connecticut*, in 1845, in a case involving boundary of an alley in Norwich, it was held that, as against certain court records, etc., traditionary reputation was admissible, to establish not only boundaries of public territorial divisions, but also lines of individuals' premises. *Kinney v. Farnsworth*, 17 Conn. 356.

In *Massachusetts*, introduction of evidence traditionary or of declarations of persons deceased, as to matters of public interest, is not extended to a question of private boundary in which no considerable number of persons have a legal interest. *Boston Water Power Co. v. Hanlon*, 132 Mass. 483. Unless made while pointing out boundaries. *Long v. Colton*, 116 Mass. 414. Compare *Hooten v. Comerford*, 152 Mass. 591.

In *Virginia*, in 1824, in a case involving location of the boundary of a street in Richmond, it was held that ancient repute and possession were entitled to more respect than any recent experimental survey. *Ralston v. Miller*, 3 Rand. (Va.) 44; 15 Am. Dec. 704.

Parol evidence may show that calls for course and distance were mistaken. *Elliott v. Horton*, 28 Gratt. (Va.) 766.

In *New Hampshire*, declarations of a deceased surveyor have been held competent. *Adams v. Blodgett*, 47 N. H. 219; 90 Am. Dec. 569. And as to presumption, etc., after twenty years, see *Richardson v. Chickering*, 41 N. H. 380; 77 Am. Dec. 769.

In *New Hampshire* and *Vermont*, declarations of a deceased owner need not be proved to have been made when he was upon the land. *Lawrence v. Tennant*, 64 N. H. 532; *Webb v. Richardson*, 42 Vt. 465.

In *Vermont*, also, is relaxed the common-law rule excluding in case of conflicting descriptions, diagrams, etc., evidence of declarations of deceased persons as to boundaries. *Wood v. Willard*, 37 Vt. 377; 36 Am. Dec. 716; *Child v. Kingsbury*, 46 Vt. 47; *Hadley v. Howe*, 46 Vt. 142; *Hale v. Rich*, 48 Vt. 217.

In *Texas*, also, are admissible declarations of a deceased person, grantee of a tract, as to boundaries of subdivisions sold by him, in regard to which he was not interested. *Hurt v. Evans*, 49 Tex. 311. Or public surveyor while making the survey. *George v. Thomas*, 16 Tex. 74; 67 Am. Dec. 612. Compare *Anderson v. Stamps*, 19 Tex. 460; *Converse v. Langshaw*, 81 Tex. 275.

But hearsay evidence to establish ancient boundaries will be carefully, if not jealously, scrutinized by the courts. *Welder v. Carroll*, 29 Tex. 317. And proof of neighborhood reputation, to establish an ancient boundary, must have reference to a time *ante litem motam*. *Stroud v. Springfield*, 28 Tex. 649. As to foundation for admitting testimony that a surveyor once pointed out a certain boundary, ambiguity latent, ambiguity patent, etc., see *Titterington v. Trees*, 78 Tex. 567.

The rule for allowing evidence of acquiescence of adjoining owners does not apply to a boundary capable of

As to the conclusiveness of acquiescence or of an agreement on the part of adjoining owners in the location of the divisional line, the decisions are not uniform.¹

III. IN TOPOGRAPHY AND HYDROGRAPHY—1. Selection of Beacon Sites.—The *United States* statutes provide for surveys to ascertain proper and necessary points for planting lighthouses, buoys, etc. It is the duty of the Secretary of the Treasury to cause such surveys to be made on the northwestern lakes by direction of the

being located by a competent surveyor, through aid of the government survey and field-notes. *Pickett v. Nelson*, 79 Wis. 9. But *compare* *Ralston v. Miller*, 3 Rand. (Va.) 44; 15 Am. Dec. 704.

In *Pennsylvania*, also, is relaxed the English rule excluding declarations of a deceased owner made while pointing out his boundaries. *Bender v. Pitzer*, 27 Pa. St. 333; *M'Causland v. Fleming*, 63 Pa. St. 36; *Kennedy v. Lubold*, 88 Pa. St. 246. Surveyors' testimony that they had run an official survey from a marked tree pointed out by a deceased surveyor as a recognized corner of the adjoining survey, was held sufficient to establish a location, *prima facie*. *Fisk v. Corey*, 141 Pa. St. 334.

In *South Carolina*, declarations of a deceased surveyor while pointing out the line, are admissible. *Blythe v. Sutherland*, 3 McCord (S.Car.) 258.

And in *North Carolina*, in *Sasser v. Herring*, 3 Dev. (N. Car.) 340, the court, by Henderson, C. J., said: "From the necessity of the case, arising from the situation of our country, and the want of self-evident termini of our lands, . . . we have, in questions of boundary, given to the single declarations of a deceased individual, as to a line or corner, the weight of common reputation, . . . but never the declaration of the owner of the land, however ancient."

In *Florida*, also, it is held, that hearsay and repute, in connection with other evidence, are entitled to respect in cases of boundaries, after great length of time. *Daggett v. Willey*, 6 Fla. 482.

1. In *New York*, acquiescence of adjoining proprietors for forty years in the practical location of the line between their lands, has been held to be conclusive, although originally made under an agreement resulting from a mutual mistake as to facts. *Baldwin v. Brown*, 16 N. Y. 359. Or for over twenty years. *Reed v. Farr*, 35 N. Y. 113. As to prescriptive rights gener-

ally, see collation of authorities in *Burbank v. Fay*, 65 N. Y. 57. As to parol evidence of a boundary, see also *Harris v. Oakley*, 130 N. Y. 1. As to the conclusiveness of reference to a plat, see *Finelite v. Sinnott*, 125 N. Y. 683.

In *Illinois*, also, so held, as to acquiescence for twenty years in a fence-line. *Hubbard v. Stearns*, 86 Ill. 35. But proof of the setting of a hedge was, in absence of evidence of agreement of adjoining proprietors that it was in the line, held to be insufficient. *McNamara v. Seaton*, 82 Ill. 500.

In *Ohio*, the finality of an adjustment of a boundary between adjoining owners cannot be disturbed, although they afterwards learn that the true line could have been found. *Hills v. Ludwig*, 46 Ohio St. 373.

In *Michigan*, *compare* *Sanscrainte v. Torongo*, 87 Mich. 69 (diagram at p. 74).

In *Pennsylvania*, *compare* *Davis v. Russell*, 142 Pa. St. 426 (diagram at p. 427).

In *West Virginia*, neither of the coterminous owners who have agreed on a disputed line is thereby estopped from claiming to the true line. *Hatfield v. Workman*, 35 W. Va. 578.

In *Wisconsin*, so also. *Pickett v. Nelson*, 79 Wis. 9. *Compare* *Keller v. Keller*, 80 Wis. 318.

In *Minnesota*, a defective town plat, offered to show a common-law dedication, cannot be varied by evidence of oral declarations of the parties who signed it. *Wayzata v. Great Northern R. Co.*, 46 Minn. 505.

In *Mississippi*, a hedge line between adjoining plantations, recognized by the owners for thirty-five years, was held so to fix the boundary that the original owner, on discovering the true line, could not recover the strip. *Jones v. Gaddis*, 67 Miss. 761.

In *Missouri*, possession of coterminous proprietors, in ignorance of the true line, will not work a disseizin. *Crawford v. Ahrnes*, 103 Mo. 11; *Finch v. Ullman*, 105 Mo. 255.

Corps of Engineers, and elsewhere under the Superintendent of the Coast Survey.¹

2. **Charting of Coasts.**—It is the duty of the President of the *United States* to cause to be made surveys of the coasts for twenty leagues from the shore, also in such other marine localities as he may deem expedient, and annually report the results to Congress; indicating by lines, colors, and explanations, the soundings, currents, etc. The hydrographical portion of the work is to be performed under officers of the Navy; the topographical, under officers of the Army.² There are also state statutory provisions for coast surveys.³

IV. IN MARITIME AFFAIRS—1. **In General.**—See SEAMEN, vol. 21, p. 915; SHIPS AND SHIPPING, vol. 22, p. 710.

2. **In Marine Insurance.**—In marine insurance, a stipulation commonly known as “the rotten clause,” provides that the insurer is not to be bound, if the vessel be declared unseaworthy by reason of her being unsound or rotten “upon a regular survey.”⁴ The word “regular” here imports one conformable to the laws and customs of the place where it is made.⁵ Such would be a survey by persons appointed under a state law therefor.⁶

V. IN FIRE INSURANCE.—Technically, the survey is but a plan or description of the premises on which insurance is asked, showing with more or less completeness their condition and surroundings.⁷

Surveys and measurements made by a person while acting

1. See U. S. Rev. Stat., § 4663.

2. See U. S. Rev. Stat. 1878, § 4681 *et seq.*

3. See *Connecticut* Gen. Stat. 1888, ch. 117. In *Virginia*, any person employed in the coast survey, may cut down trees, remove fences, or do any other “thing necessary to effect the objects of such survey.” *Virginia* Code 1887, § 20.

4. 2 Parsons, Mar. Ins. 477.

5. *Dorr v. Pacific Ins. Co.*, 7 Wheat. (U. S.) 581; *Insurance Co. v. Mordecai*, 22 How. (U. S.) 111.

6. *Janny v. Columbian Ins. Co.*, 10 Wheat. (U. S.) 411.

Such survey is not conclusive evidence, even when made under an order of a court of admiralty. *Schooner Tilton*, 5 Mason (U. S.) 465; *The Dawn, Ware* (U. S.) 491; *Gordon v. Massachusetts F. & M. Ins. Co.*, 2 Pick. (Mass.) 264. But it is important evidence. *Prince v. Ocean Ins. Co.*, 40 Me. 481; 63 Am. Dec. 676.

As to matters avoiding a marine policy, in general, see MARINE INSURANCE, vol. 14, p. 350.

7. See *supra*, this title, *Definitions*. See also 2 May on Ins. (3d ed.), § 159.

See INSURANCE, vol. 11, p. 294; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331.

The survey, if made by the agent, is coextensive with the application. *May v. Buckeye Mut. Ins. Co.*, 25 Wis. 297; 3 Am. Rep. 76.

As to location of the property, etc., see FIRE INSURANCE, vol. 7, p. 1005.

The printed stipulation is usually in this form, substantially: “If the insurance is made upon a written plan, survey, or application, the same shall form a part of the policy, and be a warranty.” *First Nat Bank v. Insurance Co. of N. A.*, 50 N. Y. 45; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19; 54 Am. Dec. 309; *May v. Buckeye Mut. Ins. Co.*, 25 Wis. 291; 3 Am. Rep. 76. Compare *Sheldon v. Hartford F. Ins. Co.*, 22 Conn. 235; 58 Am. Dec. 420; *Garcelon v. Hampden F. Ins. Co.*, 50 Me. 580.

Where a printed clause in the policy stipulated that “the application, survey, plan, or description of the property herein insured, referred to in this policy, shall be considered a part of this contract, and a warranty by the assured during the time this policy is kept in force,” it was held, that the

within the scope of his authority and line of his duty as surveyor and agent of an insurance company, in preparing the application, will be treated by the courts as if made by the company itself. Accordingly, the company is estopped from showing a breach of the warranty by proof of errors material to the risk, in a survey and application made out by the agent, with a full knowledge of the facts.¹

VI. IN ARMY REGULATIONS.—In the army, boards of survey are called principally to ascertain the responsibility for deficiency of public property under certain circumstances, and to aid in the adjustment of officers' accounts thereon.²

VII. IN REVENUE PROCEEDINGS — 1. **Customs Inspection.** — The duties of a *United States* port-surveyor are chiefly to inspect vessels arriving, and to report daily to the collector their names, nationalities, cargoes, manifests, etc.³

2. **Distillery Inspection.**—Besides a registration of every still or distilling apparatus set up, a written notice of intention, etc., to the revenue collector of the district, a bond for faithful compliance with the provisions of law regulating the business, a plan in triplicate of the distillery, etc., the *United States* statutes require that he make a survey to determine the daily spirit-producing capacity of the distillery.⁴

VIII. IN EXPROPRIATIONS—(See RAILROADS, vol. 19, pp. 826–838).—The word "survey" is often applied to an examination made by a commission appointed under statutory provision for estimation of the damages, where property is expropriated under the right of eminent domain, and the parties cannot agree upon

agreement was to insure according to the policy and not to a written plan that was referred to in the oral application; and that the fact that a force-pump was shown on the plan, did not create a continuing warranty that any particular kind of pump should always be maintained ready for use. *Albion Lead Works v. Williamsburg City F. Ins. Co.*, 2 Fed. Rep. 479.

1. *Plumb v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. 392; 72 Am. Dec. 52; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Combs v. Hannibal Sav., etc., Co.*, 43 Mo. 148. But compare *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497; *Ashford v. Victoria Mut. Assur. Co.*, 20 U. C. C. P. 434.

Ordinarily, the form of the "certificate of survey of the premises" is as follows: "The said applicant hereby covenants and agrees with the said company that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the

same are known to the applicant, and are material to the risk." See *Hough v. City F. Ins. Co.*, 29 Conn. 10; 76 Am. Dec. 581; *Garcelon v. Hampden F. Ins. Co.*, 50 Me. 580.

Thus, the principal portion of the "survey" may consist of interrogatories and answers, *e. g.*, Q. "Is there a watch in the mill during the night?" Ans. "Yes." *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19; 54 Am. Dec. 309.

2. See U. S. Army Reg. 1881, § 1400. For the procedure, etc., see §§ 1401–13.

3. See U. S. Rev. Stat., § 2627.

4. See U. S. Rev. Stat., § 3264.

The distiller is not liable for the capacity tax until a copy of the survey has been delivered to him. *Peabody v. Stark*, 16 Wall. (U. S.) 240. But compare *U. S. v. Black*, 11 Blatchf. (U. S.) 538.

An indorsement made upon a distiller's bond and signed by the obligors: "We hereby accept the within survey and consider the same as binding upon

the compensation.¹ In order that owners may be informed of the exact property proposed to be taken, some state statutes provide that a survey of the route shall be filed in some public office. Such record is conclusive on both parties.²

IX. GEOLOGICAL BOARDS.—Many state legislatures have established boards of geological survey, chiefly to ascertain and report the mineral resources of the state, collect and preserve specimens, etc. An office of state geologist has been created, the primary function of which has been to employ scientific assistants, and personally superintend field work, collection, publication, etc. Sometimes, after completion of the survey, this office has been continued at a moderate expense, the main duties being the care of the collection, etc. The personnel of such boards is different in different states. Ordinarily, the governor has been made president, and a state agricultural society represented therein.³

us on and after this date," was held to be a waiver of delivery of a copy of the survey; and the difference between the capacity of the still and the returns of production might be recovered in a suit on the bond. *Wright v. U. S.*, 108 U. S. 281.

1. As to the expropriation of lands to municipal railways, and other public purposes, see *EMINENT DOMAIN*, vol. 6, p. 518.

As to the laying out and altering of highways, and changing of grade, etc., see *EMINENT DOMAIN*, vol. 6, p. 548; *HIGHWAYS*, vol. 9, p. 369.

As to appraisals, etc., see *APPRAISEMENT*, vol. 1, p. 634.

In a case from *New Jersey*, in 1830, *Bonaparte v. Camden*, etc., R. Co., Baldw. (U. S.) 221, in deciding that an omission to comply with a charter requirement of deposit of report of survey, etc., rendered the taking a trespass, the *United States* circuit court, by Baldwin, J., said: "It is a principle of Magna Charta, recognized in all the states, that no man shall be disseized or dispossessed of his property without due process of law, or legal process, or the judgment of a jury (2 Coke Inst. 45); but if either mode is pursued, the principle is unimpaired. A law which authorizes the appropriation of property to public use, and prescribes a mode of proceeding by which compensation shall be ascertained and made, is not obnoxious to Magna Charta; or its construction in *England* or this state. An inquisition on a writ of *ad quod damnum* is the usual mode, when a franchise is granted by prerogative. but when a corporation is created by

act of Parliament, it does not seem to be usual; it certainly is not necessary to give validity to the charter, or power to do the acts it authorizes. . . . The appointment of commissioners was usual from a very early period. . . . When a mere easement . . . it is usual to do it by a jury."

2. *Hazen v. Boston*, etc., R. Co., 2 Gray (Mass.) 574.

In *Massachusetts*, omission to comply with the statute before taking, subjects the officers to an action for trespass. *Lund v. New Bedford*, 121 Mass. 286. Compare *Wilson v. Lynn*, 119 Mass. 174. As to the consequences of the failure of the Cochituate Water Board of Boston to fill in the registry a "description" of Sudbury river, "ascertain," etc., see *Wamesit Power Co. v. Allen*, 120 Mass. 352.

In *Minnesota*, no suit lies to recover the value, until actual occupation by the condemning party, unless such survey has been filed. *Teick v. Caryl Co.*, 11 Minn. 292.

In *New Jersey*, a deposit of a "survey" of the route in the office of the Secretary of State, is predicable of deposit of a description setting forth in words and figures the commencement and terminus, the stations and their distance apart, though unaccompanied by any elaborate profile. *Atty. Gen'l v. Stevens*, 1 N. J. Eq. 369; 22 Am. Dec. 526. But there, omission to comply with a statute requiring deposit of report of survey in the office of the clerk of the county, would render the taking a trespass. *Bonaparte v. Camden*, etc., R. Co., Baldw. (U. S.) 205.

3. See various state statutes.

SURVIVAL OF ACTIONS—SURVIVORSHIP.

SURVIVAL OF ACTIONS.—The general rule as to the survival of an action after the death of the plaintiff or defendant is, that actions of contract survive and that actions of tort do not; but this strictness of the rule and the distinction has been relaxed and modified considerably by statutes and judicial construction, and is now subject to exceptions and explanation.¹

SURVIVE—(See also **WILLS**).—To survive, means simply to remain in life after the death of another, or after a particular date or the happening of a particular event.²

SURVIVING PARTNER.—See **PARTNERSHIP**, vol. 17, p. 1154.

SURVIVORSHIP.—(IN COMMON DISASTER.)

I. Scope of Subject ; Presumptions,
1027.

II. Civil-Law Rule, 1027.
III. Common-Law Rule, 1028.

I. SCOPE OF SUBJECT ; PRESUMPTIONS.—Where two or more persons lose their lives in a common disaster, as, for example, a shipwreck, fire, or railway accident, it becomes often a question of importance in the determination of property rights, successions, for instance, to know who died first, in the absence of evidence outside of a presumption. The civil law recognized, *ex necessitate*, certain presumptions, which have been adopted also to a greater or less extent in the systems of the law of various European countries, and of those states of the Union whose codes follow the French or Spanish law.³

II. CIVIL-LAW RULE.—A brief statement of the rule of the civil law is essential to a comprehension of the origin, growth, and status of what may be termed the common-law rule, established firmly only within the last century. According to the Roman law, the presumptions were never in favor of contemporaneous

1. See **DEATH**, vol. 5, p. 125; **EXECUTORS AND ADMINISTRATORS**, vol. 7, pp. 262-270. See also titles of various classes of actions.

2. *Hawley v. Northampton*, 8 Mass. 31; 5 Am. Dec. 66.

"Survive" imports that the person who is to survive must be living (*i. e.*, born, in being) at the death of the person whom or at the happening of the event which he is to survive. *Gee v. Liddell*, L. R., 2 Eq. 341. In that case the court, by Romilly, M. R., said: "My opinion is, that the meaning of the word 'survive' or 'survivor' imports that a person who is to survive must be living at the time of the event which he is to survive. I have consulted several dictionaries on this subject. I have consulted Johnson and Richardson, and the authorities cited by them; and in all instances it appears to me to mean to 'outlive,' that

is, to be alive at the time of a particular event, or the death of a particular person which event or person the other is to survive. It is true that Dr. Johnson puts as one of the meanings, 'to live after another' . . . But all the passages from the English writers cited tend to the conclusion that the person who survives an event must be living at the time when that event takes place, and that 'to live after' is somewhat ambiguous."

3. See **ABSENCE**, vol. 1, p. 42; also the various text-books on the law of evidence. In the compilation of this article, and the collection of its authorities, the chief credit is due to William W. Wight, Esq., of Milwaukee, Wis., whose learned and interesting monograph entitled "Lord Mansfield's Undecided Case," and published in a limited edition in 1893, has been used freely with his permission.

demise. If a parent and his son perished in the same battle or shipwreck, the son, above the age of puberty, was presumed to have survived his father; under that age, to have pre-deceased him. This was upon the idea that in the former case the son was usually stronger, in the latter weaker, than his father. So if persons perishing in the same disaster were all under fifteen, the presumption of survivorship was with the elder; if all were over sixty, with the younger. Similarly, the wife was presumed to have yielded first to the common peril.¹

In *Holland*, *Prussia*, and *Austria*, it is a statutory presumption, in the absence of evidence, that all the kin who perish in a calamity die together, and no one receives or transmits succession.² The rule in *India* is similar.³ The Code Napoléon adopted precise and systematic rules governing doubtful cases of death.⁴ In *Italy* and *Spain* similar rules, slightly modified, obtain. The French rule is incorporated into the code of *Louisiana*,⁵ and with slight alterations has been adopted in *California*.⁶

III. COMMON-LAW RULE.—The rule of the common law, or, to speak more accurately, the rule which at the present day may be said to be in force in *England*, and in those states of the Union whose law has been derived from, or is analogous to, the English law, discards presumptions and requires proof. It may be stated thus: That each case must be determined upon its peculiar facts and circumstances, whenever the evidence is sufficient to support a finding of survivorship; but, in the absence of such evidence, the question of survivorship is to be regarded as unascertainable, and rights of property or of succession are to be determined as if death occurred to all at the same moment of time; or, to put it in other words, those who claim through a survivorship must prove survivorship, and there is no presumption of law of survivorship in the case of persons who perish by a common disaster without other evidence to prove the fact, and hence the party upon whom the onus lies fails to establish it.⁷

1. Digest, lib. 34. tit. 5, 22, 23; Burge's Commentaries on Colonial and Foreign Laws, vol. 4, pp. 11-29.

2. See the codes of these countries.

3. Baillie's Mohammedan Law of Inheritance 172.

4. Code Napoléon, arts. 720-722. These articles in substance declare that if several individuals, respectively entitled to inheritance from one another, should die by the same event without anyone being able to ascertain which died first, the presumption of survivorship is determined by the circumstances of the fact; but, these being wanting, by the condition of age and of sex. If those who thus died were under fifteen years of age, the eldest will be presumed to have survived; if all were

above sixty, the youngest will be so presumed; if some were under fifteen and some above sixty, the former will be so presumed. If those who thus died were between fifteen and sixty years of age, the presumption of survivorship is with the male as against the female, if the difference of age between them does not exceed a year. If those who thus died were of the same sex, the presumption of survivorship follows the order of nature and the younger must be presumed to have outlived the elder.

5. *Louisiana* Code, arts. 936-939. See *Robinson v. Gallier*, 2 Woods (U.S.) 178.

6. *California* Code Civ. Proc., § 1963, subd. 40. See *Sanders v. Simcich*, 65 Cal. 50; *Hollister v. Corder*, 76 Cal. 649.

7. The first statement of the rule as

adopted in the text above is taken from *Ehle's Estate*, 73 Wis. 445, a case determined in 1889. The second statement is summarized in *Newell v. Nichols*, 12 Hun (N. Y.) 604, where the opinion of Justice Van Vorst at special term was adopted *in toto* by the general term, and again by the Court of Appeals in *Newell v. Nichols*, 75 N. Y. 78; 31 Am. Rep. 424, where the judgment of both courts below was affirmed.

Lord Mansfield's Undecided Case.—In the seventh year of George III, the lawyers in *England* were exercised concerning a state of facts new to English jurisprudence and demanding the application of principles before uninvoked. The case was that of *Rex v. Hay*, 1 W. Bl. 640. General Stanwix sailed from Dublin for London, accompanied by his wife and his adult daughter by a former marriage, the latter being his only descendant. The vessel on which they were passengers was lost with all on board. No circumstances were known from which survivorship could be determined. General Stanwix being intestate, the disposition of his estate—depending upon priority of death as between him and his daughter—lay between his nearest surviving relative, a nephew, and his daughter's nearest surviving relative, her mother's brother. The common law was searched in vain for precedents. Upon the recommendation of Lord Mansfield, before whom the litigation was marshalled, the case was compromised, he having expressly stated that there was no legal precedent on which he could render a decision. See *Wright v. Sarmuda*, 2 Phil. 261; *Fearne's Posthumous Works* 38.

Summary of English Cases.—In *Wright v. Sarmuda*, 2 Phil. 261, adjudged in the prerogative court of Canterbury in 1793, the court admitted a presumption of co-demise.

In *Mason v. Mason*, 1 Meriv. 308, a case in chancery before the master of the rolls, the court refused to entertain the civil-law presumption that a grown child outlived a father.

In *Colvin v. Procurator-General*, 1 Hagg. 92, adjudged in the ecclesiastical court in 1827, the civil-law presumption that a husband survived his wife who was drowned with him, was, in effect, recognized, although the point was not argued, and no appearance was made on the part of the defendant.

In *Re Selwyn*, 3 Hagg. 748, the court, in effect, followed the last cited case,

and recognized the presumption that the husband, under similar circumstances, survived his wife.

Satterthwaite v. Powell, 1 Curteis 705, an ecclesiastical court case, recognized the presumption of a co-demise.

In *Sillick v. Booth*, 1 Y. & Col. 117, a chancery case of 1842, the civil-law presumption was applied, the vice-chancellor remarking: "I am of the opinion that the two brothers having perished by shipwreck under circumstances of which there is no evidence, it is not necessary to be taken that they died at the same instant;" and further, "If the matter were open, I should hold with the master that, having regard to the age and condition of the two brothers, it is to be presumed and decided that" the adult brother survived the minor. The master had found as a fact the survivorship, on evidence that the elder brother was stronger than the other, and that both were exposed to the same struggle. The finding was not excepted to, so that the remarks of the vice-chancellor were not called for. This adjudication has been criticised sharply, and seems to be against the current of earlier English decisions, as it certainly is against the current of the later ones. See 1 Taylor on Ev., § 203; *Newell v. Nichols*, 12 Hun (N. Y.) 604.

In *Durrant v. Friend*, 5 De G. & Sm. 343, the presumption of contemporaneous destruction was applied without question as between human life and personal property.

In *Barnett v. Tugwell*, 31 Beav. 232, a chancery case decided in 1862, proof of survivorship was required. See also *Doe v. Nepean*, 5 B. & Adol. 86; 27 E. C. L. 42.

English Cases Involving "Circumstances of the Fact."—Mr. Wight, in the monograph above referred to, says there is a foundation for the criticism uttered half a century ago in 2 Kent's Com. 435, and *Pell v. Ball*, Cheves Eq. (S. Car.) 99, that the "English law has hitherto waived" a decision which would be a final precedent; but, says Mr. Wight, "this precedent has recently and decisively been established in those English cases where there were 'circumstances of the fact.'" The earliest of these cases was decided in 1596—*Broughton v. Randall*, Cro. Eliz. 502; 2 Bac. Abr. 701; Noy 64. The action was in behalf of the son's wife for dower. The reporter, speaking of the joint tenants, says: "And they were

both hanged in one cart, but because the son (as was deposed by witnesses) survived, as appeared by some tokens, viz., his shaking his legs, his *feme* thereupon demanded dower." And upon this issue, *nunques seisie dower*, this matter was found for the demandant. Two centuries afterwards arose in the prerogative court of Canterbury the case of *Taylor v. Diplock*, 2 Phil. 261. Here the question was whether wife or husband survived, both being lost in a common shipwreck. The court said: "The proof of the wife's surviving must be shown;" or, in differing phraseology, "The burthen is thrown on the defendant to show that there ever was a moment in which the property vested in the wife." There was evidence, but it was not wholly reconcilable, owing to the confusion and excitement of the occasion. The judge declined to find that the husband survived the wife. See this case commented upon in 8 Alb. L. J. 187. See also *In re Murray*, 1 Curteis 596.

Underwood v. Wing.—The leading case in *England* on this subject, and one now universally accepted in that country and in the *United States* as expounding the doctrine from the common-law standpoint, is *Underwood v. Wing*, 19 Beav. 459. This too was a case of a shipwreck, and the question was, who was the survivor, the husband or the wife. A seaman testified and was the only witness. His testimony was inconclusive. There was conflicting testimony of physicians as experts—the first introduction of skilled evidence in this class of cases. The physicians discussed asphyxia in the case of males and females, and the discussion tended to show that the man probably lived the longer; but Sir John Romilly, master of the rolls, in his opinion, entirely ignored the experts. He said: "It is possible to speculate to an unlimited extent, but to come to a safe conclusion or to a definite result is, in my opinion, totally impossible."

My opinion is that I must consider that there is no evidence to show me who is the survivor, and the conclusion of law is that I cannot form any decision on the assumption that either was the survivor." The case was appealed in *Underwood v. Wing*, 4 De G. M. & G. 633. The subject was discussed again exhaustively, but with the same result. The case then went to the House of Lords in *Wing v. Angrove*, 8 H. L. Cas. 183, but with the

same result. The decisions below were all approved. It was held by the House of Lords that the English law was opposed definitely to any presumption of survivorship, and that any claim of survivorship must be proved. See also *Ommaney v. Stilwell*, 23 Beav. 328; *Dowley v. Winfield*, 14 Sim. 277; *Cuthbert v. Purrier*, 2 Phil. 199; *Wentworth v. Wentworth*, 71 Me. 72; 16 Irish L. T., five articles on Presumptions of Life, Death, and Survivorship.

Later English Decisions.—Since *Underwood v. Wing*, the law has been definitely settled in *England*, on the basis of that decision. Subsequent cases, whether on burden of proof or survivorship, have accepted it without question. On burden of proof under somewhat similar circumstances consult *In re Green's Settlement*, L. R., 1 Eq. 288; *In re Phene's Trusts*, L. R., 5 Ch. App. 139; *In re Lewes' Trusts*, L. R., 11 Eq. 236.

Later decisions on survivorship may be briefly collated. They all silently acquiesce in the judgment in the *Underwood* case. In *Wollaston v. Berkeley*, L. R., 2 Ch. Div. 213, where a husband and wife were lost on a ship which was never heard of after sailing, *Wing v. Underwood* was cited and accepted; so also in *Re Wainwright*, 1 Sw. & Tr. 257, and in *Scrutton v. Pattillo*, L. R., 19 Eq. 369. See, to the same effect, *Re Ewart*, 1 Sw. & Tr. 258; *Re Grinstead*, 21 L. T. N. S. 731; *Re Nichols*, L. R., 2 P. & D. 361; *Re Carmichael*, L. R., 32 P. M. & A. 70; *Re Wheeler*, 31 L. J. P. & M. 40.

American Cases.—*Coye v. Leach*, 8 Met. (Mass.) 371; 41 Am. Dec. 518, and *Pell v. Ball*, Cheves Eq. (S. Car.) 99, grew out of the loss of the *Pulaski*, wrecked in 1838 between Savannah and Baltimore. In the *Massachusetts* case there was no evidence as to survivorship, and nothing shown as to peculiar capabilities arising from strength and vigor. The court knew only the bare fact of the accident, the sexes and approximate ages of the victims. The court said: "For aught that appears in the present aspect of the case, they may both have perished together. This being so, and no arbitrary presumption being authorized by law in such cases arising from age or sex, the consequence is, that those who seek to enforce their rights as heirs at law of" one of the deceased, must fail. In the *South Carolina* case there was some evidence. The court said:

“Where there is any evidence whatever, even though it be but a shadow, it must govern in the decision of the fact.” The particulars of the disaster were rehearsed in the opinion, and the testimony reviewed, and the court said: “I have from all these considerations formed the opinion that Mrs. Ball survived her husband.” In this case the analysis of the evidence is elaborate.

In *Moehring v. Mitchell*, 1 Barb. Ch. (N. Y.) 264, *affirmed* without opinion in 3 Den. (N. Y.) 610, the subject was touched upon.

In *Hartshorn v. Wilkins*, 2 Oldr. (Nova Scotia) 276, a case of shipwreck, the doctrine of *Underwood v. Wing* was followed.

In *Smith v. Croom*, 7 Fla. 147, the survivorship of one of the victims was deemed to be established by the evidence, which was as follows: Mr. Croom, his wife, their daughter Henrietta, sixteen years of age, their son William, thirteen years of age, and their daughter Justina, seven years of age, were passengers on the “Home,” which was lost at sea. As the vessel grounded on the breakers, Mr. Croom, his wife, their daughter Justina, and their son William, were seen on the gangway. At that moment a breaker swept through the gangway, carrying with it Mrs. Croom and Justina, and they were seen no more. But William was seen holding to the tiller rope. Mr. Croom was not washed away by this breaker, but shortly thereafter was carried overboard. After his father disappeared William was seen clinging to a portion of the boat guards. It was established that the elder daughter was lost some time before the rest. Mr. Croom was physically incapacitated, and could have endured the heavy sea for only a few moments, while his son William was a rugged and robust youth. From this evidence, it was concluded that William survived the rest of the family. In this case, the court said: “As we understand the doctrine of the common law, it is this, that when several individuals perish by a common calamity, and there is no circumstance other than that of age, sex, etc., from which it may be rationally inferred who was the longest liver, no presumption arises upon which a conclusion can be predicated.”

A leading American case is that of *Newell v. Nichols*, 12 Hun (N. Y.) 604; 75 N. Y. 78; 31 Am. Rep. 424. The litigation was persistent and the

discussion exhaustive in the special term, the general term, and the court of appeals. The doctrine of *Wing v. Underwood* was followed. Among other things, Church, C. J., said: “There are cases where a strong probability, in theory at least, would arise, that one person survived another, and perhaps as strong as if there was a survivor, and yet the common law wisely refrains from acting upon it in either case. It is regarded as a question of fact, and evidence merely that two persons perished by such a disaster is not deemed sufficient. If there are other circumstances shown tending to prove survivorship, courts will then look at the whole case for the purpose of determining the question; but if only the fact of death by a common disaster appears, they will not undertake to solve it on account of the nature of the question and its inherent uncertainty.”

An *Illinois* case in the county court, *Re Hall*, 9 Cent. L. J. 381, is in line with the foregoing cases; as is *Russell v. Hallett*, 23 Kan. 276. Here the supreme court approved the following instructions given to the jury by the trial court: “When several persons lose their lives by the same event, there is no presumption of law as to survivorship based upon age or sex, nor is there any presumption that they all died at the same moment. The law makes no presumption on the subject, but leaves the survivorship to be determined as a fact by evidence, and the burden of proof is on the party asserting the affirmative.” The court, after citing with approval *Coye v. Leach*, 8 Met. (Mass.) 371; 41 Am. Rep. 518, and *Newell v. Nichols*, 12 Hun (N. Y.) 604; 75 N. Y. 78; 31 Am. Rep. 424, added: In the absence of other evidence, the fact as to who was the survivor, where several persons perish in the same catastrophe, is assumed to be unascertainable, and property rights are disposed of as if death occurred to all at the same time. While, therefore, it is correct to say the law makes no presumption on the subject, the practical consequence is nearly the same as if the law presumed all to have perished at the same moment.” In this case there was some evidence, but the supreme court said: “The testimony does not conclusively establish what is claimed.”

In *Fuller v. Linzee*, 135 Mass. 468, a husband, wife, and young children

SUSPECT.—See note 1.

SUSPEND.—See note 2.

SUSPICION.—"Suspicion is defined to be 'the act of suspecting

were lost at sea. It was argued by counsel that it should be presumed that the husband and father survived; but the court did not find it necessary to consider the question, which was but incidental.

Johnson v. Merithew, 80 Me. 111; 6 Am. Rep. 162, was a case of shipwreck. The court adopted *Underwood v. Wing*, and thus expounded the law: "In the absence of evidence from which the contrary may be inferred, all may be considered to have perished at the same moment; not because that fact is presumed, but because from failure to prove the contrary by those asserting it, property rights must necessarily be settled on that theory."

In *Cowman v. Rogers*, 73 Md. 403, the rights of certain parties to the avails due upon a certificate of membership in a beneficial association depended upon the question of survivorship. A member, his wife, and their children perished under such circumstances as left no evidence from which it could be ascertained who survived. The regulations of the association provided that if the beneficiary named in the certificate should die in the lifetime of a member, and if the latter should make no other disposition of the benefit, it should be paid to the member's widow; if no widow, then to his children; if no widow or children survive him, then to his mother. It was held, that in the absence of competent and sufficient authority to show that the wife, the nominated beneficiary, died before her husband, her legal representative was entitled to the fund.

A late case is that of *Ehle's Estate*, 73 Wis. 445. Here the evidence was analyzed and the law expounded. The circumstances calling for the determination of the question of survivorship were as follows: A father, his son, his son's wife, and his son's three children were all burned to death at their common residence. The determination of the order of their deaths was rendered necessary by the language of the father's will. The evidence showed the relative arrangement and size of the rooms, the probable origin of the fire, and the location of the bodies when found. The conclusions from the

evidence were, that the fire originated in the room of the father and that he expired before any other person in the house; that his son, having probably started from his sleeping room to his father's assistance, was caught midway and yielded up his life next after the father; and that the three children and their mother, having been sleeping in a room remote from the father, were all suffocated by the smoke or overtaken by the flames, and died together last of all. The rule adopted by the court in deciding this cause was that all such cases were to be determined upon their own peculiar facts and circumstances whenever the evidence was sufficient to support a finding of such survivorship; but in the absence of any such evidence, the question of such survivorship was necessarily to be regarded as unascertainable, and the rights of property to be "determined as if death occurred to all at the same moment of time."

The doctrine of the foregoing cases is recognized also in *Paden v. Briscoe*, 81 Tex. 563; *Cook v. Caswell*, 81 Tex. 678. See also *Stinde v. Goodrich*, 3 Redf. (N. Y.) 87; *Stinde v. Ridgway*, 55 How. Pr. (N. Y. Supreme Ct.) 301; *Matter of Ridgway*, 4 Redf. (N. Y.) 226; *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442.

1. A magistrate authorized to issue a search warrant upon the oath or affirmation of the complainant that he "believes" that the stolen goods are concealed, etc., cannot issue the warrant upon a complaint stating that the complainant "has cause to suspect and does suspect" that the stolen goods are concealed, etc. *Humes v. Taber*, 1 R. I. 464. The court said: "Suspicion may be upon very slight ground, and imports a less degree of certainty than belief." See also *BELIEF*, vol. 2, p. 165. And see *Grant v. First Nat. Bank*, 97 U. S. 81.

2. "**Suspend**" and "**Dispense**."—There is no substantial difference between the terms "dispense" and "suspend," as applied to the rules governing a legislative body. *Bayard v. Baker*, 76 Iowa 220; 23 Am. & Eng. Corp. Cas. 126.

"**Suspend**" and "**Remove**."—But the word "suspend" cannot be held syn-

or the state of being suspected,' imagination, generally of something ill, distrust, mistrust, doubt." ¹

SWAMP—(See also PUBLIC LANDS, vol. 19, p. 367).—Within the meaning of the act of Congress of September 28, 1850, granting swamp and overflowed lands to the states, such lands as, "by periodical overflow at seasons of sowing and harvesting," are "rendered unfit for cultivation of the staple crops." ²

SWEAR—(See also FALSE SWEARING, vol. 7, p. 793; FOR-SWEAR, vol. 8, p. 564; OATH, vol. 16, p. 1017; PERJURY, vol. 18, p. 300).—1. To take an oath administered by some officer duly empowered. ³ 2. To use such profane language as is forbidden by law. ⁴

SWEAT.—See BILL OF LADING, vol. 2, p. 235.

SWINDLE—(See also CHEAT, vol. 3, p. 209).—To "swindle" implies no more than to "cheat." ⁵

SWINE.—See HOG, vol. 9, p. 417.

onymous with "remove." *Poe v. State*, 72 Tex. 625; *State v. Meeker*, 19 Neb. 444.

1. *McCalla v. State*, 66 Ga. 348. In that case it was held that a charge of the trial court that the jury might find a verdict against the defendant upon the testimony of an accomplice, if the corroborating circumstances were such as to cast on the defendant "a grave suspicion of guilt," was erroneous.

2. And. L. Dict.; *Thompson v. Thornton*, 50 Cal. 144; *U. S. v. Louisiana*, 127 U. S. 182; *Merrill v. Tobin*, 30 Fed. Rep. 738.

3. An allegation that the defendant did "depose and swear" to the truth of the answers contained in the deposition following, does not show that the defendant was "sworn" to the truth of said answers. One may "swear" who is not "sworn;" and in such case the oath is not administered, but self-imposed, and the swearer incurs no legal liability thereabout. *U. S. v. McConaughy*, 33 Fed. Rep. 168.

The words "duly sworn," or "sworn according to law," when applied to an officer who is required to take and subscribe the oath prescribed in the constitution, are to be construed to mean, that he has taken the oath as required; and when applied to any other person, that such person has taken an oath faithfully and impartially to perform the duties assigned to him in the case specified. *Bennett v. Treat*, 41 Me. 226. See also PUBLIC OFFICERS, vol. 19, p. 443.

"To swear in and by a written state-

ment can only mean to make a written statement under oath." *Com. v. Carel*, 105 Mass. 585.

In *Com. v. Bennett*, 7 Allen (Mass.) 533, it was held that a certificate of a magistrate that a complaint was "taken and sworn" before him, was sufficient in form. The court said: "That 'sworn' legally means 'sworn to' seems to have been denied for the first time in the present case."

4. See BLASPHEMY, vol. 2, p. 423.

5. *Saville v. Jardine*, 2 H. Bl. 531; *Weil v. Altenhofen*, 26 Wis. 710; *Stevenson v. Hayden*, 2 Mass. 408.

In those states in which "swindling" is not a statutory crime, the term is not actionable *per se*. *Saville v. Jardine*, 2 H. Bl. 531; *Bornell v. Allen*, 3 H. & N. 376; *Odiorne v. Bacon*, 6 Cush. (Mass.) 185; *Stevenson v. Hayden*, 2 Mass. 408; *Chase v. Whilock*, 3 Hill (N. Y.) 139; *Weil v. Altenhofen*, 26 Wis. 708; *Pollock v. Hastings*, 88 Ind. 248.

In *Herr v. Bamberg*, 10 How. Pr. (N. Y.) 128, it was alleged that defendant had charged the plaintiff with having "swindled" him, and that these words were spoken of the plaintiff as a merchant. Defendant pleaded justification. The court, by Harris, J., said: "The charge as stated in the complaint is, that the plaintiff had swindled the defendant out of the property, and that he was a swindler. In other words, that the plaintiff had, by deliberate artifice, procured the defendant to deliver goods to him, under a pretended

SYMBOLIC DELIVERY.—See SALES, vol. 21, p. 444.

SYNALLAGMATIC CONTRACT.—A contract by which each of the contracting parties binds himself to the other; such as contracts of sale, hire, etc.¹

SYNDIC.—In the civil law, an assignee of a bankrupt.²

SYNDICATE.—(See also FORESTALLING THE MARKET, vol. 8, p. 442; TRUSTS).—Persons united for the purposes of an enterprise too large for successful management by a single individual; also a number of persons who buy all of an issue of stock or bonds, in order, by advancing the market value, to make a profit to themselves as members of the company.³

TACKING.—It was the established doctrine in the English law that if there be three mortgages in succession, or a mortgage, and then a judgment, and then a second mortgage, upon the estate, the junior mortgagee may purchase in the first mortgage, and “tack” his mortgage to the first, and by that contrivance “squeeze out” the middle mortgage, and gain preference over it.⁴ The

contract, but with a felonious design of appropriating the goods to his own use. (See Bouvier's Law Dict., tit. *Swindler*.) The facts stated in the second and fourth defenses do not justify such a charge. It is not stated that the goods were delivered to the plaintiff upon his own request—much less is it stated that any fraud or artifice was practiced to obtain them. The substance of what is alleged is, in brief, that the defendant and his partner had entered into an agreement with the plaintiff and his partner, by which the latter were to sell goods of the former upon commission. They received goods upon these terms, and, when called upon to account for them, they refused.”

Minnesota.—It is provided by statute in *Minnesota* that “whoever, by the means of three-card monte, so called, or any other form or device, sleight-of-hand, or other means whatever, by use of cards or other instruments of like character, obtains from another person any money or other property of any description, shall be deemed guilty of the crime of swindling.” Gen. Sts. *Minnesota* 1878, ch. 99, § 15; *State v. Gray*, 29 Minn. 142.

Texas.—By art. 790 of the Penal Code of *Texas*, “swindling” is defined as “the acquisition of any personal or movable property, money, or instrument of writing conveying or securing a valuable right, by means of some false or deceitful pretense, or device, or

fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or destroying or impairing the right of the party justly entitled to the same.” In *Blum v. State*, 20 Tex. App. 590; 54 Am. Rep. 530, it was held that to constitute the offense thus described, four things were necessary: first, the intent to defraud; second, an act of fraud committed; third, false pretenses, and, fourth, the fraud committed or accomplished by means of false pretenses made use of for the purpose—that is, they must be the cause which induced the owner to part with his property. See also FALSE PRETENSES, vol. 7, p. 699.

1. Bouvier's L. Dict.; *Zacharie v. Franklin*, 12 Pet. (U. S.) 151. In which it was held that a contract in which only the vendor speaks and which contains no stipulations, either express or implied, by the vendee, requiring nothing to be done by him, is not a synallagmatic contract under the laws of *Louisiana*.

2. In *Louisiana* all the property and rights of property of an insolvent who makes a cession pass to the syndic. *Arnold v. Danziger*, 30 Fed. Rep. 898; *Dwight v. Simon*, 4 La. Ann. 490; *West v. His Creditors*, 8 Rob. (La.) 128; *Bank of Tennessee v. Horn*, 17 How. (U. S.) 157; *Adams v. Preston*, 22 How. (U. S.) 488.

3. And. Law Dict., citing *Appeal of Whelan*, 108 Pa. St. 162.

4. 4 Kent's Com. 176; *Marsh v. Lee*,

general doctrine is, that the mortgagee who has the legal title, in whatever order he may stand in the succession, if he took his security without notice of the prior equities, is entitled to priority of satisfaction. It is founded on the principle that where the equity is equal, the law must prevail.¹ But the third incumbrancer can only enjoy this advantage if he had no notice of the second incumbrance at the time he advanced his money;² whether he had it or not before he got in the legal title, is not material.³ And as a result of this requirement, since the recordation of deeds was designed for the purpose of giving all persons the means of obtaining information of conveyances of title, where the system of recording titles prevails, the doctrine of tacking is practically exploded.⁴ And as the doctrine depends on the mortgagee's having the legal estate, it can hardly exist in those states where, by the provisions of the statutes, the legal as well as the equitable estate remains in the mortgagor.⁵ In view of these considerations, together with the fact that there is no natural equity in tacking and the practice is founded upon a questionable principle,⁶ the

2 Vent. 337; 1 Ch. Ca. 162; 3 Ch. Rep. 62; 1 Lead. Cas. Eq. 494; Edmunds v. Povey, 1 Vern. 187; Wortley v. Birkhead, 2 Ves. 371; Brace v. Marlborough, 2 P. Wms. 491; Belchier v. Butler, 1 Eden 523; Frere v. Moore, 8 Price 475.

1. Williams on Real Prop. 361; 2 Min. Inst. 312.

Where a Third Claim is not a Charge Upon the Land.—A mortgagee purchasing an outstanding claim against the mortgagor, which is not a charge upon the mortgaged premises, cannot tack it to his mortgage lien, and compel payment of it by the mortgagor, a subsequent purchaser or attaching creditor seeking to redeem. Benton v. Kent, 61 N. H. 124.

2. 4 Kent's Com. 177; 2 Min. Inst. 312.

But notice of his advance given by the second to the first mortgagee, will not prevent the third mortgagee, who lends his money without notice of it, from tacking his mortgage to the first. Peacock v. Burt, Appendix to Coote on Mortgages.

3. Wortley v. Birkhead, 2 Ves. 371.

4. 2 Min. Inst. 314; Osborn v. Carr, 12 Conn. 196; Siter v. McClanachan, 2 Gratt. (Va.) 280; Wing v. McDowell, Walk. (Mich.) 175; Brown v. Stewart, 56 Md. 431.

Where the recording statutes give priority to the first mortgage of record, the right of tacking a junior to a senior mortgage, and thus excluding an intervening one, is abolished; since

the allowing of a junior mortgage to be recorded first would be denying the older one the preference given it by statute. Grant v. Bissett, 1 Cal. Cas. in Error (N. Y.) 112; Bridgen v. Carhartt, Hopk. (N. Y.) 234. But the cases which deny the doctrine of tacking because of its inconsistency with those recording acts which invalidate an unrecorded conveyance as against those subsequent conveyances only which have been first recorded, are not necessarily in point when the question arises between unregistered equities, yet the question is of little practical importance as it will always be easier for the third mortgagee to record his mortgage and thus claim the protection of the recording acts, than to purchase in the first mortgage.

5. 4 Kent's Com. (13th ed.) 179, n. 1.

6. In Siter v. McClanachan, 2 Gratt. (Va.) 280, the court, by Baldwin, J., said: "This whole doctrine of tacking, unless in the case of further advances originally provided for by contract, is extremely harsh and unreasonable. Natural justice obviously requires that valid incumbrances should be paid according to their priority in point of time. The first incumbrance is an appropriation of the property by the consent of the owner, or the operation of law, to the satisfaction of a just demand; and so a second incumbrance is an appropriation, in like manner, of what shall remain after satisfaction of the first. The first incumbrancer who,

doctrine is not recognized in the *United States*, and has been abolished by statute in *England*.¹

But there is another rule recognized by some courts, which, although quite distinct from the above stated doctrine, is said to be an outgrowth or branch of the technical doctrine of tacking, and which may be stated as follows; when a mortgagee has made further advances to the mortgagor in continuation of those secured by the mortgage, and taken his bond, binding himself and his heirs, the mortgagee may tack such bond debt to his mortgage, as against the heir or devisee, who, in order to redeem, must pay the bond as well as the mortgage debt.² But even this species of

after a second incumbrance, enlarges his demand beyond the effect of his original contract, is in truth, as regards the second, only a third incumbrancer; and a third incumbrancer is nothing more as regards his original demand, though he purchases in the first incumbrance. The doctrine is justified by no one, upon the principles of natural justice, and rests for its support upon artificial reasoning." The assumed equity of the principle is that the latest mortgagee, when he lent his money, had no notice of the second incumbrance, and the equities between the second and third incumbrances being equal, the latter, in addition thereto, has the prior legal estate or title and he shall be preferred. In the language of one of the cases he hath "both law and equity for him"; the legal title and equity prevail over the equity. "But," the court continued, "the assumed equality of equity is not well founded. There is no color for it except in the idea that each claimant is a *bona fide* purchaser for a valuable consideration; but that does not produce equality in point of right. He whose incumbrance is thus overreached is prior in point of time, and at least equal in equity; and, therefore, should have the benefit of the maxim, *Qui prior est in tempore potior est in jure*." The same view has been taken by eminent American jurists. 4 Kent's Com. pp. 177, 178; 1 Story Eq., § 413.

While some early *Kentucky* cases seem to recognize the equity of tacking (see *Bank of Ky. v. Vance*, 4 Litt. (Ky.) 168; *Nelson v. Boyce*, 7 J. J. Marsh. (Ky.) 401; 23 Am. Dec. 411), yet a later case denies that the existence of the doctrine has been conclusively established in that court. *Averill v. Guthrie*, 8 Dana (Ky.) 82.

1. *Chandler v. Dyer*, 37 Vt. 345; *Loring v. Cooke*, 3 Pick. (Mass.) 48.

In *Georgia*, the doctrine is prohibited by statute. *Georgia Code* 1873, § 1962.

In *England*, the doctrine of tacking was abolished in 1874, by the Vendor and Purchaser Act, stats. 37 & 38 Vict., ch. 78, § 7; but this statute was repealed in 1875 by the Land Transfer Act, 38 & 39 Vict., ch. 87, § 129. Brown's Dict.

With the abolition of the English system of tacking, we are relieved from a multitude of refined distinctions, which have given intricacy to this peculiar branch of equity jurisprudence. To illustrate the dimensions to which the learning on this subject has grown, Mr. Jones states the fact that in Mr. Coventry's edition of *Powell on Mortgages*, published in 1822, it occupies one hundred and twenty-five pages. See *Jones on Mortgages*, § 569.

2. Where this rule has been applied, it is generally admitted to be only a matter of practice to prevent circuitry of action, but it has also been placed upon the principle that he who seeks equity must do equity. See *Downing v. Palmateer*, 1 T. B. Mon. (Ky.) 64; *Hughes v. Worley*, 1 Bibb (Ky.) 200; *Chase v. M'Donald*, 7 Har. & J. (Md.) 161; *Lee v. Stone*, 5 Gill & J. (Md.) 2; 23 Am. Dec. 589; *Coombs v. Jordan*, 3 Bland (Md.) 284; *Colquhoun v. Atkinson*, 6 Munf. (Va.) 550; *Siter v. McClanachan*, 2 Gratt. (Va.) 280.

In *South Carolina*, it has been held that as the legal title is in the hands of the mortgagee by breach of the condition, the mortgagor, after foreclosure, will not be permitted to redeem until he has satisfied all the mortgagee's equitable demands, and on a bill filed by the mortgagor to redeem, he must pay not only the mortgage debt, but all other debts he may owe the mortgagee, whether by bond or simple contract. *Walling v. Aiken*, 1 McMull. Eq. 2.

Definition.

TACKING.

Definition.

tacking is never allowed, in any case, to prejudice the rights of third persons.¹

Besides this employment of the word tacking, another use of it is found in the law relating to adverse possessions, to designate the connecting together of the possessions of successive holders of land so as to make a continuity of disseisin.²

In *Pennsylvania*, it has been decided that this species of tacking has no existence. *Darrow v. Kelly*, 1 Dall. (Pa.) 142; *Anderson v. Neff*, 11 S. & R. (Pa.) 208; *Thomas' Appeal*, 30 Pa. St. 378. See REDEMPTION, vol. 20, p. 608. See also, for a discussion of the cases on this matter, 1 Lead. Cas. Eq., Hare and Wallace's note to *Marsh v. Lee*, 2

Vent. 337. A full presentation of the subject will also be found in 2 Min. Inst. 304-306.

1. Boone on Mortgages, § 77, citing *Coombs v. Jordan*, 3 Bland (Md.) 330; *Brown v. Stewart*, 56 Md. 431; *Hughes v. Worley*, 1 Bibb (Ky.) 200.

2. See ADVERSE POSSESSION, vol. 1, p. 269 *et seq.*

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